

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Mercy St. Vincent Medical Center,

CASES

08-CA-128502

08-CA-129537

08-CA-133069

08-CA-134215

and

**International Union, United Automobile
Aerospace & Agricultural Implement Workers
of America, UAW, Local 2213, RN Unit, and
Local 12 Technical and Support Units,**

GENERAL COUNSEL’S BRIEF IN RESPONSE TO NOTICE TO SHOW CAUSE

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the General Counsel (GC) respectfully submits this Brief in Response to the Board’s August 11, 2015 Notice to Show Cause. In its filings with the Board, Respondent relies heavily upon the import of General Counsel Memoranda, which are not binding on the Board (see *Youngstown Sheet & Tube Co.*, 235 NLRB 578 (1978)), and fails to cite Board cases that support the validity of workplace rules at issue here. Because Respondent’s policies as alleged in the Third Consolidated Amended Complaint (“Complaint”) and Notice of Hearing are overbroad and infringe on its employees’ Section 7 rights, the Board should deny Respondent Mercy St. Vincent Medical Center’s Motion for Partial Summary Judgment and grant the GC’s Motion for Partial Summary Judgment.

I. Procedural Background

On November 20, 2014, the Regional Director issued the Complaint, pursuant to charges filed by International Union, United Automobile Aerospace & Agricultural Implement Workers

of America, UAW, Local 2213, RN Unit, and Local 12 Technical and Support Units (“Charging Party”). The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining eleven overly-broad workplace rules, including six social media policies (Complaint, ¶ 10(A)(i)-(vi)).

On December 18, 2014, Respondent filed a Motion for Partial Summary Judgment arguing that nine of the policies plead in the Complaint are lawful based on Board precedent.¹ See Exhibit A, attached. On February 9, 2015, the GC filed an Opposition to Respondent’s Motion and filed a Cross-Motion for Partial Summary Judgment asking the Board to find that the nine rules are overbroad and violate Section 8(a)(1) of the Act. See Exhibit B, attached. On February 19, 2015, Respondent filed a Reply Brief and a Memorandum opposing the GC’s Cross-Motion. See Exhibit C, attached. On March 13, 2015, the GC filed a Reply Brief to Mercy St. Vincent’s brief in opposition. See Exhibit D, attached. On March 30, 2015, Respondent filed a Supplemental Brief supporting its Motion for Partial Summary Judgment. See Exhibit E, attached. On April 13, 2015, the GC filed a Memorandum in Opposition to Mercy St. Vincent’s Supplemental Brief. See Exhibit F, attached.

On July 24, 2015, the Board denied both parties’ motions for partial summary judgment. However, on July 28, 2015, the Board rescinded its Order and the motions for partial summary judgment remain pending. In the underlying case, on July 30, 2015, the Regional Director issued an Order Indefinitely Postponing the August 4, 2015 unfair labor practice hearing on the allegations contained in the Complaint which are not the subject matter of these motions for partial summary judgment. Subsequently, the Charging Party and Respondent entered into an

¹ Respondent’s Motion also sought deferral of the allegations found at Complaint paragraphs 13 (C) and (D) concerning unilateral changes to the video monitoring system and the filing of grievances by email. On January 30, 2015, Respondent moved to withdraw these aspects of its Motion as a result of the Regional Director’s decision to defer these claims pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Informal Settlement Agreement resolving the allegations in the Complaint, except with regard to the workplace rules that are the subject of the motions for partial summary judgment pending before the Board.

II. Respondent's Workplace Rules are unlawful under governing Board precedent.

A. Legal Standards

In deciding a motion for summary judgment, the Board uses the standards set forth in Rule 56 of the Federal Rules of Civil Procedure. *Newtown Corp.*, 280 NLRB 350 (1985). Pursuant to Rule 56(a), summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In making this determination, the evidence “must be viewed in the light most favorable” to the non-moving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*. 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The test enunciated in *Lutheran Heritage* is:

[O]ur 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.

Lutheran Heritage, 343 NLRB at 647 (emphasis in original).

“Board law is settled that ambiguous employer rules - rules that reasonably could be read to have a coercive meaning - are construed against the employer.” *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (2012), *enfd.* 746 F.3d 205 (4th Cir. 2014). The Board has also held that the maintenance of a work rule is an unfair labor practice even absent evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB at 825.

Under these standards, the challenged workplace policies at issue are unlawful because the rules can be reasonably read to prohibit protected concerted activities. Furthermore, Respondent’s assertions that its rules do not violate Section 8(a)(1) because it does not enforce these rules is inconsistent with extant Board law. The particular rules are addressed below. (The rules are attached as Exhibit G, Systemwide Social Media Policy; Exhibit H, Social Media Guidelines and Best Practices; and Exhibit I, Policy Number HR-510).

B. Systemwide Social Media Policy Rule, Number 1 (Complaint ¶10(A)(i))

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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.

While this social media policy references patient privacy under HIPAA, it also identifies “confidential information” in the conjunctive. The last sentence clearly indicates that the range of “confidential and proprietary information” goes beyond what is not disclosable under HIPAA, without further definition of what the Respondent considers to be “confidential and proprietary

information.” The Board has repeatedly found that the use of the term “confidential information,” without narrowing its scope so as to exclude protected activity, would reasonably be interpreted to include information concerning terms and conditions of employment. Because the first sentence of the policy - “Do not post proprietary or confidential information” - is not narrowed to apply only to patient information, the policy runs afoul of Section 8(a)(1) as it can reasonably be read to forbid the disclosure of information about co-workers. See, e.g., *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465-466 (1987) (unlawful rule characterizing “[h]ospital affairs, patient information, and employee problems” as “absolutely confidential,” and prohibiting employees from discussing them); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip. op. at 2 (2014) (finding “Confidentiality and Data Protection” section of company’s Code of Business Conduct unlawful).

Respondent contends that the rule at issue here should be found to be lawful as it tracks similar language set forth in the General Counsel Memo 15-04 (GCM 15-04). See Exhibit E, p. 2. However, the Wendy’s “confidentiality” rule found at pp. 28-29 of that memorandum clearly focuses on the employer’s day-to-day operations and long-term strategies:

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information about Wendy's business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company. Your employee PIN and other similar personal identification information should be kept confidential. Please don't share this information with any other employee.

In contrast, the rule at issue here, “[d]o not post proprietary or confidential information,” is much broader and can reasonably be read to forbid the disclosure of information about terms and conditions of employment. Additionally, unlike the Wendy’s confidentiality rule, Respondent’s rule does not designate what information is confidential, leaving an unspecified

“range” of information that Respondent could consider to be confidential. The vagueness of the Respondent’s rule leaves employees with little or no guidance about what they may disclose without jeopardizing their employment.

Finally, Respondent asks the Board to consider the import of a so-called “savings clause”² at the end of the social media policy as further evidence that “no *reasonable* employee would assume that the employer’s intention was to prohibit lawful conduct.” Exhibit A, p. 38 (citations omitted) (emphasis in original). The Board has repeatedly held that “[a]n employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law.” *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (citations omitted). An effective “savings clause” “should adequately address the broad panoply of rights protected by Section 7.” *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 4 (April 2, 2014). Respondent’s “savings clause” does not. As the Board stated in another case: “[r]ank-and-file employees do not generally carry lawbooks (sic) to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.” *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994).

C. Systemwide Social Media Policy Rule, Number 6 (Complaint ¶10(A)(ii))

6. Do not disclose confidential information or violate copyrights. Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

² The “savings clause” provides:

2. Discussion of terms and conditions of employment. Nothing in this policy shall be construed to prohibit associates from engaging in activities that are protected under applicable labor laws.

This rule prohibits the disclosure of “confidential information,” including “proprietary financial” information and “operational and financial data.” In *Flex Frac Logistics*, the list of “confidential information” explicitly included “financial information, including costs” which the Board found “necessarily includes wages and thereby reinforces the likely inference that the rule proscribes wage discussion with outsiders.” 358 NLRB No. 127, slip op. at 2 (Sept. 11, 2012). Because the “confidential information” rule in *Flex Frac Logistics* was “broadly written with sweeping, non-exhaustive categories that encompass nearly any information related to the Respondent,” the Board found it to be unlawful. *Id.* (citing *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007)(enforcing Board decision that found unlawful employer rule requiring employees to maintain “confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters”)). Similarly, here, employees can reasonably conclude that the challenged rule restricts the disclosure of employment information, including information related to wages, benefits and other terms and conditions of employment. *Id.*

Respondent maintains that “the intent behind this provision is clearly to protect Mercy’s business related information.” Exhibit A, p. 39 (citing *Mediaone*, 349 NLRB 277 (2003)). However, Respondent failed to narrow the scope of its rule to illustrate its claimed intent, and in the absence of such clarity, Respondent’s intent is immaterial. *First Transit, Inc., supra* at 9 (“In considering the lawfulness of employer communications to employees, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights.”).

Respondent finally claims that this social media policy rule is similar to the rules set forth on pp. 6, 15, and 27 of GCM 15-04. Exhibit E, p. 2. A plain reading of these particular rules in GCM 15-04 shows that they are narrowly focused to protect trademarks and copyrights.

D. Social Media Guidelines and Best Practices, Guidelines for Social Media Participation, Number 5 (Complaint ¶10(A)(iii))

5. What you say online will reflect on you, your fellow associates and the public’s view of your workplace. Remember that if you wouldn’t want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

Respondent labels this and the other policies discussed in the next three subsections as “Social Media Guidelines and Best Practices” (“Guidelines”). Respondent argues that the Guidelines are merely “aspirational in nature” and do not “present” themselves as having the “force of a work rule.” Exhibit A, p. 42. Respondent never states that that an employee *cannot* be disciplined for engaging in behavior that runs afoul of these Guidelines, and a reasonable employee would, in fact, interpret them as work rules. In the introductory section of these Guidelines, Respondent explicitly reminds employees that when using social media, it is “important” to follow its existing “Human Resources” policies, and warns that if these “policies are not followed, there can be **serious consequences for** both our organization and **you as an associate.**” Exhibit H, p. 3 (emphasis added).

Turning to the substance of this workplace rule, a reasonable reading of the rule would forbid the disclosure of information about other employees, including their wages and other terms of an employment, as well as information about their subordinates and supervisors. This rule would reasonably squelch protected concerted activities, including protected group

complaints about supervision. The rule also overbroadly references “other professionals” which is not defined. Moreover, an employee could reasonably understand that divulging such information may lead to “legal and other implications in the workplace”, including discipline and termination. The overbreadth of this rule in terms of what may or may not be disclosed and about whom, as well as broadly stating that there are sweeping consequences for violating it creates a chilling effect on employees in the exercise of their rights under Section 7, and thus, violates the Act. *The Continental Group*, 357 NLRB No. 39, slip op. at 3 (2011) (“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.”).

Further, contrary to Respondent’s assertion (see Exhibit A, p. 43), this policy goes well beyond the language approved by the General Counsel in OM 12-59 because it specifically warns that postings involving “other employees” may have “legal and other implications in the workplace.” The social media guidelines approved in OM 12-59 do not prohibit (or even reference) postings about other employees, rather those guidelines limit employees from conduct that will adversely impact job performance.³ As stated earlier, rules prohibiting or discouraging the disclosure of information about co-workers have been found to be unlawful. See, e.g., *Brockton Hospital*, 333 NLRB 1367 fn. 3 (2001), *enf’d*. 294 F.3d 100 (D.C. Cir. 2002) (finding

³ The policy states:

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating content consider some of the risk and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

unlawful rule requiring employees to respect the confidentiality of information regarding patients, employees or hospital operations by not discussing such information).

Respondent also cites as support the rule set forth on p. 28 of GCM 15-04 and again, that rule is significantly different from the challenged rule. The rule in GCM 15-04 prohibits employees from engaging in unlawful conduct, such as libel or defamation. The challenged rule is unlawfully overbroad as it refers generally to “inappropriate” comments and behavior, and fails to specify what comments or behavior Respondent deems inappropriate. Moreover, the challenged rule is directed at the content of what employees disclose, including “postings involving . . . other employees (including peers, subordinates and supervisors) and other professionals . . .” Because the term “postings involving . . . other employees” can reasonably be read to include wages and other employment information, the challenged rule unlawfully discourages Section 7 activity. *See, e.g., Costco*, 358 NLRB No. 106, slip op. at 1 (2012) (finding social media policy prohibiting disclosure of “confidential information” as it may include employees' names, addresses, phone numbers and email addresses).

E. Social Media Guidelines and Best Practices, Guidelines for Social Media Participation, Number 3 (Complaint ¶10(A)(iv))

3. **No comment.** Do not comment on work-related matters unless you are CHP’s (or one of its organization’s) official spokesperson on the matter, and have approval from CHP leadership and management to do so.

Contrary to Respondent’s assertion (Exhibit A, p. 15), this policy is not just directed at preventing employees from expressing the company’s official or authorized position. Rather, it forbids them from commenting on “work-related matters” even to co-workers *unless* they are an official spokesperson and receive permission from management. *J.W. Marriott*, 359 NLRB No. 8, slip op. at 3 n.4 (2012) (“the ability of employees to communicate with their fellow employees

is ‘central to Sec. 7.’”). Further, “employees would reasonably construe the unequivocal language in the Respondent’s rule as prohibiting any and all such protected communications to the media regarding a labor dispute.” *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 slip. op. 1 (January 1, 2013), *vacated, affirmed as modified*, 362 NLRB No. 48 (March 31, 2015). As in *DirecTV*, Respondent makes “no attempt to distinguish unprotected communications, such as statements that are maliciously false, from those that are protected.” *Id.* Just as the Board has found similar rules prohibiting employees from talking to the press to be unlawfully broad, Respondent’s rule also violates the Act. *Trump Marina Associates, LLC*, 354 NLRB 1027 (2009); *Crown Plaza Hotel*, 352 NLRB 382 (2008).

Moreover, the rule is unlawful because it requires employees to seek and obtain the approval of management before they are permitted to speak about work-related matters. As the Board repeatedly pointed out, “any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in nonwork areas is unlawful.” *Target Corporation*, 359 NLRB No. 103, slip op. at 43 (April 30, 2013) (citing *Brunswick Corp.*, 282 NLRB 794, 795 (1987)).

Finally, Respondent’s “No Comment” policy is quite different than the policy approved in OM 12-59 (and cited by Respondent (Exhibit A, p.43)) because the approved policy does not prohibit communications but rather informs employee not to convey to others that he or she is an official spokesperson.⁴

⁴ The approved policy in OM 12-59 provides:

Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not

F. Social Media Guidelines and Best Practices, Guidelines for Associates, Number 8 (Complaint ¶10(A)(v))

8. **Think about consequences.** Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it's about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

This a provision is clearly impermissible as employees would reasonably interpret this clause to prohibit protected complaints about working conditions and protected criticism of Respondent's labor policies or treatment of employees. *See, e.g., Costco, supra* at 1 (company violated Section 8(a)(1) by maintaining a rule prohibiting employees from electronically posting statements that "damage the Company . . . or damage any person's reputation."); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 294 (1999) (employer's maintenance of a rule which prohibited "[m]aking false, vicious, profane, or malicious statements regarding another employee, guest, patron or the Hotel itself" violated Section 8(a)(1)). Respondent contends that "[e]ssentially, this language recommends to employees that they *think* and that they use their *best judgment* – again, without issuing a prohibition or making any threat." Exhibit A, p. 44 (emphasis in original). However, this policy is much more expansive than the "use your best judgment and exercise personal responsibility" language approved by the General Counsel in OM 12-59 because it warns employees about disclosing information that may "trash or embarrass the organization" or "co-workers."

Respondent also claims that the approved rule in GCM 15-04 at p. 28 tracks the language of the challenged rule but this is incorrect. The rule in GCM 15-04 specifically references the

speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Memorandum OM 12-59 at p. 23.

prohibited communications to include libel, defamation and harassment as defined in the company's anti-harassment policy. In contrast, the challenged rule here prohibits the disclosure of information "unfavorable toward your hospital or CHP," which can be reasonably read to include information about incidents concerning workplace safety or information about terms of employment. For this reason, this rule is overbroad and violates Section 8(a)(1). *See, e.g., Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (unlawful rule against "derogatory attacks"), *enf'd.* in relevant part, 916 F.2d 932 (4th Cir. 1990); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule prohibiting "negative conversations about associates and/or managers" unlawful)

G. Social Media Guidelines and Best Practices, Guidelines for Associates, Number 11 (Complaint ¶10(A)(vi))

11. Other people's information. It's simple – other people's information belongs to them. It's their choice whether they wish to share their material with the world, not yours. Before posting someone else's material, be sure to check with the content owner for permission first. If you're still unsure, the Communications or Marketing department or Legal can offer guidance.

This rule is unlawful because it encompasses information about an undefined "other people", which arguably includes supervisors, managers, and co-workers, including their wages, addresses, phone numbers, and email addresses. *Costco, supra* at 1 (found unlawful a rule the precluded employees from divulging "private matters of members and other employees . . . includ[ing]topics such as, but not limited to, sick calls, leaves of absences, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc.")). Additionally there is nothing in the rule that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's reach. *See Hills and Dales General Hospital*, 360 NLRB No. 70, slip op. at 2 (April 1, 2014) (finding unlawful policy prohibiting "negative comments about our fellow team members," including

coworkers and managers violated the Act.); *Cintas Corp.*, 482 F.3d at 468-469 (explaining that confidentiality rules that prohibit disclosure of “information concerning employees” are unlawful).

H. Policy Number HR-510, Minor Infraction Number 19 (Complaint ¶ 10(A)(ix))

19. Discourtesy to, or improper treatment of patients, visitors, or other employees.

Numerous Board cases have found such language in policies could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7. For example, in *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (December 29, 2011), the Board found unlawful a provision subjecting employees to discipline for the “inability or unwillingness to work harmoniously with other employees.” *Id.*, slip op. at 3. Similarly, in *Claremont Resort & Spa*, the Board found that a rule prohibiting “negative conversations about associates and/or managers” violated Section 8(a)(1) because employees would reasonably construe the prohibition to bar them from discussing concerns about their managers that affect working conditions. 344 NLRB at 832; see *Flamingo Hilton-Laughlin, supra* (rule against “abusive or insulting language” unlawful).

Respondent cites the permissible rule set forth in GCM 15-04 at p. 9 but this rule is distinguishable because it makes no mention of “other employees.” Because the challenged rule could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, it violates Section 8(a)(1). *2 Sisters Food Group, Inc., supra*.

I. Policy Number HR-510, Minor Infraction Number 22 (Complaint ¶ 10(A)(x))

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

This rule is impermissible because almost any "conduct" during non-work hours that the Respondent found to be "improper" would violate this rule.

Respondent argues that the Board in *Lafayette Park* did not find similar language objectionable. However, the Board recently distinguished *Lafayette Park*, when it found unlawful a prohibition against conducting "oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company." *First Transit, Inc., supra* at 2 n.5. The Board reasoned that the rule "could reasonably be read to include any behavior, however proper and protected, that the employer considered detrimental to its interest or reputation," and therefore, such rule violated Section 8(a)(1) of the Act. *Id.* at 12.

J. Policy Number HR-510, Major Infraction Number 4 (Complaint ¶10(A)(xii))⁵

4. Accessing and/or divulging information that becomes accessible through association with MSVMC that should be considered as confidential **and/or proprietary**, including information related to patients and their care. (emphasis in original).

As discussed earlier, the Board has found similar all-encompassing policies prohibiting the disclosure of confidential or proprietary information to violate the Act because they preclude discussion of wages and other terms and conditions of employment. See, e.g., *Flex Frac Logistics, supra*. This prohibition also extends to health care facilities as is the case here. See, e.g., *Pontiac Osteopathic Hospital, supra*; *Brockton Hospital, supra*.

⁵Due to an inadvertent typographical error, this subparagraph should read as 10(A)(xi).

IV. Conclusion

For the reasons set forth above, the Board should grant the GC's Motion for Partial Summary Judgment and deny Respondent's Motion for Partial Summary Judgment with respect to these workplace policies. The GC submits that there is no genuine issue of material fact and that the GC is entitled to judgment as a matter of law. Respondent's employees could reasonably construe that the foregoing rules restrict the free exercise of rights guaranteed in Section 7 of the Act.

Dated at Cleveland, Ohio this 25th day of August 2015.

Respectfully Submitted,

/s/ Stephen M. Pincus

STEPHEN M. PINCUS
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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing was filed electronically with the National Labor Relations Board and served by electronic mail, as designated below, on this 25th day of August 2015:

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/s/ Stephen M. Pincus
STEPHEN M. PINCUS

EXHIBIT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

Mercy St. Vincent Medical Center,	)	CASE NOS.: 08-CA-128502
	)	08-CA-129537
Respondent,	)	08-CA-133069
	)	08-CA-134215
vs.)	
)	
International Union, United Automobile)	
Aerospace & Agricultural Implement Workers)	
of America, UAW, Local 2213, RN Unit, and)	
Local 12 Technical and Support Units,	)	<u>RESPONDENT'S MOTION FOR</u>
	)	<u>PARTIAL SUMMARY JUDGMENT</u>
Charging Party.)	

Pursuant to National Labor Relations Board (“NLRB” or “Board”) Rule and Regulation 102.24(b), Mercy St. Vincent Medical Center (“Respondent” or “Mercy”), moves the Board for partial summary judgment on the Region 8 Director’s Third Consolidated Complaint. A memorandum of law and supporting evidence is attached to this motion.

Respectfully submitted,

/s/ Thomas J. Wiencek

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Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of December 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the NLRB's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the NLRB's system. A hard copy has been served upon the UAW Representative and the NLRB Executive Secretary via regular U.S. Mail.

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/s/ Thomas J. Wiencek

Thomas J. Wiencek (#0031465)

II. FACTS

As noted in paragraphs 10(A)(i)(ii) of the TCC, and Exhibit A attached to the Regional Director's Second Consolidated Complaint ("SCC"), Mercy maintains a System-Wide Social Media Policy that includes provisions in paragraphs 1 and 6 that address the access and release of patient confidential information, copyrights, trademarks, and other proprietary and legally protected information:

Systemwide Social Media Policy

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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.

6. Do not disclose confidential information or violate copyrights. Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

In addition, as outlined in paragraphs 10(A)(iii)(v) and (vi) of the TCC, and attached as Exhibit B of the SCC, Mercy has published "best practices" which, in paragraphs 5, 8, and 11 suggest, without penalty or restriction, employee comportment toward themselves, patients, and others who may visit Mercy's hospitals:

Social Media Guidelines and Best Practices

5. What you say online will reflect on you, your fellow associates and the public's view of your workplace. Remember that if you wouldn't want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

8. Think about consequences. Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it's about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

11. Other people's information. It's simple – other people's information belongs to them. It's their choice whether they wish to share their material with the world, not yours. Before posting someone else's material, be sure to check with the content owner for permission first. If you're still unsure, the Communications or Marketing department or Legal can offer guidance.

In regard to the social media and best practices presented above, as outlined in paragraphs 10(A)(ix)(x) and (xii) of the TCC, Mercy maintains a disciplinary policy that includes “minor” and “major” infractions under paragraphs 19, 22 and 4 as follows:

Minor Infractions

19. Discourtesy to, or improper treatment of patients, visitors, or other employees.

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

Major Infractions

4. *Accessing and/or* divulging information that becomes accessible through association with MSVMC that should be considered as confidential *and/or proprietary*, including information related to patients and their care. (Emphasis in the original)

No Mercy employee has ever been disciplined based on paragraphs 1 and 6 of the Systemwide Social Media Policy outlined above or based on paragraphs 5, 8 and 11 of the Social Media Guidelines and Best Practices. (Dolch affidavit ¶6, attached hereto as Exhibit D).

In their negotiated agreement, as outlined in detail below, the parties have agreed to a dispute resolution process which, at step 2, after step 1 discussions have not proved productive, requires an individual grievant with a grievance to “reduce the grievance to writing within ten (10) days after the discussion at Step One on a standard form, *in triplicate, specifying the facts on which it is based*, and presented to *the Administrative Director or Manager/Supervisor of the employee’s unit.*” (Exhibit A, Nursing Contract, Art. 6, §6.1)¹.

Article 6 **Grievance Procedure**

Section 6.1. Grievance Defined and Grievance Steps. A grievance is defined as a dispute with respect to an alleged violation or with respect to the interpretation of this Agreement, and shall include any and all disciplinary actions taken by the Employer, provided that, “Employee Conferences” or “Coachings” shall not be deemed disciplinary actions taken by the Employer. Therefore, such action will not be considered a “grievance” and, therefore, excluded from application of the procedure set forth in this Article. Employee conference/coaching forms will only be used, considered or raised by the Union or the Employer in any phase of the grievance process under the following circumstances: (i) when the conduct at issue is related to the conduct that was the subject of a prior conference/coaching session; or (ii) to rebut a claim by an employee of a good work record.

To be considered a grievance, such dispute has to be processed in the following manner:

Step One: When an employee(s) has a grievance, they shall first notify their Manager/Supervisor, or designee, and discuss the grievance with them; at the employee’s request, the employee may have the steward assigned to process grievances for their area present. Such discussion must take place within ten (10) days after the incident, which gave rise to the grievance, initially occurred.

¹ Also attached hereto are Exhibits B and C, the Technical Contract and Service Contract, which are identical to the Nursing Contract in all relevant respects.

Step Two: If the grievance is not satisfactorily settled at Step One, the employee(s) may so inform the steward assigned to process grievances for their area, who shall, if they believe the grievance should be processed, discuss the grievance with the Chairperson, or designee who is released to administer the Agreement in the place of the Chairperson, who shall reduce the grievance to writing within ten (10) days after the discussion at Step One on a standard form, in triplicate, and signed by the employee(s) involved, and presented to the Administrative Director or Manager/Supervisor of the employee's unit. The grievance must specify the facts which it is based on, cite the section(s) alleged to have been violated, the date on which the Step One discussion occurred, the Manager/Supervisor involved in the Step One discussion, and the resolution requested. Such Administrative Director or Manager/Supervisor, or their designee, shall within ten (10) days after receipt of the grievance, state their disposition of the grievance in writing on the grievance form, sign their name thereto, and give it to the Union's Chairperson of the Bargaining Committee.

(Exhibit A, Art. 6, §6.1).

On March 14, 2014, Mercy stopped allowing grievances to be submitted by email. (Dolch affidavit, ¶9, Ex. 1). This was precipitated by the Union committee person Susan Pratt's filing of a grievance on March 13, 2014, *via* e-mail, challenging Mercy's use of its upgraded AvaSys patient monitoring system. (*Id.*, Ex. 1). Instead of submitting this grievance to Mercy's Administrative Director or the appropriate Manager/Supervisor, as required by Step 2 of Art. 6, Pratt circumvented the required procedure by e-mailing the grievance directly to Mercy's Human Resources Manager (Ann Dolch), who is not to be involved until Step 3 (Art. 6, §6.1), as well as to Mercy's Metro Director of Human Resources for the Northern Market (Rebecca Snow). (*Id.*).

Contrary to Article 6's requirement, Pratt's grievance was not filed in triplicate and did not specify the facts on which it was based, but alleged merely: "Changes to patient watch policy to include use of patient watch monitors." (Dolch affidavit, ¶10, Ex. 1). Frustrated with the Union's fast and loose disregard of the grievance procedure, Snow advised Pratt that Mercy would no longer accept grievances *via* e-mail, but nonetheless offered to meet with Pratt and other Union representatives during the weekly labor-management committee meetings to discuss

the AvaSys patient monitoring system or, if the Union preferred, to have a separate meeting about this. (*Id.*). Pratt rejected this overture and signified her intent to press on with the grievance without meeting with Mercy representatives. (*Id.*, ¶11, Ex. 1).

Finally, in regard to the administration of the terms and conditions of the contract, in sections 5.1 and 5.2, Management Rights/Retained, as outlined in detail below, Mercy has reserved to itself the management right to run its hospital and, significantly, during the contract's term, under section 5.11, the parties have agreed that, "the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and agrees that the other shall not be obliged, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement" (Exhibit A, Art. 5, §5.11). The relevant provisions of these sections of Article 5 are set forth below:

Article 5 **Management Rights**

Section 5.1. Management Rights. The Union recognizes and agrees that the Employer retains sole and exclusive responsibility for the management, control and operation of the business and complete authority to exercise those rights and powers incidental thereto, including by way of general example and not by limitation, exclusive right and authority to determine the number and location of its buildings, facilities, and services, and to determine whether to open or close facilities, branches, clinics, or any other type of facility, merge with hospitals, hospital systems, and the number, type and land of services to be rendered by the Employer; to determine all methods of marketing, advertising, promoting and rendering its services, including the prices to be charged therefore, and the exclusive right to approve all contracts for any of its services; to make all financial decisions, including the accounting, bookkeeping and other record keeping methods and procedures, to determine the organizational and business entity structure of the Employer; to determine whether to transfer, lease, sell, merge, or discontinue the entire business operation or any part thereof; to

determine the methods of providing services, schedules of employees, to determine whether to purchase any materials or goods or services from other persons; to subcontract work; the right to determine the number of employees to be hired, employed and working, and the selection, promotion or transfer of employees to supervisory, managerial, or other positions outside the bargaining unit; the right to establish the starting and quitting time, the number of hours to be worked, and the business hours of all of its facilities; the right to establish and maintain and enforce reasonable work rules and regulations; to determine the allocation and assignment of work to employees, it being understood and agreed by the Employer and the Union that the general nature of the Employer's operations requires employees to be employed interchangeably in various positions, and that any employee may be assigned duties in other areas of work as needed. The above rights of management are not all inclusive, but only indicative of the type of matters or rights which belong to and are inherent to the Employer.

Section 5.2. Management Rights Retained. Additionally, it is understood and agreed that all rights, powers and authority of the Employer are retained by the Employer, except those specifically abridged or modified by the Agreement and any supplementary agreements that may hereafter be made.

Section 5.11. Negotiations - Waiver of Right to Bargain. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of the right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and agrees that the other shall not be obliged, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement.

As alleged in paragraph 13(C) of the TCC, in or around February 2014, Mercy exercised its management right to enhance its services to its patients by upgrading its patient monitoring system to include the AvaSys component that allowed the current monitoring system to monitor patients at risk for falls by means of a live, unrecorded feed. (Sutton affidavit, ¶5, attached hereto as Exhibit E; Dolch affidavit, ¶12). It did not increase the nurses' workload and did not contain any disciplinary component. (Sutton affidavit, ¶5; Dolch affidavit, ¶12) And when nurses were

attending to patients being monitored, they could unilaterally invoke a privacy screen so as to block the monitoring. Sutton affidavit, ¶5; Dolch affidavit, ¶12) Thus, in upgrading the patient monitoring system to allow for monitoring of patients who are at risk for falls, Mercy ensured that bargaining unit employees could take steps to prevent themselves from being seen on the system's live feed. (Dolch affidavit, ¶12).

As noted above, on March 13, 2014, the Union filed a grievance challenging Mercy's use of the upgraded AvaSys patient monitoring system. (Dolch affidavit, ¶13). The Union pursued this grievance through the Step 3 hearing, but then abandoned the grievance-arbitration process after filing the within unfair labor practice charge that is premised on the same event underlying its grievance, *viz.*, Mercy's use of the AvaSys patient monitoring system. (*Id.*)

III. STANDARD

The Board uses the summary judgment standard outlined in Fed. R. Civ. P. 56(c). *Manville, supra*, at 390. Summary judgment therefore is appropriate when the evidence in the record demonstrates "that no genuine issues of material fact exist and that the movant is entitled to judgment as a matter of law." *In re Mellott*, 187 B.R. 578, 581 (Bkrcty. N.D. Ohio, 1995). To prevail, Mercy must show the absence of genuine issues of material fact to support the non-moving party's case. *Mellott, at 581; Resolution Trust Corp. v. Fountain Circle Associates Ltd. Partnership*, 799 F.Supp. 48, 51 (N.D. Ohio 1992).

In turn, to overcome Mercy's motion, the General Counsel must do more than "simply show that there is some metaphysical doubt as to the material facts." *Bennet v. State Farm Mut. Auto. Ins. Co.*, 943 F.Supp. 821, 823 (N.D. Ohio 1996); *Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Mere reliance upon the pleadings or allegations is insufficient. *Copeland v. Machulis*, 57 F.3d 476, 579 (6th Cir. 1995).

Further, while the General Counsel is entitled to inferences from evidence properly before the Board, judgment on motion for summary judgment must strive to separate the sham and insubstantial issues of fact from the real and genuine issues. *Bryant v. Com. of Ky.*, 490 F.2d 1273, 1274-75 (6th Cir. 1974). As a result, Mercy’s motion may not be defeated by reliance on “conclusory and unsupported allegations, rooted in speculation.” *Escher v. BWXT Y-12, L.L.C.*, No. 3:06-CV-336, 2009 WL 2366464, *15 (E.D. Tenn., 2009). The General Counsel must produce a quality of evidence that would permit a reasonable trier of fact to find for it. *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475-476 (6th Cir. 2010).

As argued below, the General Counsel cannot create genuine issues of fact or present plausible arguments to overcome partial summary judgment on the §§8(a)(1) and (5) claims in ¶¶10(A)(i)-(vi), (ix-x)(xii)(B), 13(C)(D) of the TCC. Mercy therefore is entitled to partial summary judgment on all of those claims.

IV. ARGUMENT

A. Paragraphs 13(C) and (D) of the Complaint Should Be Dismissed.

1. The issues of whether Mercy had the right to unilaterally upgrade its existing AvaSys patient monitoring system and whether it could stop accepting grievances by email arise out of the parties’ negotiated agreement and should have been deferred to the grievance arbitration process.

“Whether deferral to the grievance and arbitration process is appropriate is a ‘threshold question’ which must be decided prior to addressing the merits of the allegations at issue” in an unfair labor practice proceeding. *United Hoisting & Scaffolding, Inc.*, 360 N.L.R.B. No. 137, 2014 NLRB LEXIS 524, *16 (2014). Thus, whether any claims asserted in the TCC should be deferred is appropriate for resolution before the merits of the claims are heard. *See Wonder Bread*, 343 N.L.R.B. 55, 56 (2004) (granting employer’s motion to dismiss the complaint based on deferral);

Inland Container Corp., 298 N.L.R.B. 715, 716 (1990) (granting employer's motion for summary judgment based on deferral).

Two long-standing Board deferral policies are at stake here. The first is based on *Dubo Manufacturing Corp.*, 142 N.L.R.B. 431 (1963), where the Board decided it would defer unfair labor practice proceedings to the contractual grievance-arbitration process where the subject of those proceedings has already been submitted to that process. *Id.*, at 432-433. *Dubo* deferral is appropriate with regard to the Regional Director's claim regarding the AvaSys patient monitoring system because the Union has filed a grievance over this very same issue.

The second Board deferral policy, enunciated in *Collyer Insulated Wire*, 192 N.L.R.B. 837, 842 (1971), is to defer unfair labor practice proceedings to the contractual grievance-arbitration process, even though a grievance has not been filed, where (1) the parties' dispute arises within the confines of a longstanding collective bargaining relationship; (2) there is no claim of animosity to the employees' exercise of section 7 rights; (3) the parties' agreement provides for arbitration in a broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is well suited to resolution by arbitration. *United Hoisting & Scaffolding*, 2014 NLRB LEXIS 524 at *16-*17. *Collyer* deferral is appropriate here with regard to the Regional Director's claim in the TCC premised on Mercy's refusal to accept grievances by e-mail. And even if the Union had not filed a grievance challenging the AvaSys patient monitoring system, which makes *Dubo* deferral

appropriate, the Regional Director's claim regarding the AvaSys system should still be deferred to the grievance-arbitration process pursuant to the *Collyer* doctrine.²

a. The grievance regarding the AvaSys patient monitoring system

i. *Dubo* deferral

As mentioned above, the Board's policy is to defer unfair labor practice proceedings to the contractual grievance-arbitration process where the subject of those proceedings has already been submitted to that process. *Dubo Manufacturing Corp.*, 142 N.L.R.B. 431, 432-433 (1963); *United Technologies Corp.*, 268 N.L.R.B. 557, 560 n. 17 (1984) (holding that "where contractual grievance-arbitration procedures have been invoked voluntarily we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures"). Thus, where the union has previously filed a grievance containing the same allegations as are set forth in the unfair labor practice charge, the Board will defer processing the charge while the grievance-arbitration process plays out.

On March 13, 2014, the Union filed a grievance challenging Mercy's use of the upgraded AvaSys patient monitoring system as an alleged violation of Articles 1 and 5 of the parties' contracts. (Dolch affidavit, ¶13, Ex. 1). This grievance proceeded all the way to a Step 3 hearing. However, the Union then abandoned the grievance-arbitration process by filing the within unfair labor practice charge. (*Id.*).

The Union's abandonment of the grievance-arbitration process does not change the fact this grievance should be deferred. In *United Technologies Corp.*, *supra*, the union filed a grievance alleging the employer unlawfully threatened an employee with discipline if she

² In *Babcox & Wilcox Construction Co.*, 361 NLRB No. 132 (Dec. 15, 2014), the Board announced a new standard governing post-arbitral deferral, and in so doing also modified the standard applicable to *Collyer* deferral situations. *Id.*, slip op. at 12-13. However, the Board held its decision applied only prospectively, *i.e.*, it would not apply to pending cases. *Id.*, slip op. at 13-14. In addition, *Babcock & Wilcox* involved only a Section 8(a)(3) claim; thus, the Board did not purport to extend its holding to Section 8(a)(5) cases such as this one.

appealed a previous grievance to the next step. After the employer denied the grievance, the union withdrew it and then filed an unfair labor practice charge based on the same alleged facts. The Board held deferral of the unfair labor practice case to the grievance-arbitration process was appropriate

because the union had previously invoked that process and the employer had expressed its willingness to arbitrate the dispute. *Id.*, 268 N.L.R.B. at 560.

Here, as in *United Technologies Corp.*, the Union invoked the grievance-arbitration process regarding its challenge to Mercy's use of the AvaSys patient monitoring system, and Mercy is willing to arbitrate this dispute and to waive timeliness defenses, despite the Union's abandonment of the grievance-arbitration process. (Dolch affidavit, ¶14). Thus, as in *United Technologies Corp.*, the Regional Director's claim premised on Mercy use of the AvaSys patient monitoring system should be deferred to the parties' contractual grievance-arbitration process, which the Union already invoked for the purpose of placing this very same issue before an arbitrator.

ii. Collyer deferral

The first *Collyer* deferral element is met because the parties have a longstanding collective bargaining relationship. As the TCC alleges, Mercy has recognized the Union as the exclusive bargaining representative for three bargaining units since 1999, and this recognition has been embodied in many successive collective bargaining agreements (TCC, ¶11(C)), without the need to resort to any strikes or lockouts.

Further, the TCC does not contain any claim of animosity on the part of Mercy overall toward its employees' exercise of section 7 rights. (*See, generally, TCC*). Thus, the second *Collyer* element is satisfied as well. *United Hoisting & Scaffolding*, 2014 NLRB LEXIS 524 at

*18. The Regional Director may refer to his allegation that someone associated with Mercy referred to an employee as a “union bitch” (TCC, ¶9), but this falls woefully short of evidence Mercy bears animosity toward its employees’ exercise of Section 7 rights, especially in light of the fact the Board’s *Collyer* deferral policy extends to unfair labor practice charges premised on Sections 8(a)(1) and 8(a)(3). *United Technologies Corp.*, 268 N.L.R.B. 557, 559-560 (1984) (deferring to the grievance-arbitration process a claim alleging the employer unlawfully threatened an employee with disciplinary action if she persisted in processing a grievance to the next step). Clearly, much more than an allegation that a single employee is called a “union bitch,” or even that he or she is threatened (as in *United Technologies Corp.*), is necessary to overcome *Collyer* deferral.

The relevant contractual language establishes the third *Collyer* element. In this regard, the agreements’ very broad definition of “grievance” is critical: “A grievance is defined as a dispute with respect to an alleged violation *or* with respect to the interpretation of this Agreement[.]” (Ex. A, Art. 6, §6.1 [emphasis added]).³ Thus, not only is a dispute arising from an alleged violation of the contract an arbitrable grievance, but any dispute over the interpretation of the contract is also an arbitrable grievance. This definition of “grievance” satisfies the third *Collyer* element. *United Hoisting & Scaffolding*, 2014 NLRB LEXIS 524 at *18.

As for the fifth *Collyer* element, Mercy is ready, willing and able to arbitrate the Union’s grievance regarding the AvaSys patient monitoring system and to waive timeliness defenses, despite the fact the Union abandoned the grievance-arbitration process once it filed the within unfair labor practice charge. (Dolch affidavit, ¶16).

As the analysis to follow will demonstrate, against the backdrop of the contracts’ broad definition of “grievance,” an examination of the other relevant contractual provisions makes it

³ The Service Contract and Technical Contract contain identical definitions.

clear the grievance-arbitration clauses in the applicable contracts clearly encompasses the parties' dispute about the AvaSys patient monitoring system, and that this dispute is well suited to resolution by arbitration (the fourth and sixth *Collyer* elements).

The TCC alleges Mercy violated section 8(a)(5) of the Act by unilaterally upgrading its patient monitoring with the AvaSys component so as to allow for the monitoring of patients who are at-risk for falls, without first negotiating this with the Union. This claim amounts to nothing more than a grievance challenging Mercy's exercise of its management right, pursuant to Article 5 of the parties' contracts, to enhance its services to patients by upgrading the patient monitoring system. In this regard, Article 5 has the following components:

- The Union recognizes and agrees that Mercy retains the sole and exclusive responsibility for the management, control and operation of its business and the complete authority to exercise those rights and powers incidental to this responsibility, including the right to:
 - Determine the type and kind of services to be rendered by Mercy;
 - Determine all methods of rendering Mercy's services; and
 - Determine the methods of providing Mercy's services.
- All rights, powers and authority of Mercy are retained by it, except those specifically abridged or modified by the contract.

(Ex. A, Art. 5, §5.1, §5.2).

It cannot be disputed that Mercy exists, first and foremost, to provide services to its patients, and that its mission is to provide these services in a manner that maximizes patient care and safety. It is also undisputed that the sole purpose of the AvaSys patient monitoring system is to enhance Mercy's services to its patients by providing a method to observe patients who are at risk for falls by means of an unrecorded live feed, so as to be able to quickly provide immediate care and assistance to such patients when necessary.

Further, the Union cannot seriously dispute that in using the AvaSys patient monitoring system, Mercy has exercised its management rights, as spelled out in Article 5 of the applicable contracts, to determine the type and kind of services to be rendered to patients and the methods of rendering and providing those services. As Pratts's e-mails to Snow on this subject reveal, the Union's quibble is with the manner in which Mercy has carried out these management rights – the Union believes Mercy should not exercise its management right to provide its services to its patients in a way that also monitors bargaining unit employees. (Dolch affidavit, Ex. 1). The Union's claim that Mercy has unreasonably exercised its management rights is, essentially, a claim Mercy is in violation of Article 5. This being the case, this claim falls within the definition of "grievance" contained in the parties' contract, and so it should be deferred to the grievance-arbitration process.

Not only is the Regional Director's claim over a dispute about an alleged violation of Article 5, but it also meets the second part of the contractual definition of "grievance" because it is based on a dispute over how Article 5 should be interpreted. Mercy's defense to the Regional Director's claim is that Article 5 gave it the right to unilaterally upgrade the AvaSys patient monitoring system without first negotiating with the Union based on the management rights language contained in §5.1 and §5.2.

In *Wonder Bread*, 343 N.L.R.B. 55 (2004) (quoted in *United Hoisting & Scaffolding*), which involved a claim the employer violated Section 8(a)(5) by unilaterally requiring employees to submit to physical exams and possible drug testing, the Board granted the employer's motion to dismiss based on *Collyer* deferral because the employer's reliance on the management rights clause to justify its action generated a dispute over the contract's interpretation, which was arbitrable under the contract's broad grievance-arbitration clause:

Notwithstanding, the General Counsel opposes deferral on the ground that neither the management-rights clause nor any other contract provision can reasonably be interpreted as authorizing the alleged unilateral action. We reject this argument. The question of the reasonable interpretation of the collective-bargaining agreement is one, at this point, for the arbitrator. The grievance-arbitration clause is extremely broad, in that a grievance can be filed with respect “to any difference[] between the Company and the Union as to the interpretation” of the agreement and any grievance can be brought to arbitration. So long as an interpretation of the agreement is implicated, there appears to be no restriction on the subject matter of grievances that may be filed and pursued to arbitration. In such situations, the Board defers. [Citation omitted.] Indeed, the Board has held that Collyer prearbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision’s meaning is in dispute.

The Respondent’s reliance on the management-rights clause has created a dispute as to the interpretation of the agreement. Deferral is appropriate regardless of whether the Board would interpret the management-rights clause as justifying the unilateral change at issue. [Citation omitted.]...

For all these reasons, we find that deferral of the matters alleged in the complaint is appropriate in this instance, and we shall grant the Respondent’s motion to dismiss the complaint.

Wonder Bread, 343 N.L.R.B. at 56 (emphasis added).

Additionally, Mercy’s defense to the Regional Director’s Section 8(a) claim is also based on the following “zipper” clause contained in Art. 5, §5.11 of the parties’ contracts:

Section 5.11. Negotiations – Waiver of Right to Bargain. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of the right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and agrees that the other shall not be obliged, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement.

(Art. 5, §5.11). In *United Hoisting & Scaffolding*, *supra*, the Board invoked the *Collyer* doctrine to defer a claim alleging the employer violated Section 8(a)(5) by unilaterally

implementing a drug testing policy because the employer defended its action based both on the contract's management right clause, and its "zipper" clause, which raised an issue of contract interpretation that must be decided by an arbitrator:

Given the evidence and the *Collyer* analysis described above, the crux of the matter here is therefore whether the dispute is well-suited to resolution by arbitration. The Board considers an issue to be well-suited to arbitral resolution when "the meaning of a contract provision is at the heart of the dispute." *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 2 (2011)....

* * *

In the instant case, however, the resolution of the Union's grievances involves the interpretation of several contract provisions, including the management-rights clause and the complete agreement or "zipper" clause, appropriate for the special interpretive competence of an arbitrator. There is no definite, unambiguous contract term or obligation to be applied here. Respondent's contention that it was permitted to unilaterally institute a drug testing policy will turn at least in part upon the interpretation of the contract's management-rights clause, which states that Respondent "reserves the right and retains the sole and exclusive right to manage its operations and to direct the work force," unless "express provisions of this Agreement specifically limit or qualify these rights." General Counsel is correct that this management-rights clause does not specifically empower Respondent to promulgate safety rules or other standards which could normally encompass drug testing, as was the case in *Southern California Edison Co.*, 310 NLRB at 1230-1231. [Further citations omitted.] However, the Board has deferred unilateral change allegations based upon broader management-rights language, as in *Wonder Bread*, and even in situations where there were no specific contract provisions in dispute. See *Wonder Bread*, 343 NLRB at 56 n. 2; *Inland Container Corp.*, 298 NLRB at 716; *The Standard Oil Co. (Ohio)*, 254 NLRB at 34-35.

United Hoisting & Scaffolding, 2014 NLRB LEXIS 524 at *19-*23 (emphasis added).

In *Inland Container Corp.*, 298 N.L.R.B. 715 (1990), the Board, granting summary judgment to the employer based on *Collyer* deferral in a case involving the employer's unilateral implementation of a drug testing program, succinctly articulated the policy considerations underlying its deferral doctrine in the context of Section 8(a)(5) claims premised on unilateral employer action:

In conclusion, we find not only that there are no impediments to deferral, but also that deferral will fulfill the Act's mandate to foster the practice and procedure of collective bargaining. Although the complaint alleges that the Respondent has failed to meet its bargaining obligation by unilaterally implementing its substance abuse policy, we find that deferral will foster the Act's mandate by requiring the parties to abide by their agreed-to method of resolving such disputes through the grievance and arbitration procedure and by encouraging them to resolve their dispute through bargaining within the grievance procedure. Accordingly, we shall grant the motion for summary judgment and dismiss the complaint subject to the retention of limited jurisdiction.

Id., 298 N.L.R.B. at 717. *See also The Standard Oil Co. (Ohio)*, 254 N.L.R.B. 32, 34 (1981) (declaring that the fact an employer's unilateral action pertains to a mandatory bargaining subject is no reason "for bypassing the *Collyer* principle").

With regard to Mercy's use of the AvaSys patient monitoring system, all the *Collyer* elements are present here. Most notably, the contracts' very broad arbitration clauses cover the dispute that forms the basis of the Regional Director's claim, and the contracts and their meaning lie at the center of the parties' dispute. Indeed, the management rights language that must be interpreted in this case is more specific than those at issue in *United Hoisting & Scaffolding* and *Wonder Bread*, where the Board deferred Section 8(a)(5) claims because they necessitated interpretation of management rights language. The Regional Director's claim here falls within the definition of a "grievance" that must be resolved through the contractual grievance-arbitration process, and so should be deferred to that process.

b. The grievance regarding Mercy's refusal to accept grievances by e-mail.

As the analysis above demonstrates, the first three *Collyer* deferral elements are present here. As for the fifth *Collyer* element, the Union never filed a grievance challenging the elimination of the practice of accepting grievances by e-mail, and has never asked Mercy if it is willing to arbitrate these disputes. Notwithstanding this, Mercy remains ready, willing and able to process and arbitrate these grievances and to waive timeliness defenses. (Dolch affidavit, ¶14, ¶16).

As the analysis to follow will demonstrate, against the backdrop of the contracts' broad definition of "grievance," an examination of the other relevant contractual provisions makes it clear the grievance-arbitration clauses in the applicable contracts clearly encompasses the parties' dispute about submitting grievances by e-mail, and that this dispute is well suited to resolution by arbitration (the fourth and sixth *Collyer* elements).

The TCC alleges Mercy violated section 8(a)(5) of the Act by unilaterally refusing to accept grievances by e-mail without negotiating this change with the Union. As is the case with the AvaSys patient monitoring system, this is nothing more than an arbitrable grievance. In this case, it is a grievance alleging Mercy refused to abide by the contractual grievance-arbitration process set forth in Article 6 of the applicable labor contracts, which provide for the following process:

- Step 1: The employee must first notify his or her supervisor/manager and discuss the grievance with them.
- Step 2: The Union Chairperson must reduce the grievance to writing, within ten days after the Step 1 discussion, on a "standard form" in "triplicate" that specifies the facts on which it is based, cites the contract provision(s) allegedly violated, is signed by the employee, and is presented to the Administrative Director or Manager/Supervisor of the employee's unit. The Administrative Director or Manager/Supervisor must answer the grievance within ten days.
- The Union may appeal Mercy's Step 2 answer to its Human Resources Manager by giving her written notice of such appeal within five days after the Step 2 answer is received.

(Ex. A, Art. 6, §6.1). Thus, Step 2 requires the Union to "present" grievances to the Administrative Director or Manager/Supervisor, but does not speak to the method by which such grievances are to be presented.

The Union's claim is that Mercy has violated the Step 2 procedure by refusing to accept grievances that are "presented" by means of e-mail. This is made clear by the e-mails from Pratt

to Snow, which characterize Mercy's refusal to continue to accept grievances *via* e-mail as a violation of Article 6 as supplemented by the parties' alleged past practice. (Dolch affidavit, Ex. 1). Thus, the Union's claim that Mercy has unilaterally changed the contractual process by which grievances are filed is an allegation that Mercy has violated Article 6, since Mercy's obligations regarding processing grievances are defined by that article as supplemented by an alleged past practice.⁴

Moreover, Mercy's defense to the Regional Director's claim is that Mercy was justified in not continuing to accept grievances by e-mail because the Union itself was in violation of Article 6. (Dolch affidavit, ¶9-¶10). In this regard, as the e-mail chain between Pratt and Snow reveals, Pratt had not complied with Step 2 because she did not send the grievance about the AvaSys monitoring system to the Administrative Director or Manager/Supervisor; instead, she bypassed them and sent the grievance directly to Snow and to Human Resources Manager Ann Dolch, who is not supposed to be involved until Step 3. (*Id.*, ¶9, Ex. 1).

Further, contrary to Article 6's requirements, the grievance was not filed in "triplicate" and did not specify the facts on which it was based. (Dolch affidavit, ¶10, Ex. 1) It was the Union's ongoing sloppy grievance filing habits, in derogation of Article 6, that led Snow to conclude grievances would no longer be accepted by e-mail. (*Id.*, ¶10) Thus, the Regional Director's claim gives rise to two violations of Article 6 that needed to be adjudicated, one by the Union and one by Mercy in defense of the Union's claim.

⁴ "It is well established that 'an employer's established past practice can become an implied term of a collective bargaining agreement.'" *Oklahoma Fixture Co.*, 331 N.L.R.B. 1116, 1120 (2000) (quoting *Bonnell/Tredegart Industries v. N.L.R.B.*, 46 F.3d 339, 344 (4th Cir. 1995)). Mercy does not agree that acceptance of grievances by e-mail had become an "established past practice" that became an implied term of the parties' contracts. The point is, this is the Union's and Regional Director's position, and since the essence of their claim is that Mercy has not complied with Article 6 (as supplemented by an alleged past practice), *Collyer* deferral is appropriate.

Finally, not only is the Regional Director's claim over a dispute about alleged violations of Article 6, but it also meets the second part of the contractual definition of "grievance" because it is based on a dispute over how that article should be interpreted. Mercy's argument is that grievances should be "presented" in traditional paper form, especially given the contract language requiring that a grievance must be reduced to writing on a "standard form" in "triplicate," signed by the grievant, and specify the facts on which it is based. On the other hand, the Union's argument is that the specific requirements about the filing of grievances can be bypassed by "presenting" grievances by e-mail. In light of the contracts' broad definition of "grievance," this contract interpretation issue can only be decided by an arbitrator.

It is also noteworthy that on April 10, 2014 – three weeks after Mercy notified the Union it would no longer accept grievances *via* e-mail, which occurred on March 13, 2014 – Mercy and the Union resolved the parties' dispute over this issue by agreeing on a procedure for the processing of grievances that provided for the use of e-mails. (Dolch affidavit, ¶15, Ex. 2). Astonishingly, the Region ignored this undisputed fact and included this claim in the TCC anyway. Perhaps this is because the Regional Director will claim the April 10, 2014 settlement agreement has been violated, but if he does so, clearly such a claim must also be deferred to the grievance-arbitration process since it obviously would be based on a claimed violation of a collectively bargained agreement (*viz.*, the agreed settlement of the Union's challenge to Mercy's refusal to accept grievances by e-mail).

The Board's *Collyer* deferral policy is broad. "Indeed, the Board has held that *Collyer* prearbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision's meaning is in dispute." *Wonder Bread*, 343 N.L.R.B. 55, 56 (2004). *See also United Hoisting & Scaffolding, supra*, 2014 NLRB LEXIS 524

at *22. Here, indisputably, there is a contract provision – Article 6 of the parties’ contracts – that is in dispute.

All of the *Collyer* elements are present here. Most notably, the contracts’ arbitration clauses cover the dispute that forms the basis of the Regional Director’s claim challenging Mercy’s refusal to accept grievances by e-mail, and the contracts and their meaning lie at the center of the parties’ dispute. This being the case, the Union’s claim falls squarely within the definition of a “grievance” that must be resolved through the contractual grievance-arbitration process, and so should be deferred to that process pursuant to *Collyer*.

2. Even if the Board were not to defer the claim Mercy unlawfully used the upgraded AvaSys patient monitoring system to the contractual grievance-arbitration process, Mercy had no obligation to bargain over its use of this system because this is not a mandatory subject of bargaining.

The Union’s charge was precipitated by Mercy’s upgrade to its pre-existing AvaSys patient monitoring system. The sole purpose of Mercy’s AvaSys patient monitoring system is to enhance patient safety by means of a live, unrecorded video feed. (Dolch affidavit, ¶12; Sutton affidavit, ¶5). The purpose of this system is not to monitor employees, and it has no disciplinary component *vis a vis* employees. (Dolch affidavit, ¶12). Further, when an employee goes into a patient area where the AvaSys patient monitoring system is in place, there is a privacy shield the employee can use that makes it impossible for Mercy to observe the employee while he or she is with the patient. (Dolch affidavit, ¶12; Sutton affidavit, ¶5). The privacy shield has been put in place because, again, the sole purpose of the AvaSys system is to monitor patients, not employees; Mercy simply has no interest in observing employees. (Dolch affidavit, ¶12).

Under these undisputed facts, although surveillance of employees has under some circumstances been held to be a mandatory bargaining subject, the patient monitoring undertaken by means of the upgraded AvaSys system here is not. This conclusion is compelled by the result

reached in *Remington Lodging & Hospitality, LLC*, 359 NLRB No. 95, 2013 NLRB LEXIS 274 (2013). In that case, the complaint alleged the employer violated Section 8(a)(5) by using upgraded video surveillance cameras in its hotel without first negotiating this with the union. The administrative law judge, whose decision was adopted by the Board, concluded the employer's use of the upgraded surveillance system that recorded guests and employees was not unlawful because its purpose was to enhance the safety of the hotel guests:

Paragraphs 9(c) and (g) of the first complaint allege that on about November 2009, the Respondent installed and, since then, has continued to operate surveillance cameras in the hotel, without prior notice to the Union or affording the Union an opportunity to bargain over this matter, in violation of Section 8(a)(5) of the Act....

The facts are undisputed that surveillance and security cameras have been in place at the hotel since approximately 1980. They are stationed at the two main entrances to the hotel on Fifth and Sixth Avenues. The cameras monitor the ingress and egress to the hotel and the hotel parking lots. The evidence further establishes that these cameras have been routinely replaced and upgraded numerous times over the years as the available technology has improved. No evidence was offered to show that the cameras have been moved from their fixed locations. Witness testimony was that due to vandalism in the fall of 2009, that the broken cameras were replaced. No evidence was offered that employee work areas of the hotel were monitored.

It is the Respondent's position that installing and maintaining security cameras is part of the hotel's essential duties of keeping the property safe for guests. Counsel argues that as the security of the hotel is essential to its business operations, its security practices and equipment should not be subject to negotiations with the Union. See First National Maintenance Corp. v. NLRB, 452 U.S. 666, 679, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981) (“[I]n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”)

From the limited evidence offered as to this issue, it appears that all the Respondent did was to repair and upgrade the hotel's surveillance cameras, which had been in place for years. *There is absolutely no evidence that this repair and upgrading was in any way intended to surveil the unit employees.* The expired collective-bargaining agreement was silent regarding security cameras, and, as far as I am aware, there has never been any bargaining between the parties on this issue.

I believe that the situation at hand is markedly different than those cases where an employer installs hidden cameras with the intent of surreptitiously watching its employees. To the contrary, the Respondent's security cameras were of long standing and were intended to provide security for the hotel guests, as well as for the employees. The camera locations were well known to the unit employees.

Under the circumstances before me, I am of the view that the Respondent was not obligated to bargain with the Union over what amounted only to the upgrading and repair of existing cameras. Accordingly, I shall recommend that paragraph 9(c) of the first complaint be dismissed.

Remington Lodging & Hospitality, 2013 NLRB LEXCIS at *307-*310 (emphasis added).

Likewise, here, Mercy's use of its upgraded AvaSys patient monitoring system is not subject to bargaining with the Union. As in *Remington Lodging & Hospitality*, the AvaSys system is in place to ensure patient safety, not to observe employees. Further, Mercy's employees can use a privacy shield when they are with patients so that they are not observed, and the system does not record anything. In *Remington Lodging & Hospitality*, the surveillance system recorded events, and employees did not have the option of shielding themselves from it; nonetheless, the Board still concluded the employer's use of the surveillance system was not a mandatory bargaining subject. If the surveillance system at issue in *Remington Lodging & Hospitality* was not a mandatory bargaining subject, then certainly Mercy's use of the AvaSys patient monitoring system is not a mandatory bargaining subject either.

3. Even if the Board were to decline to defer the Regional Director's claims relating to the AvaSys patient monitoring system and Mercy's refusal to accept grievances by e-mail to the contractual grievance-arbitration process, Mercy had no obligation to bargain over either of these matters because they did not have a material, substantial, and significant impact on the terms and conditions of bargaining unit members' employment.

"A unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) and (1) only if the change is a 'material, substantial, and significant' one." *Berkshire Nursing Home, LLC*, 345 N.L.R.B. 220, 220 (2005). Even if Mercy's upgraded AvaSys patient

monitoring system constituted a mandatory bargaining subject (which it does not, *see* part 2 above), Mercy's failure to provide the Union with an opportunity to negotiate this was not unlawful because the AvaSys system does not have a "material, substantial, and significant" impact on terms and conditions of employment. The same conclusion follows with respect to Mercy's refusal to accept grievances by e-mail.

In *Success Village Apartments, Inc.*, 348 N.L.R.B. 579 (2006) and *Berkshire Nursing Home, supra*, the employers implemented new parking policies that required employees to walk an additional 200 yards from their cars to the company's building (*Success Village Apartments*) and an additional two to four minutes from their cars to the building (*Berkshire Nursing Home*). In both cases, the Board held this did not constitute a material, substantial, and significant change in terms and conditions of employment. *Id.*, 348 N.L.R.B. at 580.

Similarly, in *Crittenton Hospital*, 342 N.L.R.B. 686 (2004), the employer changed its dress code policy to prohibit employees who provide hand-on health care to patients from wearing acrylic or artificial nails. The Board held this did not constitute a material, substantial, and significant change in terms and conditions of employment because there was no evidence this change would significantly affect the employees. *Id.*, 342 N.L.R.B. at 686. And in *Nynex Corp.*, 338 N.L.R.B. 659 (2002), the employer unilaterally cancelled magnetic cards that gave union representatives access to the workplace. The Board held this change was not material, substantial, and significant because it "did not limit the Union's movement within its facility or result in the Union's being denied access to any unit employee at the workplace." *Id.*, 338 N.L.R.B. at 662.

Like the changes in *Success Village Apartments*, *Berkshire Nursing Home*, *Crittenton Hospital*, and *Nynex Corp.*, Mercy's refusal to accept grievances by means of e-mail has no

material, substantial, and significant impact on the terms and conditions of employment of bargaining unit employees. Just as an additional 200-yard walk and an additional two to four minute walk were held to be *de minimis* in *Success Village Apartments* and *Berkshire Nursing Home*, so too the requirement that the Union mail or walk grievances to Mercy, rather than e-mail them, must be considered to be *de minimis*.

Likewise, just as the denial of access to the company's facility to union representatives in *Nynex Corp.* was *de minimis* because they still had a way of accessing bargaining unit employees, even though it would now be more difficult to do so, Mercy's requirement that grievances not be e-mailed was *de minimis* because the Union still had other ways to present grievances. As the Board observed in *Berkshire Nursing Home*, "at most, such an increase in walking time is a relatively minor inconvenience to the employees, not a statutorily cognizable change in terms and conditions of employment." *Id.*, 345 N.L.R.B. at 220. Mercy's requirement that the Union submit grievances other than by means of e-mail is also nothing more than a "minor inconvenience" as opposed to "a statutorily cognizable change in terms and conditions of employment." *Id.*

Further, shortly after Mercy stated its refusal to accept grievances by e-mail, the parties resolved their dispute over this by agreeing on a procedure for filing grievances that included the use of e-mail. (Dolch affidavit, ¶15, Ex. 2). This further refutes any notion this change was material, substantial, and significant, given that Mercy's refusal to accept grievances by e-mail lasted only three weeks before the parties' settled their dispute over this.

Mercy's use of the upgraded AvaSys patient monitoring system has no material, substantial, and significant impact on the terms and conditions of employment of bargaining unit employees either. Indeed, it has no impact on them whatsoever. The AvaSys system's sole

purpose is to monitor patients who are at risk for falls, there is no disciplinary component to it, the system does not record anything, and employees can use a privacy shield to prevent themselves from being displayed on the system's live feed. Under these facts, Mercy's use of the AvaSys monitoring system does not even rise to the level of a *de minimis* impact on terms and conditions of employment, let alone a material, substantial, and significant one.

4. Even if Mercy's use of the upgraded AvaSys patient monitoring system were a mandatory bargaining subject that had more than a *de minimis* effect on terms and conditions of employment, the Union waived its right in the parties' negotiated agreement to bargain over this.

A union waives its statutory right to bargain over company action if the collective bargaining agreement contains language amounting to a "clear and unmistakable" waiver of the bargaining right. *Provena Hospitals*, 350 N.L.R.B. 808, 811-812 (2007). A management rights clause containing language which, when taken together, authorizes the employer's challenged action, constitutes a waiver of the union's right to bargain over the employer's action. *Provena Hospitals*, 350 N.L.R.B. at 815.

In *Provena Hospitals*, the employer implemented a revised attendance and tardiness policy that addressed disciplinary processes relating to attendance and tardiness. The collective bargaining agreement was silent on this subject. The union demanded to bargain over this and, after the employer refused this demand, filed an unfair labor practice charge alleging a violation of Section 8(a)(5). In defense of this claim, the employer relied on the following rights provided by the collective bargaining agreement's management rights clause, none of which expressly gave the employer the right to specifically implement an attendance and tardiness policy: The right to "change reporting practices and procedures and/or to introduce new or improved ones," to "make and enforce rules of conduct," and to "suspend, discipline and discharge employees."

Reversing the administrative law judge's determination that the employer violated Section 8(a)(5), the Board held:

We find that the Respondent did not violate the Act with respect to the newly-implemented disciplinary policy on attendance and tardiness. Application of the traditional standard reveals that several provisions of the management-rights clause, taken together, explicitly authorized the Respondent's unilateral action. Specifically, the clause provides that the Respondent has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline and discharge employees." By agreeing to that combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements.

Provena Hospitals, 350 N.L.R.B. at 815.

In the same vein, in *E.I. DuPont de Nemours & Co.*, No. 3-CA-26131, 2008 NLRB GCM Lexis 13 (General Counsel Memorandum), the General Counsel was presented with the question of whether the union had waived its right to bargain over the employer's unilateral change to the allocation of health insurance premiums between the company and its employees based on memoranda of understanding between the parties – even though the memoranda of understanding did not clearly demonstrate a waiver. *Id.*, 2008 NLRB GCM Lexis 13 at *13-*16. In reaching this conclusion, the General Counsel, relying on the Board's decision in *Provena Hospitals*, reasoned as follows:

The Board recently reaffirmed its long-held position that the purported waiver of a union's bargaining rights is effective if and only if the relinquishment was "clear and unmistakable." In *Metropolitan Edison Co. v. NLRB*, the Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'." The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in the contract. As the Board noted in *Provena*, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right unilaterally to take the action in question.

The Board [in *Provena*] then considered the employer's unilateral implementation of an attendance and tardiness policy. The Board concluded that the contract "explicitly authorized" the employer's implementation of a disciplinary policy on attendance and tardiness even though it did not include the words "time and attendance" or "tardiness." The Board found that several provisions of the management rights clause – granting the employer the right to "change reporting practices and procedures and/or introduce new or improved ones," to "make and enforce rules of conduct," and to "suspend, discipline, and discharge employees" – taken together amounted to an explicit authorization of the employer's unilateral action, notwithstanding the absence of the words "time and attendance."

As *Provena* illustrates, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue.

Id., 2008 NLRB GCM LEXIS 13 at *12-*14.

The management rights language authorizing Mercy's action relating to the AvaSys patient monitoring system is arguably even stronger than the language at issue in *Provena Hospitals* and *E.I. DuPont de Nemours*. Here, the management rights clause gives Mercy "the sole and exclusive responsibility for the management, control and operation of its business and the complete authority to exercise those rights and powers incidental to this responsibility, including the right to ... determine the type and kind of services to be rendered by Mercy; determine all methods of rendering Mercy's services; and determine the methods of providing Mercy's services. (Ex. A, Art. 5, §5.1). In light of the Board's holding in *Provena Hospitals*, this amounts to a waiver of the Union's right to bargain over Mercy's use of the AvaSys patient monitoring system, which is indisputably a method of providing and enhancing the services Mercy provides to its patients.

In sum, the management rights language contained in the parties' contract amounts to a clear and unmistakable waiver of the Union's right to bargain over Mercy's use of the AvaSys patient monitoring system, without the need for further inquiry. However, lest there be any doubt about this, any such doubt is removed by examining "other provisions of the collective bargaining agreement ... that may shed light on the parties' intent concerning bargaining over the change at issue." *E.I. DuPont de Nemours*, 2008 NLRB GCM LEXIS 13 at *14.

In this regard, the management rights article provides that "[a]ll rights, powers and authority of Mercy are retained by it, except those specifically abridged or modified by the contract (Ex. A, Art. 5, §5.2), and contains an integration clause and a strong, clear and unequivocal "zipper" clause, that express a clear and unmistakable waiver of the Union's right to bargain over anything that is not addressed in the contracts:

Section 5.11. Negotiations – Waiver of Right to Bargain. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of the right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and agrees that the other shall not be obliged, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement.

Section 5.12. Entirety of Agreement. Subject to the Management Rights provisions of this Agreement, the Employer and the Union agree that this Agreement sets forth the entire Agreement between the parties as to terms and conditions governing employment of employees in the bargaining unit.

(Ex. A, Art. 5, §5.11 [emphasis added]).

In *Rockford Manor Intermediate Care Facility*, 279 N.L.R.B. 1170 (1986), the union challenged the employer's alteration of its health insurance plan (which was not covered in the

collective bargaining agreement except for a reference to participation by bargaining unit employees in the same plan that applied to non-bargaining unit employees, *id.* at 1171) during the term of the collective bargaining agreement. The employer defended the union's claim based on a zipper clause (similar to Art. 5, §5.11 of the parties contracts here), as well as an integration clause (similar to Art. 5, §5.12) and a management rights clause (similar to similar to Art. 5, §5.1 and §5.2). These clauses provided as follows:

This Agreement constitutes the entire Agreement between the Company and the Union. *The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreement arrived at by the parties after the exercise of those rights and opportunities are set forth in this Agreement. Each voluntarily and unqualifiedly waives the right to bargain collectively with respect to any subject or matter not specifically referred to in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated this Agreement.*

It is further understood and agreed ... that this document correctly sets forth the effect of all preliminary negotiations, understandings, and agreements and superceded [sic] any previous agreements, whether written or verbal.

* * *

The employees covered by this Agreement are entitled only to those certain aspects of wages, hours, or working conditions which are specifically covered by this Agreement. All aspects of wages, hours, or working conditions which are not covered by this Agreement may be changed, altered, continued, or discontinued without consultation with the Union.

* * *

Except to the extent expressly abridged or limited by a specific provision of this Agreement, the Company reserves and retains, solely and exclusively, all of its inherent rights functions and prerogatives of management as such rights, functions and prerogatives existed prior to the execution of this Agreement. Such rights, functions and prerogatives include, but are not limited to, the Company's right to establish, continue and change, from time to time, policies, practices and procedures for the conduct of the business; ... Recognizing the desirability of avoiding any impediment to the exercise by the Company of its management rights, functions and prerogatives in a manner beneficial to the employees, it is agreed that no such right, function or prerogative shall be limited by any practice

or course of conduct or otherwise than by the express provisions of this Agreement.

* * *

To the extent that any function of management is not expressly limited by the terms of this Agreement, such a function may be exercised unilaterally by the Company.

Rockford Manor, 279 N.L.R.B. at 1173-1174 (emphasis added).

The administrative law judge, whose decision was adopted by the Board, held the foregoing provisions, including the zipper clause, “given their ordinary meaning, substantiate mutual intent to waive bargaining during the contract term with respect to all subjects left unregulated within the four corners of the parties’ agreement,” and thus “it is clear [the employer and union] negotiated a complete agreement, including terms which are incisive, direct, and specific in their assault upon the existence of any negotiating responsibility during the term of the contract, and in their desire to commit unresolved issues to management prerogatives as they existed upon entry of the agreement.” *Id.*, 279 N.L.R.B. at 1173, 1174. Accordingly, the union waived its right to bargain over the employer’s alteration of the health insurance plan. *Id.* at 1174. Similarly, here, the Union waived its right to bargain over Mercy’s use of the upgraded AvaSys patient monitoring system by agreeing to the terms of Article 5 of the parties’ contracts.

In light of applicable Board precedent, the management rights language contained in the parties’ agreements (Art. 5, §5.1 and §5.2), alone, amounts to a waiver of the Union’s right to bargain over Mercy’s use of the AvaSys patient monitoring system. The fact the Union also agreed to a clear zipper clause (Art. 5, §5.11), under which the Union expressly waived its right to bargain over anything not addressed in the parties’ contract, further compels this conclusion. The Regional Director’s claims premised on Mercy’s use of this system should therefore be dismissed.

B. Paragraphs 10(A)(i), (ii), (iii), (iv), (v), (vi), (ix), (x), and (xii) of the TCC Should Be Dismissed Because Mercy’s Social Media, Best Practices, Discipline Policies, and Rules Are Lawful On Their Face And In Their Application.

Introduction

In connection with employers’ social media policies, the Board has established a clear procedure for considering whether a given policy violates Section 8(a)(1) of the Act, by chilling employees’ exercise of their Section 7 rights. As explained in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004), first, one looks at whether the policy in question *explicitly* restricts Section 7 protected activities. If it does not, then a violation can only be found if the rule in question: (a) has been issued in response to union activity, (b) has been applied to restrict the exercise of Section 7 rights, or (c) could reasonably be construed by employees to prohibit Section 7 rights.

In this case, nothing in the actual language of the clauses challenged by the Region asserts an explicit restriction on Section 7 rights – nor does the TCC make any such assertion. The TCC, moreover, is void of alleging in any specific manner either that these clauses are responsive to union activity⁵, or that they have actually been applied to restrict Section 7 rights. If the Region intended to proceed on one of these bases, it would surely have been explicit in this, the *third* iteration of the Complaint, since, “The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met. The complaint should be sufficiently specific to defend against a Motion for a Bill of Particulars.” Section 10264.2, *N.L.R.B. Case Handling Manual*,

⁵ Work rules, such as those cited in Paragraph 10 of the Complaint, which, by their very language, have general applicability, cannot form the premise of a claim that they are responsive to union activity under *Lutheran Heritage. N.L.R.B. v. Arkema, Inc.*, 710 F.3d 308, 318-319 (5th Cir.2013)[“Neither does the second prong of *Lutheran Heritage* offer an alternative path to find the email in violation. The Board concluded that the email was in response to union activity, because it referenced union activity and was sent before the election. **The policy however, applied to all employees**, even if harassment by union employees was expressly included: ‘You have the right to not be harassed, intimidated, or threatened in any way—physically or verbally—by anyone, including the union.’”].

Part I; N.L.R.B. Benchbook, Section 3-230 [“A rough rule of thumb is that a complaint should allege the 4 Ws: who committed the act, what was done, when was it done, and where.”]

In point of fact, Paragraph 10(B) of the Complaint embodies the true focus of the Region’s objection: “The policies and/or work rules ... are overly broad restrictions. ...” Since there is no presumption that a workplace rule impermissibly interferes with employees’ right to exercise their Section 7 rights, *Flex Frac Logistics v. N.L.R.B.*, 746 F. 3d 205, 209 (5th Cir. 2014), in the absence of any actual allegations that these clauses have been impermissibly applied, the focus of this Motion is on the last of the *Lutheran Heritage* criteria: whether the language could *reasonably* be construed by employees to prohibit Section 7 rights. *Fiesta Hotel*, 344 N.L.R.B. 1363, 1367 (2005); *TT & W Farms*, No. 26-CA-023722, 2012 NLRB Lexis 589, 4, 5.

The standard for determining how a *reasonable* employee would interpret such a policy, and whether the language would *reasonably* tend to interfere with employee rights is an objective one. *General Motors*, No. 07-CA-53570, 2012 NLRB Lexis 304, *7 (ALJ Sandron). In making this assessment, the Board gives the policies a reasonable reading, and refrains from reading phrases in isolation or presuming improper interference with employee rights. *Lutheran Heritage*, at 646. The Board has consistently indicated that it will not find a violation simply because a rule could *conceivably* be interpreted to prohibit Section 7 activity. *Lutheran Heritage*, at 647; *Palms Hotel and Casino*, 344 N.L.R.B. 1363, 1368 (2005) (advising “We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it”).

Systemwide Social Media Policy

Paragraph 10(A)(i)

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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.

This Rule begins with bolded language: “**Adhere to HIPAA patient privacy and confidentiality.**” The focus of this Rule is clearly “HIPAA.” In the course of 118 words, the term is stated 4 separate times, in addition to stating the formal name of the Act: Health Insurance Portability and Accountability Act.” The Rule specifies that HIPAA “protects patient privacy and promotes security and confidentiality of patient information.” The Rule then gives a specific example of a violation: taking a picture of a patient and then distributing it in social media. Rules that clarify and restrict their scope by giving examples of clearly illegal or unprotected conduct are not unlawful. *Tradesmen Intl.*, 338 N.L.R.B. 460, 460-462 (2002). Thus, there can hardly be a question that the focus and intent of this Rule is to alert employees to the need to comply with HIPAA in particular and patient privacy concerns in general.

It is a federal crime to disclose individually identifiable health information relating to an individual as a result of the enactment of HIPAA. See, e.g., 42 USC §1320d-6(a)(3). Photographic images of a patient may be included as part of the medical record which is protected by HIPAA. See, e.g., 45 CFR §164.514(b)(2)(i)(Q). And the unauthorized use of such protected information, including a photograph, for posting on the internet can give rise to both criminal liability under HIPAA, and civil liability under state law. See, e.g., *Yath v. Fairview Clinics*, 767 NW2d 34, 48-50 (Minn. App. 2009). Similarly, Ohio common law makes actionable

the unauthorized disclosure of patient information. *Hageman v. Southwest Gen. Health Ctr.* (2008), 119 Ohio St. 3d 185, 187-188⁶.

In addition, licensed healthcare providers such as nurses are expressly required by Ohio law to maintain the confidentiality of patient information as a condition of their licenses; and are **forbidden** from using that information in social media. See, e.g., Ohio Administrative Code

⁶ “In general, a person's medical records are confidential. Numerous state and federal laws recognize and protect an individual's interest in ensuring that his or her medical information remains so. For example, the Ohio Public Records Act prohibits medical records maintained by public institutions from being released pursuant to a public-records request: " 'Public record' means records kept by any public office * * * [but] does not mean any of the following: (a) Medical records." R.C. 149.43(A)(1)(a). Likewise, the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prevents healthcare providers from disclosing health information except in certain specific circumstances. See generally 45 C.F.R. 164.502. Physician-patient and psychologist-patient privileges have been codified in Ohio to deny the use of such information in litigation except in certain limited circumstances. See R.C. 2317.02(B)(1) and 4732.19. Physical and mental-health examinations of a litigating party may be ordered only when relevant and "for good cause shown." See Civ.R. 35(A). “We explicitly recognized and applied this basic policy of confidentiality in *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 1999 Ohio 115, 715 N.E.2d 518. In that case, we confronted issues arising from the disclosure of health-care information obtained through a physician-patient relationship. After surveying cases in Ohio and beyond, we recognized that the breach of patient confidentiality is a palpable wrong. *Id.* at 400. However, we also determined that such an injury is difficult to remedy appropriately. *Id.* “Finding the various methods that courts have used to address such claims (including theories like invasion of privacy, defamation, breach of contract, and others) to be unsatisfactory, we recognized a separate tort for breach of confidentiality related to medical information. *Id.* at 400-401, 715 N.E.2d 518. We defined the boundaries of this tort by recognizing two related causes of action: one against physicians and hospitals that disclose confidential medical information to a third party without authorization or privilege to do so, and one against third parties who induce physicians or hospitals to disclose such information. *Id.* at paragraphs one and three of the syllabus.”

§4723-4-03(A),(H)⁷, pertaining to registered nurses, §4723-4-04(A),(H)⁸, pertaining to licensed practical nurses, and §4723-4-06(Q)⁹, pertaining to patient safety.

Thus, there can hardly be a question that this subject matter merited Mercy's concern. It is of equal concern to employees, and certainly a subject about which they would have been trained and the importance of which would have been known to these employees. The fact that this Rule is issued within the context of a healthcare facility is significant, because its mission includes maintaining the confidentiality of patient information; and employees would logically understand this Rule within that context. *Cf., e.g. Costco Wholesale Corp.*, 358 NLRB No. 106, 2012 NLRB Lexis 534, at *43.

Moreover, this Rule is expressly focused upon "patient privacy and confidentiality." The Court in *University Medical Center v. N.L.R.B.*, 335 F. 3d 1079, 1089 (D.C. Cir. 2003), cogently, and quite aptly, has commented:

⁷ 4723-4-03 Standards relating to competent practice as a registered nurse.

(A) A registered nurse shall provide nursing care within the scope of practice of nursing for a registered nurse as set forth in division (B) of section 4723.01 of the Revised Code and the rules of the board.

* * *

(H) A registered nurse shall maintain the confidentiality of patient information. The registered nurse shall communicate patient information with other members of the health care team for health care purposes only, shall access patient information only for purposes of patient care, or for otherwise fulfilling the nurse's assigned job responsibilities, and shall not disseminate patient information for purposes other than patient care, or for otherwise fulfilling the nurse's assigned job responsibilities, through social media, texting, emailing or any other form of communication.

⁸ 4723-4-04 Standards relating to competent practice as a licensed practical nurse.

(A) A licensed practical nurse shall function within the scope of practice of nursing for a licensed practical nurse as set forth in division (F) of section 4723.01 of the Revised Code and the rules of the board.

(H) A licensed practical nurse shall maintain the confidentiality of patient information obtained in the course of nursing practice. The licensed practical nurse shall communicate patient information with other members of the health care team for health care purposes only, shall access patient information only for purposes of patient care, or for otherwise fulfilling the nurse's assigned job responsibilities, and shall not disseminate patient information for purposes other than patient care, or for otherwise fulfilling the nurse's assigned job responsibilities, through social media, texting, emailing or any other form of communication.

⁹ 4723-4-06 Standards of nursing practice promoting patient safety.

(Q) For purposes of paragraphs (I), (J), (K), (L), and (M) of this rule, a nurse shall not use social media, texting, emailing, or other forms of communication with, or about a patient, for non-health care purposes or for purposes other than fulfilling the nurse's assigned job responsibilities.

Confidential information is information that has been communicated or acquired in confidence. **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.** And to the extent an employee is privy to confidential information about another employee or about a patient, he has no right to disclose that information contrary to the policy of his employer. *Cf. Aroostook County Reg'l Ophthalmology Ctr. v. NLRB*, 317 U.S. App. D.C. 114, 81 F.3d 209, 213 (D.C. Cir. 1996) ("**The Board does not question [a hospital's] right to require employees to protect patient privacy**"). (emphasis added)

The Board, in *Lutheran Heritage*, at 647, expressly cited *University Medical Center* opinion with approval, noting that a reasonable employee would not read the rules as prohibiting conduct protected by the Act. The Board further emphasized that the test is not whether a rule *could* be interpreted in an unlawful manner:

To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Finally, the TCC has avoided noting that the Policy concludes with the following statement:

13. Discussion of terms and conditions of employment. Nothing in this policy shall be construed to prohibit associates from engaging in activities that are protected under applicable labor laws.

While, admittedly, such disclaimers are not talismans that can transform an unlawful clause into a lawful one, nevertheless, such assertions can be considered and further support a conclusion that, reading the document as a whole, no *reasonable* employee would assume that the employer's intention was to prohibit lawful conduct. *Cox Communications*, No. 17-CA-087612, 2012 NLRB GCM Lexis 38, *9 (General Counsel Memorandum)[“Finally, the social media’s savings clause ... further ensures that employees would not reasonably interpret any potentially ambiguous provision in a way that would restrict Section 7 activity.”]; *Baltimore Sun*, No. 5-CA-

32186, 2005 NLRB GCM Lexis 29, *13 (General Counsel Memorandum)[“In view of these disclaimers, employees would not reasonably conclude that they are prohibited from discussing their terms and conditions of employment....”].

For these reasons, judged objectively and within context, the language in this Rule could not *reasonably* be interpreted by a reasonable employee to prohibit Section 7 rights. Judgment on this allegation should be granted in favor of Mercy as a matter of law.

Paragraph 10(A)(ii)

6. Do not disclose confidential information or violate copyrights. Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

As with the prior provision, this Section begins with bolded language which emphasizes the focus of the conduct being addressed: “**Do not disclose confidential information or violate copyrights.**” The intent behind this provision is clearly to protect Mercy’s business-related information. If one breaks this paragraph down into its constituent parts, essentially Mercy is seeking to protect: (1) copyrights and trademarks; (2) proprietary financial and intellectual property; (3) patient care or similar sensitive or private content. (Note, incidentally, that *nothing* in this section pertains to *employee*¹⁰ *information* of any kind.)

As concerns the copyrights and trademarks, the rule advises: do not “*violate* copyrights” and “*comply* with copyrights” and trademarks. As occurred in *Cox Communications*, “this rule does not prohibit the use, but merely urges employees to respect the laws.” As a result, this rule

¹⁰ See, e.g., *Boeing Co.*, No. 19-CA-088157, 2013 NLRB Lexis 8, n.15 (GCM), in which the General Counsel notes that the absence of a specific reference to employee wages or working conditions was a significant factor in assessing the intent of a rule and determining that it is not reasonable to assume an intention to restrict Section 7 rights.

avoids the entire debate which occurs in some cases¹¹ as to whether “fair use” has been prohibited – because all the rule does, essentially, is tell the employee to follow the law, whatever that may be, and whatever “loopholes” to that there may be. Urging employees to comply with copyrights and other intellectual property laws, without prohibiting them from using copyrights, is not a violation of the Act. General Counsel Memorandum OM 12-59, at 11.

The rule further advises not to reveal *proprietary* financial and intellectual property. In *Mediaone*, 349 N.L.R.B. 277, 278-279 (2003), the Board dismissed the General Counsel’s challenge to a policy prohibiting the disclosure outside the company of proprietary information – (noting that the rule said nothing about wages, hours, and working conditions), and expressly indicating that the inclusion of specific business-related terms (such as “intellectual property,” “financial information,” and “copyrights”) made it obvious that the rule was designed to pertain to the employer’s proprietary business information rather than to prohibit an employee’s discussion of his wages. Hence, the Board found that no employee could reasonably construe such language as restricting discussion or disclosure of his terms and conditions of employment.

ALJ Cates makes the same point, in *Cellco Partnership*, No. 21-CA-075867, 2014 NLRB Lexis 585, *22-23, criticizing the rule he had before him because “the Company’s rule at no point uses the term ‘intellectual property’ nor refers to ‘private business information’ **that it has every right to protect.**” Plainly stated, a rule requiring employees to maintain the confidentiality of private and confidential information is not unlawful. General Counsel Memorandum 12-59, at 20. And, when the clear direction of the rule, taken as a whole, addresses *proprietary* and business confidential information, it would not be reasonable for an employee to assume that the rule covered protected Section 7 activities. *Echostar*, No. 27-CA-066726, 2012 NLRB Lexis

¹¹ Compare *Kroger Co.*, No. 07-CA-098566, 2014 NLRB Lexis 279, **31-34 (ALJ Goldman), in which the ALJ drew a distinction between rules calling for *respecting* copyrights as opposed to a complete prohibition on their use because, for example, employer logos might lawfully be used by employees in protected activity.

627, *67-68 (ALJ Anderson). *And see Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, 2014 NLRB Lexis 597, **9-10.

Third, the rule seeks to protect “patient care or similar sensitive or private content.” As Mercy has already indicated, above, “to the extent an employee is privy to confidential information about another employee or about a patient, he has no right to disclose that information contrary to the policy of his employer.” *University Medical Center*, at 371.

Finally, Mercy reiterates that this set of rules includes the disclaimer, already quoted, which would pertain here as well. As an indication of Mercy’s intent, that clause further demonstrates that, objectively, this rule is not aimed at restricting Section 7 rights.

For these reasons, judged objectively and within context, the language in this Rule could not *reasonably* be interpreted by a reasonable employee to prohibit Section 7 rights. Judgment on this allegation should be granted in favor of Mercy as a matter of law.

Paragraph 10(A)(iii)

Social Media Guidelines and Best Practices

5. **What you say online will reflect on you, your fellow associates and the public’s view of your workplace.** Remember that if you wouldn’t want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

First, this provision must be put in its proper context. The prior two provisions singled out by the Region are part of “Exhibit ‘A,’” a policy issued by Mercy. In contrast, the Region now reaches out to contest a separate document, “Exhibit ‘B,’” termed “*Social Media Guidelines and Best Practices*.” Page 3 of these Guidelines directs an employee to specific “policies” (other

documents) that are to be followed; but then the substantive text begins with this prefatory language:

The following *guidelines* aim to *help* you participate in social media with confidence while also adhering to CHP's policies:

In other words, this document is *not* a policy; and it does not present itself as having the force of a work rule that will be enforced through employee discipline. The Board has previously suggested, in *Karl Knauss Motors*, 358 NLRB No. 164, 2012 N.L.R.B. Lexis 679, *5, n.5, that employer language consisting of a "commonsense behavioral guideline," which does not contain a prohibition and is aspirational in nature is not considered violative of Section 7 rights.

In this case, once again, each paragraph of the Guidelines begins with bolded language, emphasizing the point Mercy is attempting to make: "**What you say online will reflect on you, your fellow associates and the public's view of your workplace.**" Then the language proceeds to suggest the time-tested standard: what would your mother think? There is no Board decision which Mercy has been able to identify that has condemned the "what would your mother think?" standard.

The guideline does continue with this statement: "Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace." Mercy submits, however, that this is indistinguishable from the following language, which was found acceptable in General Counsel Memorandum 12-59, at 11:

"Remember that there can be consequences to your actions in the social media world – both internally, if your comments violate [Employer] policies, and with outside individuals and/or entities."

That Memorandum makes the point, at 12, that, while the rules obliquely referenced may have been objectionable, merely reminding employees that there can be consequences to their actions is not unlawful.

Similarly, the “model” language approved in Memorandum 12-59, the policy states:

Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely effects members, customers, suppliers, people who work on behalf of [Employer] or [Employer’s] legitimate business interests may result in disciplinary action up to and including termination.

The language used by Mercy here is certainly comparable to, if not much tamer than, that already approved by the General Counsel. Judgment on this allegation is therefore appropriate.

Paragraph 10(A)(iv)

3. No comment. Do not comment on work-related matters unless you are CHP’s (or one of its organization’s) official spokesperson on the matter, and have approval from CHP leadership and management to do so.

Again, this provision should be placed in context. Specifically, it is part of a separate section prefaced as follows: “**The following tips are best practices to help you participate in social media with confidence on both your professional and personal time.**” A tip means “a useful *suggestion*.” *Macmillan Dictionary*, (<http://www.macmillandictionary.com/us/dictionary/american/tip>). So, once again, the language reflects aspirational language, unaccompanied by any prohibition or threat of discipline.

The specific language in this section is obviously intended to apply to people making comments in the capacity of “official spokesman” on behalf of Mercy. In General Counsel Memorandum 12-59, at 15, the General Counsel looked at similar language:

No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President’s designated agent.

This rule passed muster because such a rule “cannot reasonably be construed to restrict employees’ exercise of their Section 7 right to communicate about working conditions among themselves and with third parties.”

Further in that same Memorandum, at 16-17, the General Counsel considered this comparable language:

Unless you are specifically authorized to do so, you may not:

- **Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].**

The General Counsel singled out this language from the rest of the rule before him and found this language acceptable, both because an employee would not reasonably assume this pertains to his talking about terms and conditions of employment and because the language “is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer.” Mercy’s language in Paragraph 10(A)(iv) of the Complaint is similarly lawful.

Paragraph 10(A)(v)

8. **Think about consequences.** Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it’s about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

Essentially, this language recommends to employees that they *think* and that they use their *best judgment* – again, without issuing a prohibition or making any threat. Language which speaks only of thought, has no reference to possible discipline, and does not require employees to engage in any kind of action, does not violate Section 7, since it is more in the nature of advice or a suggestion rather than a mandate. *General Motors*, No. 07-CA-53570, 2012 NLRB Lexis 304, *19 (ALJ Sandron). Further, the General Counsel has raised no issue with specific language

asking employees to “use good judgment about what you share and how you share.” General Counsel Memorandum 12-59, at 6. And, he specifically found no problem with a clause that began: “Use your best judgment and exercise personal responsibility.” *Id.*, at 11-12. Mercy’s rule here, therefore, is lawful.

Paragraph 10(A)(vi)

11. **Other people’s information.** It’s simple – other people’s information belongs to them. It’s their choice whether they wish to share their material with the world, not yours. Before posting someone else’s material, be sure to check with the content owner for permission first. If you’re still unsure, the Communications or Marketing department or Legal can offer guidance.

Much of what has been argued above applies equally here. This is part of a compilation of “tips,” *i.e.*, suggestions. There is no prohibition or threat of discipline. And the focus is on information which belongs to other people – the employer does not assert any control or rights to such information but suggests the employee contact the owner of the information. The language offers three choices of sources of “guidance” to an unsure employee – this is not a requirement, nor is it suggested that their “guidance” is binding. Thus, here again, this wording amounts to advice – not a prohibition, and not a requirement that the individual take any kind of action. Hence, it is not violative of Section 7. *General Motors*, at *19.

For these reasons, judged objectively and within context, the language in the foregoing provisions of the *Guidelines* could not *reasonably* be interpreted by a reasonable employee to prohibit Section 7 rights. Judgment on the allegations of paragraphs 10(A)(iii) – (vi) should be granted in favor of Mercy as a matter of law.

Paragraph 10(A)(ix)

19. Discourtesy to, or improper treatment of patients, visitors, or other employees.

It is difficult to distinguish this language from that considered by ALJ Amchan, in *Eym King*, No. 7-CA-118835, 2014 NLRB Lexis 742, **28-29, just weeks ago, when he stated the following:

The General Counsel alleges that Respondent's confidentiality and professional conduct rules violate the Act in numerous provisions. In undertaking this analysis, I consider the fact that in *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB*, 335 F.3d 1079, 357 U.S. App. D.C. 361 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB 1318 (2001) regarding a rule prohibiting ²disrespectful conduct. In *Lutheran Heritage*, the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

Applying this principle I conclude the following with regard to the following provisions of Respondent's confidentiality and professional conduct rules:

Misconduct includes a failure to treat co-workers, customers, supplier and visitors with *courtesy* and respect: I find this rule would not, in isolation, be reasonably read to prohibit discussion of wages, hours, working conditions or unionization.

He echoes the reasoning of ALJ Biblowitz, in *Boch Imports, Inc.*, No. 1-CA-83551, 2014 NLRB Lexis 28, *16, who, similarly, had no problem with wording aimed at courtesy to others:

The *Discourtesy* Policy, under General Rules of Conduct, states:

All employees are expected to be courteous, polite and friendly, both to customers and to their fellow employees. The use of profanity or disrespect to a customer or co-worker, or engaging in any activity which could harm the image or reputation of the Company, is strictly prohibited.

I find that no reasonable reading of the first sentence, as well as the first half of the second sentence (up to co-worker) could be construed as limiting or prohibiting Section 7 rights. *Adtranz ABB Daimler-Benz Transp., NA, Inc.*, 331 NLRB 291 (2000); *Lutheran Heritage, supra*, at 647. An employer is certainly permitted to maintain order in its workplace and promote harmonious relations between its employees, other employees and its customers.

Both opinions are in keeping with the “model” language, approved by the General Counsel in Memorandum 12-59, at 22: “**Be respectful.** Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer.]”

The fact is that this Rule is designed merely to maintain a civil and decent workplace, and could not be interpreted as something more troublesome without attributing to Mercy an unlawful intent for which there is no basis – as such, the Rule should be confirmed. *Community Hospital v. N.L.R.B.*, 335 F.3d 1079, 1088-1089 (D.C. Cir. 2003).

Paragraph 10(A)(x)

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

The Region’s citation of this language is beyond Mercy’s understanding. Virtually identical language was considered, *and endorsed*, by the Board in *Lafayette Park*, 326 N.L.R.B. 824, 826-827 (1998):

Standard of conduct 31 states that the following conduct is unacceptable:

Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community.

Contrary to our dissenting colleagues, we do not believe that this rule can reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity that the Respondent may deem to be “improper.” **To ascribe such a meaning to these words is, quite simply, farfetched.** Employees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act.

The Board further endorsed similar language in *Flamingo Hotel*, 330 N.L.R.B. 287, 288-289 (1999).

Those decisions of the Board remain “good law,” *see, e.g., Pleasant Travel Services*, 37-CA-7806, 2010 NLRB LEXIS 374, 13-14 (ALJ Schmidt) – this is not even a debatable point; so

that this particular allegation by the Region necessarily calls into question its good faith in including it at all.

Paragraph 10(A)(xii)

4. *Accessing and/or* divulging information that becomes accessible through association with MSVMC that should be considered as confidential *and/or proprietary*, including information related to patients and their care. (Emphasis in the original)

Mercy has demonstrated above (concerning 10(A)(i)) the lawfulness of an employer's rule seeking to protect patient care information. Further, Mercy has demonstrated (concerning 10(A)(ii)) the lawfulness of an employer's rule concerning confidential and proprietary information. Note also that, once again, nothing in this rule makes reference to employee-related data or otherwise takes this language outside of the employer's appropriate area of concern for business and/or patient records. This specific language can hardly be distinguished then from what has already been fully analyzed above.

The Region should have considered the analysis of ALJ Giannasi, in *TT & W Farm Products*, No. 26-CA-023722, 2012 NLRB Lexis 589, **35-38, before including this language as part of the TCC:

Non-Revelation of Classified or Proprietary Information. Paragraph 6(f) of the complaint alleges as unlawful the handbook rule that prohibits “**revealing to an unauthorized person classified or proprietary information without approval,**” which is labeled an intolerable offense punishable by immediate discharge. The Acting General Counsel asserts that the language in this rule interferes with the protected activity of employees because it precludes their discussion of wages and other terms and conditions of employment, citing cases that hold that rules precluding such discussions or sharing such information with others violates the Act. See *Bigg's Food*, 347 NLRB 425, 425 fn. 4 (2006); and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291-292 (1999). Respondent counters that its rule does not specifically refer to discussion of wage or benefit information and the main focus of the rule is removing from the plant or revealing classified or proprietary information, a legitimate business concern.

I find that the Acting General Counsel has failed to prove that the rule could reasonably be read to prohibit employees from discussing wage or other benefits among themselves or with others. The rule by its terms does not prohibit the discussion of wages and other terms and conditions of employment. Moreover, the Respondent's rule is very similar to other rules that the Board has found not to infringe on protected rights. For example, in the lead case of *Lafayette Park Hotel*, above, 326 NLRB at 826, the Board declined to find unlawful a rule that prohibited “divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.” The Board found that employees would not reasonably read the rule to prohibit discussion of wages and working conditions among themselves or with a union, even though the term “hotel-private” is not specifically defined in the rule. **It also noted that employers have a substantial and legitimate interest in maintaining the confidentiality of private and proprietary information.** Ibid. See also *Super K-Mart*, 330 NLRB 263, 263-264 (1999); and *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278-279 (2003).

In support of his position, the Acting General Counsel cites *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463, 375 U.S. App. D.C. 371 (D.C. Cir. 2007); and *Brockton Hospital*, 333 NLRB 1367 (2001). But those cases are distinguishable. In *Brockton Hospital*, the Board affirmed a judge's finding that a rule requiring employees to respect the confidentiality of information regarding patients, employees or hospital operations by not discussing such information was unlawful. 333 NLRB at 1367 fn. 3 and 1377. **That rule specifically focused on employee information that might reasonably be read to include wage and benefit information. The rule in the instant case focuses on classified or proprietary information without specifying whether such information relates to employees.** In *Cintas*, the Board found unlawful a confidentiality rule, whose terms amounted to an unqualified prohibition of the release of “any information” regarding its employees. The rule in *Cintas*, like that in *Brockton Hospital*, but **unlike the rule in the instant case, specifically dealt with employee information**; thus, the Board could properly read the rule as broadly prohibiting employees from discussing their wage and benefit information. Nor is the language in the Respondent's rule any more ambiguous in its reference to classified or proprietary information than the reference to hotel-private information in *Lafayette Park Hotel*, above, or similar references in *Super K-Mart* or *Mediaone*, above, **all cases in which the Board declined to find a violation.**

There is no dispute that a rule that prohibits employees from disclosing acquired confidential or proprietary information about an employer its clients is valid since it is designed to protect the confidentiality of proprietary business information. *Lily Transportation Corp.*, No. 01-CA-108618, 2014 NLRB Lexis 280, (ALJ Chu)[The ALJ found a problem for this employer

only because it had crossed a line by expressly adding “employee information” to the rule’s prohibition. “In contrast, more narrowly drafted confidentiality rules that do not specifically reference and restrict information concerning employees and their jobs have been found lawful.” n.3]. Hence, this allegation should also be dismissed on its face.

V. CONCLUSION

For the reasons outlined above, the Board should grant Mercy summary judgment on the §§8(a)(1) and (5) allegations outlined in ¶10(A)(i)-(vi), (ix-x)(xii)(B), 13(C)(D) of the TCC.

Respectfully submitted,

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Mercy St. Vincent Medical Center,

**CASE NOS.: 08-CA-128502
08-CA-129537
08-CA-133069
08-CA-134215**

and

**International Union, United Automobile
Aerospace & Agricultural Implement Workers
of America, UAW, Local 2213, RN Unit, and
Local 12 Technical and Support Units,**

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, GENERAL
COUNSEL'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board ("Board"), the Counsel for the General Counsel (GC) respectfully submits this opposition to the Motion for Partial Summary Judgment ("Motion") filed by Respondent Mercy St. Vincent Medical Center ("Respondent") on December 18, 2014. In the alternative, should the Board decide to rule on the merits of the allegations placed into issue by Respondent's Motion, the General Counsel hereby submits a cross motion for summary judgment. Respondent asserts that, the challenged work place rules, including several of its social media policies, do not violate the Act. As explained below, the Board should deny the Motion because the allegations concerning the rules are part of a larger complaint that requires an evidentiary hearing and piecemeal litigation of this matter is neither effective nor cost efficient. However, if the Board decides that a piecemeal resolution is warranted, however, the General Counsel requests that his

cross motion for summary judgment be granted since Respondent's policies alleged in the complaint infringe on its employees' Section 7 rights.

I. Procedural Background

On November 20, 2014, the Regional Director issued a Third Consolidated Amended Complaint ("TCC") and Notice of Hearing, pursuant to charges filed by International Union, United Automobile Aerospace & Agricultural Implement Workers of America, UAW, Local 2213, RN Unit, and Local 12 Technical and Support Units ("Charging Party"). The TCC alleges that Respondent violated Section 8(a)(1) of the Act by maintaining 11 overly broad workplace rules, including social media policies (TCC, ¶ 10(A)). Respondent's Motion pertains to 9 of the 11 rules alleged to be over broad in paragraph 10(A).

Several other allegations in the TCC are not challenged in Respondent's Motion. The TCC alleges that Respondent violated Section 8(a)(1) of the Act, on multiple occasions, by publicly and individually referring to an employee as a "union bitch" (TCC, ¶ 9) and by maintaining two overly broad no solicitation/distribution rules (TCC, ¶ 10(A)). The TCC also alleges Respondent violated Sections 8(a)(1) and (5) of the Act by dealing directly with employees over the terms and conditions of individual nurse practitioner contracts (¶ 12); unilaterally implementing individual employment contracts for nurse practitioners; and unilaterally implementing addendums to nurse practitioner contracts. (¶¶ 13(A), (B)).¹

¹ Respondent's Motion also sought deferral of the allegations found at paragraphs 13 (C) and (D) concerning the video monitoring system and the filing of grievances by email. On January 30, 2015, Respondent moved to withdraw these aspects of the Motion as a result of the Regional Director's decision to dismiss these claims pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).

II. The Board should deny Respondent’s Motion for Summary Judgment because it will not avoid a trial and will require piecemeal litigation of this matter.

“[T]he primary purpose of summary judgment is to avoid unnecessary trials.” Franklin v. Civil City of South Bend, 2015 WL 363461, at *4 (N.D. Ind. Jan. 25, 2015). The Respondent’s instant Motion asks that the Board rule on the merits of some allegations in the complaint but leaves a number of other substantive allegations to be decided after a hearing before an Administrative Law Judge. Thus, deciding the merits of the Respondent’s Motion for *Partial* Summary Judgment will not obviate the need for a trial or even significantly simplify the trial. Indeed, the Respondent’s Motion asks the Board to rule on some of the Employer’s workplace rules policies but not others that are the subject of the complaint. As a result, the Respondent is asking the Board to look at some of its workplace policies now and then others at a later point in time after a Judge has ruled on them. This is just the sort of piecemeal approach that the Board generally seeks to avoid because it is not an efficient use of the Board’s resources. Furthermore, it requires the parties to litigate this matter on two fronts.

For these reasons, the General Counsel requests that the Board deny Respondent’s motion for partial summary judgment because it asks the Board to act in a manner that is not an effective or efficient use of the resources of the Board or of the parties.

III. In the alternative, the General Counsel asks the Board to grant its cross motion for summary judgment.

A. Legal Standards

In deciding a motion for summary judgment, the Board uses the standards set forth in Rule 56 of the Federal Rules of Civil Procedure. *Newtown Corp.*, 280 NLRB 350 (1985). Pursuant to Rule 56(a), summary judgment is appropriate if “there is no genuine dispute as to

any material fact and the movant is entitled to judgment as a matter of law.” In making this determination, the evidence “must be viewed in the light most favorable” to the non-moving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The test enunciated in *Lutheran Heritage* is:

[O]ur 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.

Lutheran Heritage, 343 NLRB at 647 (emphasis in original).

“Board law is settled that ambiguous employer rules - rules that reasonably could be read to have a coercive meaning - are construed against the employer.” *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (2012), *enfd.* 746 F.3d 205 (4th Cir. 2014). The Board has also held that the maintenance of a work rule is an unfair labor practice even absent evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB at 825.

Under these standards, the challenged workplace policies at issue are unlawful because the rules could be read to prohibit certain protected concerted activities.

B. Systemwide Social Media Policy Rule, Number 1 (Complaint ¶ 10(A)(i))

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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.

While this social media policy largely concerns patient information, the Board has repeatedly found that the use of the term “confidential information,” without narrowing its scope so as to exclude protected activity, would reasonably be interpreted to include information concerning terms and conditions of employment. Because the first sentence of the policy (“Do not post proprietary or confidential information”) is not narrowed to only concern patient information, the policy runs afoul of Section 8(a)(1) as it can reasonably be read to forbid the disclosure of information about co-workers. See, e.g., *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465-466 (1987) (unlawful rule characterizing “Hospital affairs, patient information, and employee problems” as “absolutely confidential,” and prohibiting employees from discussing them); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip. op. at 2 (2014) (finding “Confidentiality and Data Protection” section of company’s Code of Business Conduct unlawful).

Respondent asks the Board to consider the import of a so-called “savings clause”² at the end of the entire social media policy as further evidence that “no *reasonable* employee would assume that the employer’s intention was to prohibit lawful conduct.” Motion, p. 38 (citations

² The “savings clause” provides:

2. Discussion of terms and conditions of employment. Nothing in this policy shall be construed to prohibit associates from engaging in activities that are protected under applicable labor laws.

omitted) (emphasis in original). The Board has repeatedly held that “[a]n employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law. *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (citations omitted). As the Board stated in another case: “Rank-and-file employees do not generally carry lawbooks (sic) to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.” *Ingram Book Co.*, 315 NLRB 515, 516 n. 2 (1994).

C. Systemwide Social Media Policy Rule, Number 6 (¶10(A)(ii))

6. Do not disclose confidential information or violate copyrights. Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

Respondent maintains that “the intent behind this provision is clearly to protect Mercy’s business related information.” Motion, p. 39 (citing *Mediaone*, 349 NLRB 277 (2003)).

However, Respondent’s intent is immaterial to whether the policy interferes with Section 7 rights. Rather, “[i]n considering the lawfulness of employer communications to employees, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights.” *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 9 (2014).

Objectively, the provision in question infringes upon Section 7 rights because it prohibits the disclosure of “confidential information,” including “proprietary financial” information and “operational and financial data.” *Flex Frac Logistics* is very closely on point. In this case, the list of “confidential information” explicitly included “financial information, including costs”

which the Board found “necessarily includes wages and thereby reinforces the likely inference that the rule proscribes wage discussion with outsiders.” 358 NLRB No. 127, slip op. at 2. Because the “confidential information” rule was “broadly written with sweeping, nonexhaustive categories that encompass nearly any information related to the Respondent,” the Board found it to be unlawful. *Id.* (citing *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007)(enforcing Board decision that found unlawful employer rule requiring employees to maintain “confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters”)).

The rule is also impermissible because it prohibits the positing of videos or photographs of the workplace without first obtaining “appropriate permission.” In *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 12-13 (2011), the Board found a similar rule objectionable because “[e]mployees would reasonably construe the rule as prohibiting all photography of hospital property, including photography performed in concert for mutual aid or protection.” In addition, requiring management permission to engage in Section 7 activity leads employees to “reasonably conclude that they were required to disclose to management the nature of the activity for which they sought access - a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights.” *J.W. Marriott*, 359 NLRB No. 8, slip op. at 2 (2012).

D. Social Media Guidelines and Best Practices, Guidelines for Social Media Participation, Number 5 (¶10(A)(iii))

5. What you say online will reflect on you, your fellow associates and the public’s view of your workplace. Remember that if you wouldn’t want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

Respondent labels this and the other policies discussed in the next three subsections as “Social Media Guidelines and Best Practices” (“Guidelines”). Respondent argues that the Guidelines are merely “aspirational in nature” and do not “present” themselves as having the “force of a work rule.” Motion, p. 42. Respondent never states that that an employee *cannot* be disciplined for engaging in behavior that runs afoul of these Guidelines, and a reasonable employee would, in fact, interpret them as work rules. In the introductory section, Respondent explicitly reminds employees that when using social media, it is “important” to follow its existing “Human Resources” policies, and warns that if these “policies are not followed, there can be **serious consequences for** both our organization and **you as an associate.**” *Id.* (emphasis added). Respondent’s Discipline Policy, published by its Human Resources department, includes a “representative list” of infractions that can conceivably cover any improper use of social media outside of work: “Unlawful or improper conduct off Employer premises or during non-work hours which affects the employee’s relationship to his job.”

Turning to the substance of this policy, contrary to Respondent’s assertion (see Motion, p. 43), this policy goes well beyond the language approved by the General Counsel’s Office in Memorandum OM 12-59 because it specifically warns that postings involving “other employees” may have “legal and other implications in the workplace.” The social media guidelines approved in OM 12-59 do not prohibit (or even reference) postings about other employees.³ As stated

³ The policy states:

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating content consider some of the risk and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

earlier, rules prohibiting or discouraging the disclosure of information about co-workers have been found to be unlawful. See, e.g., *Brockton Hospital*, 333 NLRB 1367 fn. 3 (2001), enfd. 294 F.3d 100 (D.C. Cir. 2002) (finding unlawful rule requiring employees to respect the confidentiality of information regarding patients, employees or hospital operations by not discussing such information); *Costco*, 358 NLRB No. 106, slip op. at 1 (2012) (finding social media policy prohibiting disclosure of “confidential information” as it may include employees' names, addresses, phone numbers and email addresses).

E. Social Media Guidelines and Best Practices, Guidelines for Social Media Participation, Number 3 (¶ 10(A)(iv))

3. **No comment.** Do not comment on work-related matters unless you are CHP's (or one of its organization's) official spokesperson on the matter, and have approval from CHP leadership and management to do so.

Respondent maintains that this rule is “obviously intended to apply to people making comments in the capacity of ‘official spokesman’ on behalf of Mercy.” Motion, p. 15.

Respondent again mistakenly invokes its intention to justify the policy rather than focusing on the pertinent issue -- whether the rule can be reasonably construed as restricting employees from exercising their Section 7 rights.

Respondent's “No Comment” policy is much broader than the policy approved in OM 12-59 and cited by Respondent (Motion, p.43). The approved policy provides:

Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on

behalf of [Employer]. It is best to include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of [Employer].”

Memorandum OM 12-59 at p. 23.

Here, the Respondent’s policy is not just directed at preventing employees from expressing company’s official or authorized position. Rather, it forbids them from commenting on “work-related matters” unless they are an official spokesperson and receive permission from management. Respondent could not have written a more broad policy. As such, this policy violates Rule 8(a)(1). See *J.W. Marriott, supra*.

F. Social Media Guidelines and Best Practices, Guidelines for Associates, Number 8 (¶ 10(A)(v))

8. Think about consequences. Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it’s about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

Respondent contends that “[e]ssentially, this language recommends to employees that they *think* and that they use their *best judgment* – again, without issuing a prohibition or making any threat.” Motion, p. 44 (emphasis in original). A single policy is not to be read in “isolation”, see *Lutheran Heritage*, 343 NLRB at 646, and when read in context with the “Introductory” section discussed earlier, this policy can be grounds for discipline. This policy is much more expansive than the “use your best judgment and exercise personal responsibility” language approved by the General Counsel in OM 12-59 because it warns employees about disclosing information that may “trash or embarrass the organization” or “co-workers.” Such a provision is clearly impermissible as employees would reasonably interpret this clause to prohibit protected complaints about working conditions and protected criticism of Respondent’s labor policies or

treatment of employees. *See, e.g., Costco, supra* at 1 (company violated Section 8(a)(1) by maintaining a rule prohibiting employees from electronically posting statements that “damage the Company . . . or damage any person's reputation.”); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (unlawful rule against “derogatory attacks”), *enfd.* in relevant part, 916 F.2d 932 (4th Cir. 1990).

G. Social Media Guidelines and Best Practices, Guidelines for Associates, Number 11 (§ 10(A)(vi))

11. Other people’s information. It’s simple – other people’s information belongs to them. It’s their choice whether they wish to share their material with the world, not yours. Before posting someone else’s material, be sure to check with the content owner for permission first. If you’re still unsure, the Communications or Marketing department or Legal can offer guidance.

This rule is unlawful because it encompasses information about co-workers, including their wages, addresses, phone numbers and email addresses. *Costco, supra*. Additionally there is nothing in the rule that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule’s reach. *See Hills and Dales General Hospital*, 360 NLRB No. 70, slip op. at 2 (2014) (finding unlawful policy prohibiting “negative comments about our fellow team members,” including coworkers and managers violated the Act.).

H. Policy Number HR-510, Minor Infraction Number 19 (§ 10(A)(ix))

19. Discourtesy to, or improper treatment of patients, visitors, or other employees.

Numerous Board cases have found such language in policies could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7. For example, in *Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011), the Board found unlawful a provision subjecting employees to discipline for the

“inability or unwillingness to work harmoniously with other employees.” *Id.*, slip op. at 3. Similarly, in *Claremont Resort & Spa*, 344 NLRB 832 (2005), the Board found that a rule prohibiting “negative conversations about associates and/or managers” violated Section 8(a)(1) because employees would reasonably construe the prohibition to bar them from discussing concerns about their managers that affect working conditions. *Id.* at 832; see *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (rule against “abusive or insulting language” unlawful).

I. Policy Number HR-510, Minor Infraction Number 22 (¶ 10(A)(x))

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

While the Board in *Lafayette Park* did not find similar language objectionable, the Board has recently distinguished *Lafayette Park*. For example, in *First Transit, Inc.*, 360 NLRB No. 72 (2014), after considering *Lafayette Park*, the Board found unlawful a prohibition against conducting “oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company.” *Id.*, slip op. at 2 n.5. The Board reasoned that the rule could reasonably be read to comprise any behavior, however proper and protected, that the employer considered detrimental to its interest or reputation, and therefore violated Section 8(a)(1) of the Act. *Id.*

Similarly, because this rule could cover almost any behavior that the Respondent finds objectionable, the rule violates the Act.

J. Policy Number HR-510, Major Infraction Number 4 (¶ 10(A)(xii))⁴

4. Accessing and/or divulging information that becomes accessible through association with MSVMC that should be considered as confidential **and/or proprietary**, including information related to patients and their care. (emphasis in original).

As discussed earlier, the Board has found similar all-encompassing policies prohibiting the disclosure of confidential or proprietary information to violate the Act because they preclude discussion of wages and other terms and conditions of employment. See, e.g., *Pontiac Osteopathic Hospital, supra*; *Flex Frac Logistics, supra*. This prohibition also extends to health care facilities as is the case here. See, e.g., *Brockton Hospital, supra*.

IV. Conclusion

For the reasons set forth above, the Board should deny Respondent's motion for summary judgment with respect to these workplace policies. In the alternative, the Board should grant the GC's cross motion for summary judgment.

Dated at Cleveland, Ohio this 9th day of February 2015.

Respectfully Submitted,

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⁴Due to an inadvertent typographical error, this subparagraph should read as 10(A)(xi). The TCC will be formally corrected at a later time.

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing General Counsel's Opposition to Respondent's Motion for Partial Summary Judgment and Cross Motion for Summary Judgment was filed electronically with the National Labor Relations Board and served by electronic mail, as designated below, on this 9th day of February 2015:

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Accordingly, the General Counsel's motion for summary judgment should be denied and should be stricken from the record.

II. THE GENERAL COUNSEL'S RESPONSE TO MERCY'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE STRICKEN FROM THE RECORD BECAUSE IT WAS FILED THIRTY-THREE (33) DAYS LATE, AND THUS MERCY'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE TREATED AS CONCEDED AND SUMMARY JUDGMENT SHOULD BE ENTERED IN MERCY'S FAVOR.

When a motion for summary judgment has been filed, the Board may issue a notice to show cause why the motion should not be granted, and "the time for filing the response shall be fixed in the notice to show cause." Rule 102.24(b). Here, to Mercy's knowledge, the Board did not issue a notice to show cause why Mercy's motion for partial summary judgment should not be granted and did not otherwise establish a briefing schedule applicable to Mercy's motion.

In the absence of a notice to show cause why a motion for summary judgment should not be granted, a party who desires to oppose the motion must file its opposition "no later than 21 days prior to the hearing" (Rule 102.24(b)) – in this case, by January 7, 2015. However, not only did the General Counsel not file his response to Mercy's motion by the January 7, 2015 deadline, he did not file his response brief until February 9, 2015 – *thirty-three (33) days* after the deadline.

The General Counsel never sought leave to file an untimely response to Mercy's motion for partial summary judgment, nor has he offered any excuse whatsoever for his exceedingly untimely filing. Accordingly, the General Counsel's response to Mercy's motion should be stricken from the record, leaving the parties and the Board governed by the following language contained in Rule 102.24(b):

If the opposing party files no opposition or response, the Board may treat the motion as conceded, and ... summary judgment, ... if appropriate, shall be entered.

Id. Here, based on the arguments contained in Mercy’s motion for partial summary judgment, it is appropriate to enter summary judgment in Mercy’s favor as it has requested, in accordance with Rule 102.24(b).

III. EVEN IF THE BOARD WERE TO CONSIDER THE GENERAL COUNSEL’S EXCEEDINGLY UNTIMELY RESPONSE TO MERCY’S PARTIAL MOTION FOR SUMMARY JUDGMENT, THE GENERAL COUNSEL’S REQUEST THAT THE MERITS OF MERCY’S MOTION NOT EVEN BE CONSIDERED CAN ONLY BE DESCRIBED AS FRIVOLOUS.

The General Counsel’s principal response to Mercy’s motion for partial summary judgment is based on the counter-intuitive suggestion that considering Mercy’s motion “is neither effective nor cost efficient” because Mercy’s motion does not address each and every claim contained in the General Counsel’s Third Consolidated Complaint (“TCC”) (GC’s Opposition to MSJ, pp. 1-3), even though Mercy’s motion addresses many of the General Counsel’s claims and therefore is designed to streamline the issues to be presented at the evidentiary hearing.¹ (GC’s Opposition to MSJ, pp. 1-3.)

In urging the Board to refrain from considering the merits of Mercy’s motion for summary judgment at all and instead to deny it outright based on purported “efficiency” concerns, the General Counsel’s twisted logic, taken to its natural conclusions, can be illustrated as follows:

- If the Board considers Mercy’s motion for summary judgment and grants it in whole or in part – which would obviously result in a simpler, less time consuming, and less costly evidentiary hearing as compared to one addressing all the TCC’s claims – the evidentiary hearing will be less efficient, more costly, and more time consuming than if Mercy hadn’t filed its motion for partial summary judgment.

¹ To the extent the General Counsel is asserting Mercy has abandoned its defense to the claims not addressed in its motion for partial summary judgment simply by not addressing them in the motion, this is clearly not the case. As a matter of law, the filing of a motion for partial summary judgment that does not address certain claims or issues does not constitute a waiver of the movant’s right address them at trial. *Hotel 71 Mezz Lender LLC v. National Retirement Fund*, 2015 U.S. App. LEXIS 1942, *28-*29 (7th Cir. Feb. 6, 2015). Mercy’s position is that summary judgment should be granted on the claims addressed in its motion for partial summary judgment, and the remaining claims will be vigorously defended by Mercy at the evidentiary hearing.

- If the Board considers Mercy's motion for summary judgment and then denies it – which would result in an evidentiary hearing addressing all the TCC's claims – the hearing will end up being less efficient, more time consuming, and more costly than if Mercy had never filed its motion for summary judgment in the first place.

The absurdity of the General Counsel's rationale speaks for itself. Essentially, the General Counsel is attempting to create out of whole cloth a rule that motions for partial summary judgment should *never* be considered by the Board simply because they don't address the entirety of the General Counsel's complaint. Such a proposed rule not only has no support in the law, it is totally contrary to the Board well established practice.

Contrary to the General Counsel's fantasy, the Board's practice is to entertain and rule upon the merits of motions for partial summary judgment, including those filed by employers. *See, e.g., General Dynamics Corp.*, 271 NLRB 187, 189-190 (1984) (granting the employer's partial motion for summary judgment addressing only a portion of the complaint's allegations underlying a claimed Section 8(a)(3) violation, while leaving remaining allegations not addressed in the employer's motion for the evidentiary hearing).

Indeed, the Board routinely entertains and rules upon the merits of motions for partial summary judgment filed by the General Counsel. *Shaw's Supermarkets, Inc.*, 350 NLRB 585, 587-589 (2007) (considering the merits of, but denying, the General Counsel's motion for partial summary judgment addressing only one aspect of the complaint alleging a Section 8(a)(5) violation, while granting the employer's motion for partial summary judgment and the General Counsel's request that the Board remand the remaining allegations for an evidentiary hearing); *Family Fare, Inc.*, 344 NLRB No. 100, 2005 NLRB LEXIS 268, *2-*3 (2005), *enf. granted*, 205 Fed. Appx. 403 (6th Cir. 2006), *cert. denied*, 551 U.S. 1133 (2007) (granting the General Counsel's motion for partial summary judgment addressing only one aspect of the complaint's

allegations underlying a claimed Section 8(a)(5) violation, while leaving the rest of the claims not addressed in the General Counsel's motion for the evidentiary hearing); *Sassaquin Nursing & Rehab. Center*, 326 NLRB 6, 6 (1998), *recon. denied*, 326 NLRB 1056 (1998) (granting the General Counsel's motion for partial summary judgment addressing only some of the complaint's allegations underlying a claimed Section 8(a)(1) violation, while leaving remaining allegations not addressed in the General Counsel's motion for the evidentiary hearing); *FWD Corp.*, 257 NLRB 1300, 1301 (1981) (granting in part and denying in part the General Counsel's motion for partial summary judgment addressing only some of the complaint's allegations underlying a claimed Section 8(a)(5) violation, while leaving remaining allegations not addressed in the General Counsel's motion for the evidentiary hearing).

The Board's practice of entertaining and considering motions for partial summary judgment is consistent with established federal court practice and makes total sense – contrary to the General Counsel's ridiculous suggestion, this practice is designed to streamline the case left for the evidentiary hearing, resulting in less time, effort and cost for everyone. In other words, as the federal courts universally observe, “a motion for partial summary judgment is a useful pretrial tool that ‘streamline[s] the litigation process by narrowing the triable issues.’” *Eli Lilly & Co. v. Viking Corp.*, 2005 U.S. Dist. LEXIS 44033, *9 (Feb. 7, 2005) (quoting *Republic Tobacco, L.P. v. North Atl. Trading Co.*, 254 F.Supp.2d 985, 997 n. 13 (N.D. Ill. 2002)).

A court may use the summary judgment mechanism to establish certain facts or issues, even if summary judgment is not rendered on the whole action. [Citation omitted.] “Motions for partial summary judgment are permitted.” [Citation omitted.] Under certain circumstances, partial summary judgment can serve a useful purpose and promote efficiency in litigation.

Ames v. Rock Island Boat Club, 2009 U.S. Dist. LEXIS 11562, *7 (C.D. Ill. Feb. 17, 2009). Put another way:

A request for partial summary judgment can serve a useful brush-clearing function even if it does not obviate the need for a trial, *see Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1995), and it may also facilitate the resolution of the remainder of the case through settlement.

Hotel 71 Mezz. Lender LLC v. National Retirement Fund, 2015 U.S. App. LEXIS 1942, *30 (7th Cir. Feb. 6, 2015). “Requests for (and grants of) partial summary judgment, including summary judgment as to fewer than all parties and claims, are nothing new.... There is no doubt that a court may grant, and a party may seek, summary judgment as to one party or one claim, leaving other claims and other parties to be addressed at a later point in the litigation.” *Id.*, 2015 U.S. App. LEXIS 1942, at *29-*30. *See also In re Cardizem CD Antitrust Litigation*, 105 F.Supp.2d 682, 691-692 (E.D. Mich. 2000) (flatly rejecting the same argument proffered by the General Counsel here, *viz.*, that a motion for partial summary judgment was improper because resolution of the issue presented will not streamline the litigation process, materially shorten the trial, or conserve judicial resources).

Contrary to the General Counsel’s misguided characterization, the practice of utilizing the Board’s available summary judgment practice to whittle down claims and issues to make for a less costly and more efficient evidentiary hearing does not “require[] the parties to litigate this matter on two fronts.” (GC’s Opposition to MSJ, p. 3.) Summary judgment practice is not trial litigation; rather, as noted above, it is a useful *pre*-trial tool – *i.e.*, “[t]he partial summary judgment is merely a *pretrial* adjudication that certain issues shall be deemed established for the *trial* of the case This type of adjudication ... serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of material fact.” *McDonnell v. Cardiothoracic & Vascular Surgical Associates*, 2004 U.S. Dist. LEXIS 10392, *5 (S.D. Ohio May 27, 2004) (quoting Advisory Committee Notes to FED.R.CIV.P. 56).

After exhaustively researching the issue, undersigned counsel has been unable to locate a single decision wherein the Board declined to consider a motion for partial summary judgment simply because it did not address all of the claims set forth in the General Counsel's complaint. The reason for this is simple – there are no such decisions.

The General Counsel's position is irrational, counter-intuitive, and contrary to Board practice and well established case law regarding motions for partial summary judgment. Enough said.

IV. EVEN IF THE BOARD WERE TO CONSIDER THE GENERAL COUNSEL'S UNTIMELY SUBMISSION, IT NOT ONLY FALLS FAR SHORT OF DEMONSTRATING SUMMARY JUDGMENT IN MERCY'S FAVOR IS NOT APPROPRIATE, BUT IT SUBSTANTIATES THAT SUMMARY JUDGMENT IN MERCY'S FAVOR SHOULD BE ENTERED.

The Brief of the General Counsel makes it clear his Complaint about Mercy's social media policies/rules/guidelines is not premised on their having been a response to union activity, nor on the policies actually having been applied to restrict anyone's Section 7 rights. So, for the General Counsel, the case is all about how he theoretically/hypothetically imagines the policies *might* be applied.

The General Counsel's entire approach to this case is embodied in his statement, at 4, "the challenged workplace policies at issue are unlawful because the rules could be read to prohibit certain protected concerted activities." But, although his brief, at 4, quotes *Lutheran Heritage*, 343 NLRB 646, 647 (2004), the General Counsel nevertheless ignores a crucial difference in what that opinion actually stated, to wit: "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. ..."

The General Counsel's approach throughout his brief of looking to whether these rules *could conceivably* be interpreted to prohibit Section 7 activity is out of step with Board precedent *Lutheran Heritage*, at 647; *Palms Hotel and Casino*, 344 N.L.R.B. 1363, 1368 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it”). Rather, the Board instructs that policies are to be given a reasonable reading, without reading phrases in isolation and without presuming improper interference with employee rights. *Lutheran Heritage*, at 646.

When that “fair reading” approach is used, it is clear that the rules here in question pass muster – and that summary judgment should be granted on these specific issues in favor of Respondent-Mercy, *not* the General Counsel.

Systemwide Social Media Policy

Paragraph 10(A)(i)

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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.

This is a policy in which, as we have already demonstrated, the actual language specifically references HIPAA or Health Insurance Portability and Accountability Act *five times*; which *begins*, in **bold** language, by referring to HIPAA; and which gives specific examples of the conduct being addressed (namely taking a picture of a patient and then posting it publicly). It is a policy which is addressed to employees of a health care facility who are governed and

restricted by federal and state statutory and tort law in connection with the disclosure of such information, many of the employees being licensees of the state who are specifically forbidden from disclosing such information through social media. There is every reason to assume that this employer was concerned with addressing “patient privacy and confidentiality” (to use the actual words of the policy), and that its employees would be fully conversant with that concern and the context in which the rule was intended.

Nevertheless, the General Counsel does precisely what the Board, in *Lutheran Heritage*, at 646, has directed he should not do: he isolates a single sentence and presumes an improper interference with employee rights based on what they *might* believe. In taking that tack, the General Counsel acts directly contrary to the directive of the Court in *University Medical Center v. N.L.R.B.*, 335 F. 3d 1079, 1089 (D.C. Cir. 2003) (yet, he elects not to even address that precedent in his brief):

The Board’s concern with respect to Rule 8 was that employees **might** understand the “release or disclosure of confidential information” to include the revelation of “information concerning terms and conditions of employment, including wages,” *Order* at 5, the sharing of which is useful, indeed perhaps essential, to successful self-organizing. Community again argues the rule must in reason be read more narrowly to prevent disclosure only of “sensitive patient and business information,” and not to prohibit discussion with other employees or with union organizers of information about the terms of one’s own employment.

Again we agree. The Board’s objection to this provision appears to rest chiefly upon **the possibility that an employee might believe** the rule prohibits him from revealing information, such as wages or a disciplinary record, concerning himself. Unlike the provision at issue in *Brockton Hospital v. NLRB*, 352 U.S. App. D.C. 302, 294 F.3d 100, 106-07 (D.C. Cir. 2002), however, the rule covers only “confidential” information. Confidential information is information that has been communicated or acquired in confidence. **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.** And to the extent an employee is privy to confidential information about another employee or about a patient, he has no right to disclose that information contrary to the policy of his employer. *Cf. Aroostook County Reg’l Ophthalmology Ctr. v. NLRB*,

317 U.S. App. D.C. 114, 81 F.3d 209, 213 (D.C. Cir. 1996) (“The Board does not question [a hospital’s] right to require employees to protect patient privacy”).

The General Counsel not only ignores *University Medical Center*, but also ignores the fact that the Board, in *Lutheran Heritage*, at 647, cited that opinion with approval, and observed that a reasonable employee would not read the rules as prohibiting conduct protected by the Act, and emphasized that the test is not whether a rule *could* be interpreted in an unlawful manner:

To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Instead of addressing those precedents head on, the General Counsel relies on two decisions which are obviously distinguishable. First, the General Counsel elects to stand on *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465-467 (1987). But, even a casual review of that opinion demonstrates that the rule there in question provided: “**Hospital affairs**, patient information, and **employee problems** are absolutely confidential and will not be discussed.” The Board’s analysis focused on words in that policy which are not even present in this policy:

That rule bans, among other things, discussion of **hospital affairs** and **employee problems**. As argued by General Counsel that ban could reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment, including wages, which, could fall under the broad categories of hospital affairs and employee problems.

There can be little question that the Mercy’s rule **prohibiting employees from discussing their wages** constitutes a clear restraint on employees’ Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment.

There is nothing whatsoever analogous in the *Pontiac* policy, as compared with the one here at issue.

The General Counsel also cites to *Fresh & Easy Neighborhood Market*, 361 NLRB No.8, 2014 NLRB LEXIS 597, 9-10 – but, he has failed to take note of this language from that opinion, which applies directly to the policy we have here, not to mention that opinion’s discussion of the *University Hospitals* [“*Community Hospitals*”] decision:

Because the reach of the challenged rule is not adequately limited by context, we further find this case distinguishable from *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), cited by our colleague. In that case, the employer’s handbook rule prohibited disclosure of “customer and employee information, including organizational charts and databases.” **The rule was part of a section prohibiting the unauthorized use of “company and third party proprietary information, including information assets and intellectual property” and contained a long list of materials prohibited from disclosure such as “business plans,” “copyrighted works,” “trade secrets,” and patents. The context of that rule and its relationship to legitimate employer concerns (i.e., the protection of intellectual property assets) was therefore much clearer and would, unlike here, reasonably inform employees that the rule’s scope was not as broad as might be suggested by reading it in isolation.** Likewise, we find that the rule in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 357 U.S. App. D.C. 361 (D.C. Cir. 2003), also cited by our colleague, is narrower than the challenged rule here. **That rule prohibited the “[r]elease or disclosure of confidential information concerning patients or employees,” which arguably suggested that it applied only to a small subset of highly sensitive information about employees.**

In sum, the General Counsel cites two cases. The first concerns language that is clearly not analogous; and the second opinion includes language which *endorses* a policy in which supposedly offensive language is found within the context of a section that is plainly a legitimate employer concern.

Finally, the General Counsel sets up the disclaimer issue as a straw man argument. He rightly notes that a disclaimer cannot be relied upon to save other language which specifically prohibits protected activity – but, we assumed that to be the case in our prior Brief (“admittedly such disclaimers are not talismans that can transform an unlawful clause into a lawful one”). What is significant is that the General Counsel entirely disregards the point that we actually did

make, namely, that, in the absence of language which is a clear violation, such disclaimers *may be considered* in evaluating how a reasonable employee would interpret language which might be thought ambiguous – and, ignores the fact that the source of that teaching is two Memoranda issued by his own office. *Cox Communications*, No. 17-CA-087612m 2012 NLRB GCM LEXIS 38, 9 (“[T]he social media policy’s savings clause, which provides that “[n]othing in Cox’s social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment,” further ensures that employees would not reasonably interpret any potentially ambiguous provision in a way that would restrict Section 7 activity.”); *Baltimore Sun*, No. 5-CA-32186, 2005 NLRB GCM LEXIS 29, 11 (“In view of these disclaimers, employees would not reasonably conclude that they are prohibited from discussing their terms and conditions of employment with another labor organization.”

The General Counsel’s arguments are speculative, not persuasive.

Paragraph 10(A)(ii)

6. **Do not disclose confidential information or violate copyrights.** Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

Once again, while the General Counsel ignores the text, the actual language of this rule begins with bolded language which emphasizes the focus of the conduct being addressed: “**Do not disclose confidential information or violate copyrights.**” While the context of this paragraph makes it clear to the reasonable employee that it is intended to address legitimate business concerns, the General Counsel again pulls out of context three phrases: “confidential

information,” “proprietary financial” information, and “operational and financial data,” asserting that a reasonable employee is likely to do the same.

Once again, the General Counsel simply ignores the precedents identified by Mercy, and asserts that *Flex Frac Logistics*, 358 NLRB No. 127 (2012), is directly controlling. Close analysis proves otherwise.

To begin with, as the Court of Appeals notes in its decision enforcing the Board Order, *Flex Frac Logistics v. NLRB*, 746 F.3d 205, 210 (5th Cir. 2014), the provision it had before it pertained to “personnel information” – which the Court expressly distinguished from “Hotel-private information” or “company business and documents,” the language that had been found acceptable in precedents *Flex Frac* relied upon. Which is to say, the key phrase found controlling and objectionable by the Board and the Fifth Circuit does not even appear in the rule now under consideration. Further, the terms “proprietary financial information” and “operational and financial data,” which appear in Mercy’s rule, are much more akin to the phrases the *Flex Frac* court found permissible, than the phrase “personnel information.”

Second, while the General Counsel’s analysis elects to ignore *Mediaone*, 349 NLRB 277, 278-279 (2003), relied on by Mercy, the Fifth Circuit, in considering *Flex Frac*’s rule actually compares the two rules, finding distinctions which are clearly applicable to Mercy’s rule:

Moreover, the NLRB’s decision here does not conflict with its decision in *Mediaone*. In *Mediaone*, a divided panel of the NLRB agreed that an employer’s prohibition against disclosure of “proprietary information ... includ[ing] ... customer and employee information, including organizational charts and databases [and] financial information” would not chill employees in the exercise of their Section 7 rights. 340 N.L.R.B. at 278-79. The NLRB noted that the prohibitions were listed as examples of “intellectual property,” and thus employees who read the rule as a whole would not believe it extended to terms and conditions of employment. *Id.* at 279.

Mediaone is distinguishable from the confidentiality provision at issue here. In *Mediaone*, **the information was listed as a sub-set of “intellectual property.” Therefore, employees would not reasonably understand their wages to be a form of intellectual property.** Flex Frac’s confidentiality provision contains no limitation on the type of “personnel information” that is prohibited. Instead, it is a part of the larger category of “confidential information.”

Flex Frac’s remaining attempts to justify its confidentiality provision are equally unavailing. Flex Frac contends that its rule prohibits only disclosure of confidential personnel information, not all personnel information; however, it fails to point to any language making this distinction. Moreover, Flex Frac defines confidential information as including personnel information. Therefore, contrary to Flex Frac’s contentions otherwise, we hold that the NLRB’s order does not contravene its precedent.

Flex Frac Logistics, L.L.C. v. NLRB, 746 F.3d 205, 210 (5th Cir.2014)

In our case, the General Counsel has pulled out terms which are merely a subset of the general category of confidential and copyright materials and ascribed meanings to selected words out of context – *Flex Frac* teaches this is not permissible.

Moreover, the General Counsel’s argument was expressly discounted by the Board in

Mediaone:

II. NONDISCLOSURE RULE

The handbook at page 74 sets forth the following rule concerning the disclosure of proprietary information:

Proprietary Information

You’re responsible for the appropriate use and protection of company and third party proprietary information, including *information assets* and *intellectual property*. Information is any form (printed, electronic or inherent knowledge) of company or third party proprietary information. Intellectual property includes, but is not limited to:

- business plans
- technological research and development
- product documentation, marketing plans and pricing information
- copyrighted works such as music, written documents (magazines, trade journals, news-papers, etc.), audiovisual productions, brand

names and the legal rights to protect such property (for example, patents, trademarks, copyrights)

- trade secrets and non-public information
- customer and employee information, including organizational charts and databases
- financial information
- patents, copyrights, trademarks, service marks, trade names and goodwill.

While it's not improper for you to use proprietary information in the general course of doing business, you must safeguard it against loss, damage, misuse, theft, fraud, sale, disclosure or improper disposal. Always store proprietary information in a safe place.

You may not use or access the proprietary information of the company or others for personal purposes or disclose non-public information outside the company. Doing so could hurt the company, competitively or financially. ...

...

(***Bold and italics in original.***)

The General Counsel contends that this rule violates Section 8(a)(1) because the provision prohibiting disclosure of "employee information, including organizational charts and databases" can reasonably be read by employees to prohibit discussion among employees about their wages, hours, or working conditions and to forbid disclosure of such information to unions. The General Counsel maintains that this rule would tend to chill employees in the exercise of their Section 7 rights.

The judge dismissed this allegation, finding that this provision would not tend to chill employees in their exercise of Section 7 rights because it cannot reasonably be read to prohibit disclosure of employees' wages, hours, or working conditions. He found it to be reasonably read as prohibiting only disclosure of the Mercy's information assets and intellectual property, which is private business information that the Mercy has a right to protect.

We agree with the judge. Accordingly, we shall dismiss this allegation of the complaint.

The handbook language here does not explicitly prohibit the discussion or disclosure of wages, hours, working conditions, or any other terms and conditions of employment, nor does it forbid conduct that clearly implicates Section 7 rights. See *Super K-Mart*, 330 NLRB 263 (1999). Further, contrary to our dissenting colleague, we do not believe that employees would reasonably read this rule as

prohibiting discussion of wages and working conditions among employees or with a union. Although the phrase “customer and employee information, including organizational charts and databases” is not specifically defined in the rule, **it appears within the larger provision prohibiting disclosure of “proprietary information, including *information assets and intellectual property* “ and is listed as an example of “intellectual property. “ Other examples include “business plans,” “marketing plans,” “trade secrets,” “financial information,” “patents,” and “copyrights.” Thus, we find, contrary to our dissenting colleague, that employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the Mercy’s proprietary business information rather than to prohibit discussion of employee wages.** “Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of proprietary information.” Lafayette Park, supra, 326 NLRB at 826 (employer rule prohibiting “divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information” found lawful) ; Super K-Mart, supra, 330 NLRB at 263, 264 (employer rule stating that “Company business and documents are confidential” and “disclosure of such information is prohibited” found lawful)

340 N.L.R.B. 277; 278-279.

The General Counsel goes on to contest the isolated clause “post video/photographic images taken in the workplace,” specifically stating: “In *Flagstaff Medical Center*, 357 NLRB NO. 65, slip op 12 12-13 (2011), the Board found a similar rule objectionable because “employees would reasonably construe the rule as prohibiting all photography of hospital property, including photography performed in concert for mutual aid or protection.”

Unfortunately, what the General Counsel has attributed to the Board’s view was, in fact, a quotation from the *dissenting* view, which continued on to state: “The majority dismisses this allegation because the rule does not explicitly restrict conduct protected by the Act and because FMC has not yet applied the rule to prohibit photography that is protected by the Act.” That is, the position taken by the dissent and expressly relied upon by the General Counsel was *rejected* by the majority, - which *actually* stated:

D. Rule Against Photographing Hospital Patients, Property, or Facilities

In April, after a hospital visitor photographed a patient, other visitors, and hospital employees using a cell phone camera, FMC began reviewing its policies regarding patient privacy. In July, FMC issued an updated portable electronic equipment policy, which prohibited the use of electronic equipment during worktime and which further provided that “[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited.” **The General Counsel contends that this policy violated the Act. We agree with the judge that it does not.**

We agree with the judge that FMC’s rule restricting photography of hospital property is not unlawfully overbroad as it does not have a reasonable tendency to interfere with Section 7 activities. Lutheran Heritage Village-Livonia, supra. First, FMC’s rule against photographing hospital property does not expressly restrict Section 7 activity. Further, like the judge, and **contrary to our dissenting colleague, we find that employees would not reasonably interpret the rule as restricting Section 7 activity.** The privacy interests of hospital patients are weighty, and FMC has a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography. See, e.g., 42 U.S.C. § 1320d-6 (prohibiting wrongful disclosure of individually identifiable health information). Employees would reasonably interpret FMC’s rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity. Finally, there is no evidence that FMC promulgated the rule in response to Section 7 activity or that FMC actually applied the rule to prohibit Section 7 activity. The General Counsel does not argue, much less establish, that any photography that predated the rule’s promulgation was protected by Section 7. **Accordingly, we shall dismiss this allegation.**
2011 NLRB LEXIS 477, 19-22.

The year following *Flagstaff*, ALJ Laws was concerned with an even more robust prohibition on posting photographs, in *G4S Secure Solutions*, No. 28-CA-23380, 2012 NLRB Lexis 161, 16, 72-76:

Photographs, images and videos of G4S employees in uniform, (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.

But, the ALJ found the rule permissible, grounded on the language of what the *Flagstaff* majority actually held (as opposed to the dissent the General Counsel now relies on and attributes to the majority):

Regarding the prohibition on placing photographs on social networking sites, this rule does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights. As such, I must determine whether it would reasonably be construed as prohibiting protected activity. For the reasons set forth below, I find that it would not.

In *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65, slip op at 6 (2011), the employer adopted a rule prohibiting the “use of cameras for recording images of patients and/or hospital equipment, property, or facilities.” In finding that employees would not reasonably interpret the rule as restricting Section 7 activity, the Board noted that the hospital had significant privacy concerns, and found that employees would reasonably interpret the rule as legitimately protecting patient privacy. There are two key differences between the instant case and *Flagstaff Medical Center*. First, the prohibition here only applies to posting photographs of the worksite or uniformed employees on social networking sites, whereas in *Flagstaff Medical Center*, the rule banned all photography of hospital equipment and property. As the rule at issue here is less restrictive, this difference obviously weighs in Mercy’s favor.

Second, the Board found significant management’s legal duty at *Flagstaff Medical Center* to protect patient privacy, a concern largely unique to a hospital setting. While patient privacy is not as great a concern in this case, Mercy clearly has legitimate reasons for not having pictures of uniformed employees or employees who are at work posted on Facebook and similar sites. Starting with the worksite, Mercy does have patient privacy concerns for the EMT services it provides. Moreover, Mercy serves a variety of clients on a national basis. The various businesses and government agencies where its employees work can be presumed to have their own rules centered on privacy and legal concerns. I find the rule at issue here is reasonably construed as protecting Mercy’s clients. To read it as a prohibition on Section 7 activity strikes me a stretch, particularly considering the rule does not ban photographs but merely prohibits employees from posting them on social networking sites. As for the prohibition on posting pictures of uniformed employees, this would not reasonably seem to be an inherent component of the more generalized fundamental Section 7 rights. What readily comes to mind is a desire to avoid broad dissemination of photos of uniformed employees engaging in unprofessional behavior. Again, this is not a ban on taking and using photographs; it is a prohibition on posting them on social networking sites that are potentially accessible to employees and non-employees alike. This

does not amount to “an unreasonable impediment to self-organization.” *Republic Aviation*, 324 U.S. at 803.

The General Counsel asserts that the rule would essentially bar an employee from posting a photograph about an unsafe working condition, concerns about uniform appearance and safety, as well as pictures of concerted activities such as handbilling or picketing in front of Mercy’s facilities. It is true that Mercy may not interpret the policy to prohibit employees from engaging in legitimate union-related activity such as, for example, taking photos unsafe working conditions or other concerted activities unless patient privacy or a similar privacy right is compromised. *See* *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47 (2004); *Lafayette Park Hotel*, 326 NLRB at 825 (1998), *enfd.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999). **Because I find, however, this part of the Policy is not reasonably construed as a prohibition on Section 7 activity, I shall recommend dismissing the attendant part of the amended complaint.**

While *G4S* would seem to dispose of this entire issue, we would note parenthetically that the General Counsel’s reference to *J.W. Marriott*, 359 NLRB No. 8, slip opinion, at 2 (2012) is yet another ill-advised citation. *Marriott* concerned an employer’s rule about off-duty employees’ returning to the workplace; it has nothing whatsoever to do with photographs, nor does it purport to alter the conclusion reached by the majority in *Flagstaff*.

Paragraph 10(A)(iii)

Social Media Guidelines and Best Practices

5. **What you say online will reflect on you, your fellow associates and the public’s view of your workplace.** Remember that if you wouldn’t want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

Once again, the General Counsel has a curious way of representing to the Region what authoritative precedents really say. To try to escape the umbrella of protection of General Counsel Memorandum 12-59, which seems to cover Mercy, the General Counsel states: “The

social media guidelines approved in OM 12-59 do not prohibit (or even reference) posting about other employees” -- and then he quotes, in footnote 3, this language from that policy:

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, **the performance of fellow associates** or otherwise adversely affects **members**, customers, suppliers, **people who work on behalf of [Employer]** or Employer’s] legitimate business interests may result in disciplinary action up to and including termination.

Query: who are these “fellow associates” and “people who work on behalf of Employer” if not other employees?

The General Counsel wants to further distance himself from Memorandum 12-59 by reaching for two authorities which had fundamentally different language before them, and in which disclosure of personal employee information was expressly barred. *Brockton Hospital*, 333 N.L.R.B. 1367, 1377 (2001) (“This confidentiality clause is overly broad since it would prohibit nurses from discussing hours, wages, and other terms and conditions of employment with each other or their union representatives unless they are doing so “strictly in connection with hospital business.”); *Costco*, 358 NLRB No. 106, 2012 NLRB Lexis 534, 77 (“In the course of our business, we collect from our members and employees a substantial amount of personal information (such as name, address, phone number, e-mail address, social security number, membership numbers and credit card numbers). All of this information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person’s prior consent or (2) a special exception is allowed that has been approved by the legal department.”)

We suggest that much more analogous language was considered favorably by ALJ Wacknov, in *Landry’s, Inc.*, No. 32-CA-118213, 2014 NLRB Lexis 472, 11-14, when he stated:

The General Counsel maintains that employees would reasonably construe the following language to prohibit activity protected by the Act:

While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or **other employees** which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.

I do not agree. **The first sentence does not explicitly prohibit employees from posting their own job-related information or information regarding the jobs of coworkers, or personal information regarding coworkers, or information regarding the company. Rather it urges employees not to do so if such information is likely to create morale problems.** Without more, it would be reasonable for employees reading this language to conclude that the Mercy generally frowns upon all job-related postings of any type. However, the cautionary language is modified by the language in the next sentences which may be understood to clarify that the avoidance of morale problems may be "accomplished" by simply being civil to others and their opinions. **In other words, it is not the job-related subject matter of the postings that are of concern to the Mercy, but rather the manner in which the subject matter is articulated and debated among the employees.**

The foregoing two sentences were obviously crafted to be read together and not in isolation, and a fair effort must be made to give each its intended meaning. Forethought and civility in the exercise of protected concerted or union activity are not mutually exclusive concepts. Accordingly, employees reading the Mercy's Social Media policy could reasonably conclude, I find, that they are being urged to be civil with others in posting job-related material and discussing on social media sites their grievances and disagreements with the Mercy or each other regarding job-related matters. **Nor do I find that the admonition regarding "posting personal information about others" would reasonably inhibit employees from posting information regarding coworkers' wages, as the General Counsel contends.** There is no restriction in the Social Media policy against posting "personnel" information or "payroll information," or "wage-related information"; and obviously, posting information that in common parlance is generally understood to be personal such as, for example, matters regarding social relationships and similar private matters, could result not only in morale problems but could also constitute "harassment" to which the Mercy's Social Media policy refers. It is readily apparent that such postings would likely create enmity among employees in the workplace which could, in turn, adversely affect the Mercy's business.

Note that, in the policy Mercy issued, the common sense advice of the rule comes first, instead of after, as in *Landry's*. Specifically, a “don’t post if you wouldn’t want your mother to read it” standard is suggesting – as in *Landry's*, the emphasis is on *how* you say it, not the job-relatedness of *what* you say.

Paragraph 10(A)(iv)

3. No comment. Do not comment on work-related matters unless you are CHP’s (or one of its organization’s) official spokesperson on the matter, and have approval from CHP leadership and management to do so.

Memorandum OM 12-59 consists of 24 pages. Within that memorandum, the General Counsel looked at several employers’ policies and stated what he did, or did not, find objectionable; then, he concludes with, in effect a “model” policy which he found entirely unobjectionable. But, nothing in that “model” section of the opinion suggests that the language that had been *approved* in the first 21 pages was any less *approved* than language set forth on the last 3 pages.

In connection with the “No Comment” clause, we previously asserted that at least two of the policies considered in course of that opinion had language comparable to that now under consideration, language which the General Counsel did not find offensive. In response, the General Counsel urges that Mercy’s clause is much broader than what is found in the “model” language – implying that that is the end of the matter. But the General Counsel completely, and disingenuously, ignores the fact that he made these additional comments in the course of opinion 12-59:

Slip Opinion, at 15:

The policy also sets forth the following restriction on Internet postings:

No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could

reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent.

We found that this provision is lawful. **A rule that requires an employee to receive prior authorization before posting a message that is either in the Employer's name or could reasonably be attributed to the Employer cannot reasonably be construed to restrict employees' exercise of their Section 7 right to communicate about working conditions among themselves and with third parties.** [Us Helping Us, Case 05-CA-036595]

Slip Opinion, at 16-17.

Unless you are specifically authorized to do so, you may not:

- Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].

We did not find unlawful, however, the prohibition on representing “any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].” **Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment.** Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer. Thus, an employee could not criticize the Employer or comment about his or her terms and conditions of employment while falsely representing that the Employer has made or is responsible for making the comments. Similarly, we concluded that the requirement that employees must expressly state that their postings are “my own and do not represent [Employer's] positions, strategies or opinions” is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

Paragraph 10(A)(v)

8. Think about consequences. Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it's about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

The General Counsel objects to a statement by an employer to its employees, asking them to think. But, as stated by ALJ Sandron in *General Motors*, No. 07-CA-53570, 2012 NLRB Lexis 304, *19:

This provision explains that communications with coworkers would be inappropriate in the workplace are also inappropriate on-line **and that employees should “think** carefully about ‘friending’ coworkers ... on external social media sites.” Counsel for the Acting General Counsel is correct in arguing that this language is ambiguous. Nonetheless, **the section speaks only of thought, has no reference to possible discipline**, and does not require employees to engage in any kind of action. Thus, **it is in the nature of advice** or of a suggestion rather than a mandate since GM can monitor conduct but not thoughts.

Once again, rather than directly challenge the cogency of the precedent Mercy relies on, the General Counsel he reverts to his tactic of citing two decisions which addressed *substantially* different language. *Costco*, No. Case 34-CA-012421, 2012 NLRB LEXIS 534, construed this language:

Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

While *Southern Maryland Hospital*, 293 NLRB 1209, 1222, (1989) construed this language:

Rule 25. Malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representative: first offense, three-day suspension with intent to terminate.

Neither case is about an employer asking its employees to think about what they are about to do.

Neither is precedent for challenging Mercy’s suggestion to its employees.

Paragraph 10(A)(vi)

11. **Other people’s information.** It’s simple – other people’s information belongs to them. It’s their choice whether they wish to share their material with

the world, not yours. Before posting someone else's material, be sure to check with the content owner for permission first. If you're still unsure, the Communications or Marketing department or Legal can offer guidance.

Once again, Mercy is making suggestions. The language does not remotely suggest any disciplinary action, nor does the employer superimpose any authority over the use of information belonging to others. The employer merely asks employees to check with the owners of information before disclosing it.

The General Counsel has found no authority which finds such a suggestion unlawful. So, again, he cites to two decisions which concern facts and policy language that are dramatically different from the language here at issue. *Costco*, 2012 NLRB Lexis 534, 3, provides: "(b) employees are **prohibited** from discussing "private matters of members and other employees ... includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc." The General Counsel's other authority, *Hills & Dales General Hospital*, 360 NLRB No. 7, 2014 NLRB LEXIS 236, 16, states:

Teamwork

.....
11. **We will not** make negative comments about our fellow team members and we will take every opportunity to speak well of each other.

.....
16. **We will** represent Hills & Dales in the community in a positive and professional manner in every opportunity.

Attitude

.....
21. **We will not** engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

Mere advice from an employer, such as Mercy is offering, should not be assumed to be violative of employee's section 7 rights. *General Motors*. The General Counsel's authorities do not state otherwise.

Paragraph 10(A)(ix)

19. Discourtesy to, or improper treatment of patients, visitors, or other employees.

Mercy's prior brief cited to two 2014 decisions (*Eym King*, No. 7-CA-118835, 2014 NLRB Lexis 742, **28-29, *Boch Imports, Inc.*, No. 1-CA-83551, 2014 NLRB Lexis 28, *16) which were virtually indistinguishable from and favorable to Mercy on this point (not to mention the "model" language previously approved by the General Counsel in Opinion 12-59). Once again, the General Counsel counters them – by entirely ignoring them.

Instead, once again, the General Counsel misdirects to authorities which concerned language that was substantially different. In two of them, *Sisters Food Group*, 357 NLRB No. 168 (2011), construed this language: "Rule 35: Inability or unwillingness to work harmoniously with other employees"; *Flamingo Hotel* 330 NLRB 287 (1999), construed this language: "Using loud, abusive or foul language. Disorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees."

In the General Counsel's third authority, *Claremont Resort*, 344 NLRB 832 (2005), once again, the language construed was dramatically different: "Negative conversations about associates and/or managers are in violation of our Standards of Conduct that may result in disciplinary action." The term "associates" refers to employees. Moreover, the General Counsel does not mention in his Brief that, the underlying facts of *Claremont Resort* begin with an employee who was discharged for the violation of various rules – specifically, the employee used "profanity addressed to Dickson during the same incident¹⁰" – and the footnoted rule stated:

¹⁰Standard of Conduct 8 makes it unacceptable to use 'profane, **discourteous**, abusive or rude

language or action against another employee, supervisor, manager, guest or to others.” That discharge resulted in the filing of an unfair labor practice charge, which concluded as follows:

It was dismissed for insufficient evidence on December 19, 2002. The Union’s appeal was denied on February 11 because the investigation failed to establish that Fitzgerald was disciplined for conduct protected by Section 7 of the Act.¹³

¹³ Specifically, the appeal was dismissed because, could not be concluded that Ms. Fitzgerald’s insistence on meeting with a manager was protected conduct, particularly where Ms. Fitzgerald was informed that the manager did not want to meet with her. Further, there was insufficient evidence to establish that the Employer treated Ms. Fitzgerald in a disparate manner from other employees when it suspended and subsequently terminated her.

No mention is made that this Standard of Conduct concerning *discourtesy* violated the employee’s Section 7 rights.

Mercy’s Rule is simply designed to maintain a civil and decent workplace; it could not be interpreted as something more troublesome without attributing to Mercy an unlawful intent for which there is no basis. *Community Hospital v. N.L.R.B.*, 335 F.3d 1079, 1088-1089 (D.C. Cir. 2003).

Paragraph 10(A)(x)

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

As we previously noted, this language is virtually identical to language that was approved in *Lafayette Park*, 326 N.L.R.B. 824, 826-827 (1998) – but, let us be clear about what specific language the Board was approving in that case:

Standard of conduct 31 states that the following conduct is unacceptable:
Unlawful or improper conduct off the hotel’s premises or during non-working hours which affects the employee’s relationship with the job, fellow employees, supervisors, or the hotel’s reputation or good will in the community.

Contrary to our dissenting colleagues, we do not believe that this rule can reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the Mercy would use this rule to punish them for engaging in protected activity that the Mercy may deem to be “improper.” **To ascribe such a meaning to these words is, quite simply, farfetched.** Employees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act.

Now, the General Counsel concedes that the Board, in *Lafayette Park* did not find “similar” language “objectionable” [obviously, the Board found identical language to be legally appropriate]; but, he asserts, the Board has changed course with *First Transit, Inc.*, 360 NLRB No. 72. Once again, the General Counsel’s assertions do not bear up under close analysis.

The General Counsel specifically directs us to note 5 of the *First Transit* opinion, in which the majority states it endorses the decision of the ALJ with respect to bullet points 2 and 3 of section Rule 11.01. Rule 11.01 provides:

11.01 DISLOYALTY

- Making false, vicious, or malicious statements concerning the Company or its services, a client, or another employee.
- Participation in outside activities that are detrimental to the company’s image or reputation, or where a conflict of interest exists.
- Conducting oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company.

When one looks at the ALJ’s reasoning, on these 2 points, at **53-56, he explains:

The Respondent argues that Rule 11.01’s prohibition against participating “in outside activities that are detrimental to the company’s image or reputation, or where a conflict of interest exists,” is consistent with one approved by the Board in *Lafayette Park*, supra at 824 and therefore lawful. **The *Lafayette* rule forbade “being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the [employer’s] goals and objectives.”** The Board concluded the rule, set in that context, addressed the legitimate business concern of uncooperativeness “with supervisors, employees, guests and/or regulatory agencies.” The Board stated that arguable ambiguity arose only by viewing the phrase “goals and objectives” in isolation and by attributing to the employer an intent to interfere with employee rights. The instant rule is different from the *Lafayette* rule. Here, no wording provides a context limiting the rule to legitimate business concerns such as uncooperation with supervisors. Rather, the prohibition bans all outside activities the Respondent may consider to be detrimental to its image or reputation or to present a conflict with the Respondent’s interests. It would not be unreasonable for employees to suppose that such outside activities as public union rallies, informational picketing, or public expressions of workplace dissatisfaction would, in the Respondent’s view, fall into “detrimental” or “conflict” of interest categories. Since employees might reasonably view the rule as restricting

protected outside activities, the rule chills participation in Section 7 activity and violates Section 8(a)(1) of the Act.

As to Rule 11.01's prohibition against conducting "oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company," the Respondent cites *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001), as support for its position that the prohibition is lawful. In *Ark*, the company rules forbade: (1) conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company, and (2) participating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, [the employee], fellow associates, the Company, or its guests, or that adversely affects job performance or [employees'] ability to report to work as scheduled. The Board noted that the *Ark* rules were largely identical to those found lawful in *Lafayette Park*, which was the appropriate precedent to apply. The instant rule is readily distinguishable from those the Board considered in *Lafayette Park* and *Ark*. The rules in both *Lafayette Park* and *Ark* contextually limited the prohibited conduct to unprotected actions: **the Lafayette Park rule related to uncooperative behavior with supervisors and others**; the *Ark* rules related to unprofessional or unethical behavior or behavior that brings "discredit to or reflects adversely on" the employee and others. Set in those contexts, the *Lafayette Park* and *Ark* rules clearly contemplated employee conduct that was intrinsically improper and unprotected.

Now, last piece of the puzzle – we need to look at the language which *Lafayette* was construing and which the ALJ was comparing in making this decision. And, what we find is that the Rule which was being evaluated was Standard of Conduct 6, which states:

a. Standard of conduct 6

Standard of conduct 6 provides that the following conduct is unacceptable:

Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

The point is this: the analysis being made by the Board in *First Transit*, pertains to "Standard of Conduct 6"; and, more specifically, pointing out that the language it had before it was different from what it had approved in reviewing Standard of Conduct 6. Regardless, although the General Counsel skips over this salient point, nothing in *First Transit* makes any comment, or espouses

any change in the Board's approval of Standard of Conduct 31, the one on which Mercy relies, and the one which General Counsel has not addressed. A rule which prohibits unlawful or improper off-duty conduct does not violate the Act because a reasonable employee would know it concerns serious *misconduct*, not conduct protected by the Act. *Burndy, LLC*, No. 34-CA-65746, 2013 NLRB Lexis 540, 161-162.

Paragraph 10(A)(xii)

4. *Accessing and/or* divulging information that becomes accessible through association with MSVMC that should be considered as confidential *and/or proprietary*, including information related to patients and their care. (Emphasis in the original)

Once again, in our prior brief, we directed the General Counsel to a virtually identical provision, which was approved by the Board. In *TT & W Farm Products*, 358 NLRB No. 125, 2012 NLRB Lexis 589, the Board, fn. 1, approved the ALJ's decision about a rule "that prohibits **“revealing to an unauthorized person classified or proprietary information without approval,”** finding that **“the Acting General Counsel has failed to prove that the rule could reasonably be read to prohibit employees from discussing wage or other benefits among themselves or with others. The rule by its terms does not prohibit the discussion of wages and other terms and conditions of employment. Moreover, the Mercy's rule is very similar to other rules that the Board has found not to infringe on protected rights.”** In the course of that opinion, the ALJ considered, but distinguished *Brockton Hospital*, 333 NLRB 1367 (2001).

Once again, the General Counsel simply ignores that decision, citing to *Brockton Hospital*, and other cases on which we have already commented above. But, the fact of the matter is that there is no real dispute over the validity of a rule that prohibits employees from disclosing acquired confidential or proprietary information about an employer and its clients and prohibits them from discussing such information with outsiders since such a rule is designed to

protect the confidentiality of the Company's proprietary business information. *Lily Transportation Corp.*, No. 01-CA-108618, 2014 NLRB Lexis 280, **14-15; *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003); *Super K-Mart*, 330 NLRB 263 (1999).

CONCLUSION

For the reasons outlined above, the Board should grant Mercy's summary judgment on the §§8(a)(1) and (5) allegations outlined in ¶10(A)(i)-(vi), (ix-x)(xii)(B), 13(C)(D); and should deny the General Counsel's Motion concerning the same sections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of February 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the NLRB's electronic filing system to all parties indicated on the electronic filing receipt.

The undersigned also certifies that on this 19th day of February 2015, a copy of the foregoing was served via e-mail to Joseph Rioux and Gina Fraternali, and hard copies were also served upon the following individuals via regular U.S. Mail.

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Cleveland, Ohio 44199

/s/ Thomas J. Wiencek _____

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Mercy St. Vincent Medical Center,

**CASE NOS.: 08-CA-128502
08-CA-129537
08-CA-133069
08-CA-134215**

and

**International Union, United Automobile
Aerospace & Agricultural Implement Workers
of America, UAW, Local 2213, RN Unit, and
Local 12 Technical and Support Units,**

**REPLY BRIEF TO RESPONDENT'S OPPOSITION TO GENERAL COUNSEL'S
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

On February 19, 2015, Respondent Mercy St. Vincent Medical Center filed a brief opposing General Counsel's Cross Motion for Summary Judgment. The General Counsel rests on its initial brief for the Cross Motion's substantive arguments¹ and files this short reply solely to address Respondent's contention that the Cross Motion was untimely filed.

Section 102.24(b) of the Board's Rules and Regulations provides::

All motions for summary judgment or dismissal shall be filed with the Board no later than **28 days prior to the scheduled hearing. Where no hearing is scheduled**, or where the hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, **the motion shall be filed promptly.** . .

Id. (emphasis added).

¹ The General Counsel's assertion in the Cross Motion regarding Systemwide Social Media Policy Rule, Number 6 as it pertains to posting of video/photographic images was in error. However, the General Counsel continues to maintain that another part of Rule No. 6 that prohibits the sharing of operational and financial data is unlawful. See Cross Motion for Summary Judgment, pp. 6-7.

When the General Counsel filed its Cross Motion for Summary Judgment on February 9, 2015, there was no scheduled hearing² and Section 102.24(b) requires only that the Cross Motion be “filed promptly”. The Board requires that the party opposing summary judgment establish that it has been prejudiced in order to find the motion was not “promptly” filed. See, *Excel DPM of Arkansas, Inc.*, 324 NLRB 880, 880 fn. 1 (1997) (motion for summary judgment filed “promptly” under Section 102.24(b) where the respondent did not show that it suffered prejudice due to the lapse of five months between the General Counsel’s receipt of its answer to the complaint and the filing of the motion); see also, *Arizona Daily Star*, 2012-13 NLRB Dec. P 15684 (N.L.R.B.), 2011 WL 5869215 at fn. 1 (Nov. 21, 2011) (requirement of Board Rule 102.26 that a Request for Special Appeal be filed “promptly” was met “[i]n the absence of any showing of prejudice.”). Here, Respondent does not argue and cannot show that it suffered any prejudice by the timing of the General Counsel’s filing. For this reason, the General Counsel’s motion was “filed promptly” in accordance with Section 102.24(b) and the Cross Motion should not be denied on timeliness grounds.

Dated at Cleveland, Ohio this 13th day of March 2015.

Respectfully Submitted,

/s/ Stephen M. Pincus

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²On January 6, 2015, the Region indefinitely postponed the January 28 hearing.

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Reply Brief to Respondent's Opposition to General Counsel's Cross Motion for Partial Summary Judgment was filed electronically with the National Labor Relations Board and served by electronic mail, as designated below, on this 13th day of March 2015:

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COUNSEL FOR THE GENERAL COUNSEL

EXHIBIT E

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

Mercy St. Vincent Medical Center,	)	CASE NOS.: 08-CA-128502
	)	08-CA-129537
Respondent,	)	08-CA-133069
	)	08-CA-134215
vs.)	
)	
International Union, United Automobile)	
Aerospace & Agricultural Implement Workers)	
of America, UAW, Local 2213, RN Unit, and	)	<u>MERCY'S SUPPLEMENTAL BRIEF</u>
Local 12 Technical and Support Units,	)	<u>SUPPORTING ITS MOTION FOR</u>
	)	<u>PARTIAL SUMMARY JUDGMENT</u>
Charging Party.)	

On March 18, 2015, the General Counsel offered additional guidance as to his views on the evolving standards for reviewing employers' social media policies and employee handbooks. Within Memorandum 2015-04, the General Counsel described language from a variety of contexts which, in his view, was lawful. While the scope of that Memorandum does not fully encompass all of the language which is challenged in this case, in several respects, language expressly found acceptable in this latest guidance tracks closely with language here under review. We offer this supplemental brief for purposes of highlighting those instances.

Language being challenged in this case:

Systemwide Social Media Policy

Paragraph 10(A)(i)

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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.

Language expressly found acceptable by the General Counsel:

GCM 15-04, at 28-29

“During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information about Wendy’s business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company.”

Language being challenged in this case

Paragraph 10(A)(ii)

6. **Do not disclose confidential information or violate copyrights.** Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

Language expressly found acceptable by the General Counsel

GCM 15-04, at 15

“Respect all copyright and other intellectual property laws. For [the Employer’s] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer’s] own copyrights, trademarks and brands.”

GCM 15-04, at 27

“Respect copyright, trademark and similar laws and use such protected information in compliance with applicable legal standards.”

GCM 15-04, at 6

“Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”

Language being challenged in this case

Paragraph 10(A)(iii)

Social Media Guidelines and Best Practices

5. What you say online will reflect on you, your fellow associates and the public's view of your workplace. Remember that if you wouldn't want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

Language expressly found acceptable by the General Counsel

GCM 15-04, at 28

“Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our antiharassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.”

Language being challenged in this case

Paragraph 10(A)(v)

8. Think about consequences. Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it's about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

Language expressly found acceptable by the General Counsel

GCM 15-04, at 28

“Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our antiharassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.”

Language being challenged in this case

Paragraph 10(A)(ix)

19. Discourtesy to, or improper treatment of patients, visitors, or other employees.

Language expressly found acceptable by the General Counsel

GCM 15-04, at 9

“No “rudeness or unprofessional behavior toward a customer, or anyone in contact with” the company.

“Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.”

Language being challenged in this case

Paragraph 10(A)(xii)

4. Accessing and/or divulging information that becomes accessible through association with MSVMC that should be considered as confidential and/or proprietary, including information related to patients and their care. (Emphasis in the original)

Language expressly found acceptable by the General Counsel

GCM 15-04, at 28-29

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information about Wendy’s business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company.

GCM 15-04, at 6

No unauthorized disclosure of “business ‘secrets’ or other confidential information.”

“Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.”

“Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”

CONCLUSION

For these reasons, in addition to those already briefed by Mercy, the Board should grant Mercy's summary judgment on the §§8(a)(1) and (5) allegations outlined in ¶10(A)(i)-(vi), (ix-x)(xii)(B), 13(C)(D); and should deny the General Counsel's Motion concerning the same sections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of March, 2015, a copy of the forgoing was filed electronically. Notice of this filing will be sent by operation of the NLRB's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the NLRB's system. On March 30, 2015, a copy of the forgoing was also served via e-mail communication to Joseph Rioux and Gina Fraternali, and hard copies were also served upon the following individuals via regular U.S. Mail.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Mercy St. Vincent Medical Center,

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and

**International Union, United Automobile
Aerospace & Agricultural Implement Workers
of America, UAW, Local 2213, RN Unit, and
Local 12 Technical and Support Units,**

**GENERAL COUNSEL’S MEMORANDUM IN OPPOSITION TO
RESPONDENT’S SUPPLEMENTAL BRIEF SUPPORTING ITS MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Counsel for the General Counsel files this supplemental brief in response to Respondent’s March 30, 2015 Supplemental Memorandum asserting that recently issued General Counsel Memorandum 15-04 (“GCM 15-04”) supports its position that the challenged rules are lawful, and its partial motion for summary judgment should be granted.

1. Systemwide Social Media Policy Rule, Number 1 (Complaint ¶ 10(A)(i))¹

Respondent contends that the rule at issue here should be found to be lawful as it tracks closely the language in the rule set forth in the GCM 15-04. However, the “confidentiality” rule found at pp. 28-29 of GCM 15-04 clearly focuses on the employer’s day-to-day operations and long-term strategies. The rule at issue here, “[d]o not post proprietary or confidential information,” is much broader and can reasonably be read to forbid the disclosure of information about the terms of employment. Additionally, Respondent’s rule does not designate what

¹ Given that the language of the rules at issue has been reproduced in previous briefs, we will not do so again.

information is confidential, leaving an unspecified “range” of information that Respondent could consider to be confidential. Because the policy is not sufficiently narrowed, it is overbroad and runs afoul of Section 8(a)(1). See, e.g., *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465-466 (1987) (unlawful rule characterizing “[h]ospital affairs, patient information, and employee problems” as “absolutely confidential,” and prohibiting employees from discussing them); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip. op. at 2 (2014) (finding “Confidentiality and Data Protection” section of company’s Code of Business Conduct unlawful).

2. Systemwide Social Media Policy Rule, Number 6 (¶10(A)(ii))

Respondent claims that its social media policy rule is similar to the rules set forth on pp. 6, 15 and 27 of GCM 15-04. A plain reading of the rules set forth in GCM 15-04 shows that the rules are narrowly focused to protect trademarks and copyrights. In contrast, the challenged rule in this case prohibits the disclosure of confidential information, including operational and financial data. Employees could reasonably conclude that the challenged rule restricts the disclosure of employment information, including information related to wages, benefits and other terms and conditions of employment. *Flex Frac Logistics*, 358 NLRB No. 127, slip op. at 2 (2012). Respondent’s rule is overbroad and distinguishable from the rules in GCM 15-04.

3. Social Medial Guidelines and Best Practices, Guidelines for Social Media Participation, Number 5 (¶10(A)(iii))

Again, the rule set forth on p. 28 of GCM 15-04 is significantly different from the challenged rule. The rule in GCM 15-04 prohibits employees from engaging in unlawful conduct, such as libel or defamation. The challenged rule is overbroad as it refers generally to “inappropriate behavior”. The rule does not specify which communications or behavior Respondent deems inappropriate and is therefore overbroad and violates the Act. Moreover, the challenged rule is directed at the content of what employees disclose, including “postings

involving . . . other employees (including peers, subordinates and supervisors) . . .” Because the term “postings involving . . . other employees” can reasonably be read to include wages and other employment information, the challenged rule unlawfully discourages Section 7 activity. *See, e.g., Costco*, 358 NLRB No. 106, slip op. at 1 (2012) (finding social media policy prohibiting disclosure of “confidential information” as it may include employees' names, addresses, phone numbers and email addresses).

4. Social Media Guidelines and Best Practices, Guidelines for Associates, Number 8 (¶ 10(A)(v))

While Respondent claims that the rule in GCM 15-04 at p. 28 tracks the language of the challenged rule, plain reading shows that this is incorrect. The GCM rule specifically references the prohibited communications to include libel, defamation and harassment as defined in the company’s anti-harassment policy. The challenged rule prohibits the disclosure of information “unfavorable toward your hospital or CHP.” “[U]nfavorable information” can be reasonably read to include information about incidents about workplace safety or information about terms of employment, the rule is overbroad and violates Section 8(a)(1). *See, e.g., Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (unlawful rule against “derogatory attacks”), *enfd.* in relevant part, 916 F.2d 932 (4th Cir. 1990).

5. Policy Number HR-510, Minor Infraction Number 19 (¶ 10(A)(ix))

The rule set forth in GCM 15-04 at p. 9 is different in one key aspect to the challenged rule prohibiting “[d]iscourtesy to, or improper treatment of patients, visitors, or **other employees**” (emphasis added). The rule in GCM 15-04 makes no mention of “other employees.” Because the challenged rule could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, it violates Section 8(a)(1). *Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 3 (2011) (finding unlawful a

provision subjecting employees to discipline for the “inability or unwillingness to work harmoniously with other employees”).

6. Policy Number HR-510, Major Infraction Number 4 (§ 10(A)(xii))

Finally, Respondent cites two rules found at pp. 6, 28-29 of GCM 15-04 which address the unauthorized disclosure of “trade secrets” and “business secrets.” In contrast, the challenged rule is more encompassing by prohibiting “information . . . that should be considered as confidential and/or proprietary.” The challenged rule is not narrowly tailored and in its overbroad scope, reasonable employees would likely understand “confidential” information to include terms and conditions of employment. See, e.g., *Pontiac Osteopathic Hospital, supra*; *Flex Frac Logistics, supra*.

Accordingly, GCM 15-04 does not provide additional support to the arguments made by Respondent in its motion for summary judgment. It is respectfully requested that Respondent’s Motion for Partial Summary Judgment be denied.

Dated at Cleveland, Ohio this 13th day of April 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Memorandum in Opposition was filed electronically with the National Labor Relations Board and served by electronic mail, as designated below, on this 13th day of April 2015:

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EXHIBIT G

 CATHOLIC HEALTH PARTNERS	Systemwide social media policy
	Approved by: Joseph Gage, SVP, HR Endorsed by: EMT, HRC, Communications/Marketing, Compliance, Human Resources, Legal, Risk Management, Information Technology
	Original Approval Date: May 2011 Revised: October 2012

Catholic Health Partners (CHP) wants to ensure that social media is used consistently, strategically and thoughtfully throughout the entire CHP system, so we can maximize this powerful communication medium to the fullest of its potential. Catholic Health Partners' social media policy applies to all associates throughout CHP, including the home office, regions and every CHP organization and entity. When CHP is referenced in this policy, it refers to all organizations within CHP. This policy applies to associates who use social media at work as well as the private, personal use of social media.

Definitions: *Social media* includes blogs and other websites, including Facebook, LinkedIn, Twitter, Google+, Pinterest, YouTube, Flickr and others. *Associates* include all employees, employed physicians, contracted agents of CHP, leaders and medical staff or physician/residents.

- 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. An example of a violation would be a physician or associate recording photographic images of a patient on a cell phone while in CHP facilities and then sharing photos and/or accounts about patient-related activities on a personal blog or social media account. This is given as an example only and does not cover the range of what HIPAA or CHP consider confidential and proprietary information.
- 2. You may be monitored.** CHP reserves the right to monitor, prohibit, restrict, block, suspend, terminate, delete or discontinue your access to any social media sites at work at any time without notice for any reason at its sole discretion. CHP may also restrict, block or remove any content that is deemed in violation of this policy or applicable law.
- 3. Discipline for violating this policy.** Violations of this policy will result in disciplinary action up to and including termination.
- 4. Assume legal risk.** Associates who use social networking sites do so at their own legal risk, and are legally responsible for their actions. Associates can be held personally liable and have both Civil and

Criminal penalties assessed to them by parties harmed by their actions and by State/Federal enforcement.

5. Follow applicable CHP policies. As a condition of employment, CHP associates agree to abide by the Core Values in Action corporate responsibility requirements. Associates also must follow existing Information Technology and Internet usage policies, ethical standards, rules and procedures while using social media. Associates should keep the organization's Mission and Values in mind while posting updates on social networks.

6. Do not disclose confidential information or violate copyrights. Associates must comply with copyrights, trademarks and disclosures, and not reveal proprietary financial, intellectual property, patient care or similar sensitive or private content while using social media. Do not give specific medical advice that could create the appearance of a caregiver/patient relationship. Associates must not share confidential information, such as patient, operational and financial data, or post video/photographic images taken in the workplace or work-related functions, without first obtaining appropriate permission.

7. Do not create social media pages on behalf of CHP without permission. All official social media presences (such as Facebook and Twitter pages, YouTube channels or blogs) created on behalf of CHP and/or its subsidiary organizations must be approved by the appropriate CHP organization's Communications or Marketing, Human Resources and Information Technology departments. Contact the Social Media Champion within Communications or Marketing at the home office or in your CHP region, and that person will handle your request in conjunction with Human Resources and Information Technology. Unless you are given specific permission by Communications or Marketing, Human Resources and IT at the home office or your region, you are not authorized to create a social media presence on behalf of CHP, or represent that you do.

8. Access to social media on CHP equipment only for leadership and those with business uses. Only CHP's Strategic Leadership Team (SLT) and functional areas with a business need (communications, marketing, advocacy, foundation, recruiting, IT, physician relations and privacy officers) are permitted access to social networking sites on CHP equipment. The Communications or Marketing, Human Resources and Information Technology departments may grant other associates limited access to social media on CHP equipment if they demonstrate a legitimate business need for such access. **If you are permitted access to social media on CHP equipment, you must ensure that your social media activity does not interfere with your work commitments and that you are using social media as a legitimate business tool to advance CHP's strategic initiatives.**

9. Add a disclaimer when commenting. Write in the first person. Where your connection to Catholic Health Partners is apparent, make it clear that you are speaking for yourself and not on behalf of CHP. In those circumstances, you should include this disclaimer: "The views expressed on this (blog or website) are my own and do not reflect the views of my employer." Consider adding this language in an "About me" section of your blog or social media profile.

10. Think before you post. All content contributed to social media sites becomes searchable and can be shared by other users. **Once posted, content leaves your control forever.** Social media sites often have terms and conditions that specify that any content posted becomes the exclusive property of the hosting sites.

11. Leadership is discouraged from “friending” associates. CHP encourages development of professional relationships, but realizes that “friending” can create awkward situations that may be perceived as harassment or intrusion. CHP discourages staff in management/supervisory roles from initiating and accepting social media “friend” requests with associates they manage. Connecting on LinkedIn, however, is appropriate.

12. No harassment or discrimination. Do not use social media, either in the workplace or personally to engage in any form of discrimination, harassment, defamation, threats, intimidation, bullying, or any other unlawful behavior.

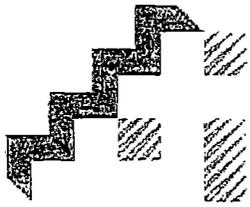
13. Discussion of terms and conditions of employment. Nothing in this policy shall be construed to prohibit associates from engaging in activities that are protected under applicable labor laws.

(SocialMediaPolicy – November 25, 2012)



Social Media Guidelines and Best Practices

2012



CATHOLIC
HEALTH
PARTNERS

Social Media Guidelines and Best Practices

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Associates and Social Media

Almost all of us have been inundated by social media. From Facebook to Twitter, this new way of communicating holds tremendous promise, but also carries significant risks. These guidelines have been written to help you understand both the opportunities and challenges you may face as an associate of CHP.

As is the case with other forms of public communication, such as talking with the media, only certain people are authorized to speak on behalf of the facility and/or the organization.

CHP's policies and procedures have not changed with these new media platforms. These authorized individuals have received special training and are familiar with the complexities of communicating within the healthcare environment.

Given the saturation of social media in our lives, you will undoubtedly encounter situations where you may mention your workplace in your comments or online conversations. Indeed, you are an ambassador for the organization and can be a strong advocate for recruitment, patients/residents and community outreach. It is important, however, to follow the existing Human Resources, Information Technology, Compliance, Privacy, and Communications and Marketing policies. When these policies are not followed, there can be serious consequences for both our organization and you as an associate.

CHP policies that apply to social media

Current CHP policies apply, including, but not limited to:

- Social Media Policy
- Internet Usage Policy
- CHP Code of Conduct
- Applicable HIPAA Policies
- Permissions, including copyright, photographs and videos
- Facility-specific policies, such as Work Conduct, Solicitation of Materials, and Workplace Violence

Guidelines for social media participation

The following guidelines aim to help you participate in social media with confidence while also adhering to CHP's policies.

1. **CHP and HIPAA policies apply to your social media interactions.** For example, do not share confidential or proprietary information about CHP, and be sure to maintain patient privacy. This includes policies concerning photography and video, discussing or posting patient information, and patient confidentiality.

2. **If you are authorized and wish to share information with the public on behalf of CHP or your organization, be sure to check with your Communications or Marketing Department.** (It is understood that those in Communications and Marketing will then follow up with the appropriate privacy and legal representatives if deemed necessary.) This may include creating a Facebook group or page, a Twitter account, a blog or any other public website group. In most cases, a social media strategy, along with visual and branding materials, has been created to help facilitate your online presence. (See the process in the CHP Social Media Policy to get started.)

3. **While we understand you may wish to share an experience you've had at CHP, unless you are authorized to speak on behalf of CHP or your organization, make it clear that you are speaking for yourself.** In those circumstances, we encourage you to include a disclaimer: "These are my personal views and not the views of my employer." Consider adding this language at the end of your statement if the statement applies to your facility or your position. Please remember that privacy laws, such as HIPAA, still apply in all posts, including personal posts. Your online conversations also remain a permanent part of the Internet. Assume that even if you delete a post, it will be available elsewhere forever.

4. **Use a personal e-mail address as your primary means of identification when you are posting information to a social media website on your own behalf.** Just as you would not use CHP stationery to submit a letter to the editor expressing your personal views, do not use your CHP e-mail address to do the same online. You should use your CHP e-mail address only if you are authorized to speak on behalf of your CHP organization.

5. **What you say online will reflect on you, your fellow associates and the public's view of your workplace.** Remember that if you wouldn't want your colleagues or manager – or your mother! – to see your comments, it is unwise to post them on the Internet. Also, please remember that your postings – both internal and external – involving patients, other employees (including peers, subordinates and supervisors) and other professionals may have legal and other implications in the workplace. Comments or behavior that would be inappropriate in the workplace are also inappropriate in the context of social media.

6. **Be respectful and professional to your fellow associates, business partners, competitors and patients.** Avoid using unprofessional online personas.

7. In accordance with CHP's Internet Usage Policy, personal use of social media should not interfere with your work commitments.

8. Users should understand that each of their internal postings will leave an audit trail, including both the identity and the location of the poster.

What CHP expects from those engaged in social media on behalf of CHP

As we engage in online conversations, adhere to the following code of conduct, both in CHP-sponsored sites and in comments posted on other sites:

- Blog posts and comments will be accurate and factual
- Mistakes will be acknowledged and corrected promptly
- Spam and/or comments that are off topic or inappropriate content should be deleted
- E-mails and comments will be replied to when appropriate
- Online and original source materials will be referenced

Coordinate with your Communications or Marketing department

Some CHP employees may be interested in engaging in Internet conversations for work-related purposes, or may be asked by their manager or leadership to participate in support of organizational objectives. Such engagement on behalf of CHP, including the establishment of official external websites representing CHP, must be approved and coordinated through the Communications/Marketing-HR-IT team, and is subject to Internet Usage and other relevant policies. A social media subgroup of the CHP Communications Network also provides oversight and assistance to guide the development of new social media platforms, sharing knowledge and instituting best practices for successful implementation. (See Social Media Policy for the process.)

Use of external websites for work-related purposes, such as photo sharing through Flickr.com, must be first approved by Communications or Marketing, as well as the appropriate Privacy and Compliance officers.

Failure to adhere to CHP policies may result in disciplinary action (up to and including termination) and any and all legal remedies. Nevertheless, neither these guidelines nor the best practices following this page will be interpreted or applied in a manner that interferes with employees' rights to engage in concerted activity under Section 7 of the National Labor Relations Act.

Social media best practices for associates

The following tips are best practices to help you participate in social media with confidence on both your professional and personal time.

1. Never disclose patient information. CHP is committed to protecting our patients' medical information, and it's important to remember that privacy laws, such as HIPAA, still apply in all professional and private posts. You must maintain patient privacy at all times, which includes the release of patient information to the media or a social networking site. We are required by law to keep medical information private, provide a notice to patients describing our legal duties and privacy practices for medical information and follow the terms of the notice currently in effect. If you're still unsure, the Communications/ Marketing-HR-IT team or CHP legal/compliance experts can offer guidance.

2. Don't tell secrets. Anything you post is accessible to anyone with a browser. Although some websites have a restricted content feature, keep in mind that external content is NOT as secure as content that resides within a protected environment. You are responsible for the content you post and the restricted spaces you manage. Use common sense. It's perfectly OK to talk about your work and have a dialog with the community, but it's NOT OK to publish trade secrets, such as posting comments about revenue, unannounced financial results, medical matters or similar matters that are apt to get you, the organization, or both, into serious legal trouble. Stay away from financial topics and predictions of future performance. Content requiring a non-disclosure agreement or that is considered CHP property should NOT be published on CHP accessible websites, even in spaces set up to restrict access to CHP associates only. If the judgment call is tough, on confidential information or other issues discussed here, it's always a good idea to discuss it with your manager or a member of the Legal team before you publish.

3. No comment. Do not comment on work-related matters unless you are CHP's (or one of its organization's) official spokesperson on the matter, and have approval from CHP leadership and management to do so.

4. Be respectful. Whether in the real or virtual world, your interactions and discourse should be respectful. Be courteous and helpful when communicating with the outside world. Remember that what you state or the manner or tone you state something could come across as inappropriate or offensive.

5. Be honest and write what you know. Being helpful online will be a great asset to your office or facility. But if you don't know the answer, don't make it up. Simply state that you will do your best to find the answer. Keep in mind that the best way to be interesting and add value is to write about what you know. If you have a deep understanding of a topic, by all means share that with your audience, within the confines of what is appropriate to share.

6. Don't write anonymously. If you comment publicly about any issue in which you are engaged in your capacity as a CHP associate, even loosely, you must make your status as a CHP employee clear. In such commentary, you should also be clear about whether you are speaking for yourself (presumably the normal case) or on behalf of CHP.

7. Quality matters. Be sure to use the spell-check feature before posting your comments. You don't have to be a great – or even a good – writer to succeed at this, but you do have to make an effort to be clear, complete and concise. There are very few first drafts that can't be shortened and improved in the process. If you're not design-oriented, ask someone who is and take their advice on how to improve the layout of your social networking websites.

8. Think about consequences. Imagine you are at a public meeting and someone in the audience has a printout of something that you have posted which is unfavorable toward your hospital or CHP. This could be used in a way that you did not intend. Once again, it's about using your best judgment. Using your public voice to trash or embarrass the organization, your patients, your co-workers, or yourself, is not only dangerous, but not very smart.

9. Moderating. Some community websites, such as wikis, require a moderator. Optional moderation on other websites, such as a group blog or forum, can add value by maintaining content organization and responding to ongoing decisions and questions. The goal of moderating is to guide and nurture, not command and control.

10. Dialoguing with external parties. When someone posts derogatory or negative comments about your facility or CHP, it is recommended that you do not directly address that comment in a public forum. Instead, alert the Communications/Marketing-HR-IT team, who will follow up internally and possibly externally.

11. Other people's information. It's simple – other people's information belongs to them. It's their choice whether they wish to share their material with the world, not yours. Before posting someone else's material, be sure to check with the content owner for permission first. If you're still unsure, the Communications or Marketing department or Legal can offer guidance.

12. Disclaimers. CHP employees may put a disclaimer on their Facebook home page stating who they work for, but that they're not speaking officially on their organization's behalf. This is a good practice, but don't count on it to avoid trouble; it may not have much legal effect. Community websites that contain material written on behalf of CHP associates are governed by company policies. When an associate leaves CHP, material written during their employment normally remains in place and is subject to the same policies.

Strategic uses
for
social media

Social media allows organizations to implement a number of business-related strategies, such as:

- building awareness
- building brand equity/positioning
- developing brand equity as experts
- attracting new patients and residents
- building opportunities for advocacy positions
- reaching out and attracting future business partners
- increasing search engine ranking
- establishing trust
- generating leads
- educating about services
- building relationships
- providing patient and resident service
- developing new product ideas
- increasing patient and resident satisfaction
- increasing patient and resident loyalty
- driving word-of-mouth recommendations
- providing information about your product or category
- soliciting feedback from patients and residents
- convening focus groups
- humanizing your brand
- gaining attention from industry analysts and press
- better communicating corporate news

With the above in mind, Catholic Health Partners and/or its subsidiary organizations utilize social media strategies that contribute to achievement of Key Result Areas such as:

- **Human Potential** – Attracting, retaining and developing a first-rate diverse workforce to carry out the Mission.
- **Growth** – Helping the organization and/or its subsidiaries become “best in market.”
- **Stewardship** – Pro-active outreach and collaboration in each of our communities to sustain and grow the mission for the future.
- **Physician Engagement** – Supporting recruitment of and alignment with physicians.
- **Quality and Patient Safety** – Communicating about initiatives such as partnerships to improve health, clinical quality and efficiency honors, and links to quality information on the external website

Who to
contact
about CHP's
Social Media
Policy

Monitoring and access.....Keith Fricke
HR disciplinary.....Molly Seals or Maggie Lund
HIPAA regulations.....Regional and CHP HIPAA Privacy Officer
Communications.....Mike Boehmer
Risk Management.....Carol Kortz

(Draft – Social Media Guidelines & Best Practices – July 31, 2012)

EXHIBIT H

Facility Name: **MERCY St. Vincent Medical Center**

Title:	Discipline Policy	Policy Number:	HR-510
Author/Index:	Human Resources		
Chapter/Issues By:	Human Resources	Effective Date:	09/01/1981
Authorized By:	Gary George	Revision Date:	01/01/2010
Replaces:		Review Date:	01/01/2013
References:		Date of Next Review:	01/01/2016
Keywords:			
Applies To:	Hourly - Salaried (Non-Management)		

Revisions to this policy over the previous version are highlighted in italics.

The orderly and efficient operation of Mercy St. Vincent Medical Center (hereinafter "MSVMC" or "Employer") requires that employees maintain proper personal standards of conduct. Proper standards of conduct are necessary to protect the health and safety of all employees, to maintain uninterrupted service and provide job security, and to protect goodwill and property of Mercy St. Vincent Medical Center and all of its employees.

An employee who fails to maintain proper standards of *behavior*, including violating any of the following rules will be subject to disciplinary action including discharge.

Mercy St. Vincent reserves the right to add to, subtract from, or modify its discipline policy and work rules.

Mercy St. Vincent Medical Center will discipline employees (who have completed their probationary period) for just cause.

Typically, discipline is cumulative. Any written form of discipline for any matter that occurs within two (2) years of service after the issuance of a previous discipline is considered in determining a greater level of discipline for any subsequent offenses. Discipline progresses to the next step for a minor infraction as described below, such as "eating in unauthorized areas", and is issued at the appropriate step for a major infraction.

The Employer will administer a system of discipline based on its assessment of the circumstances. Discipline for minor offenses typically follows the following progression: (1) written reprimand; (2) suspension of 1 to 3 days; (3) suspension of 4 to 7 days; and (4) termination.

Generally, the process of disciplinary action for minor offenses and some major offenses will be progressive, corrective discipline, based upon the employee's past record and the seriousness of the current offense. However, a combination of various offenses, or an act of a serious nature may prompt bypassing one or more of the disciplinary steps outlined below.

In those situations where the Employer is conducting an investigation that may lead to disciplinary action, the employee may be suspended without pay pending the outcome of the Employer's investigation. *The Employer will make a good faith attempt to conclude*

investigations within one week. If there are extenuating circumstances that will cause the investigation to exceed one week, then the union will be notified and the employee will be given the option to use CTO for the balance of the investigation. In the event that the findings of the investigation exonerate the employee, then the employee will be made whole in a timely fashion. In the event that the findings of the investigation result in suspension level discipline, then the time served during the unpaid investigation will count towards the suspension.

Minor Infractions

Infractions of a minor nature may result in discipline which begins with a written warning for the first offense in this category. A second offense in this category within two (2) years from the issuance of the first offense will result in a one (1) to three (3) day suspension, the third offense within two (2) years of the second offense will result in a four (4) to seven (7) day suspension, and a fourth offense within two (2) years of the third offense will result in discharge.

For employees on shifts different than eight (8) hour shifts, the suspension days are converted to an equivalent number of hours based on eight (8) hours.

An employee can be discharged for his first offense in this category if within the prior two (2) years he had been given a four (4) to seven (7) day suspension. Additionally, any one of the below-listed minor offenses, under aggravated circumstances, may result in a minor infraction discipline greater than the progressive step generally applied.

A representative list of violations of minor work rules and regulations includes, but is not limited to:

1. Failure to adhere to departmental/unit, facility, or MSVMC standards/procedures with respect to personal hygiene, grooming, clothing, and uniforms.
2. Violation of minor security, fire, traffic, smoking, or parking regulations.
3. Violation of any safety rules or practices or engaging in any conduct which tends to create a safety hazard.
4. Failure to wear safety articles and use protective equipment provided by the Employer and failing to immediately report to the Employer any injury or accident.
5. Unauthorized solicitation or distribution of material on Employer property or violation of the Solicitation Policy.
6. Posting or removing any matter on bulletin boards or Employer property unless authorized by the Employer, or regarding Union bulletin boards, unless authorized by the Union.
7. Unauthorized entry into or use of Employer facilities and/or equipment.
8. Poor Job performance, carelessness, negligence, *loafing*, or inefficiency in performing assigned duties which does not pose a serious hazard or risk for a patient.
9. Negligent use of MSVMC property.
10. Conducting personal business during work hours (e.g. phone use, *cell phone use, text messaging, use of iPods, etc*).
11. Horseplay.
12. Consuming or taking food provided for patients.
13. Eating in unauthorized areas.
14. Restricting or interfering with others in the performance of their jobs or engaging or participating in any interruption of work. (This rule does not relate to violation of the no

- strike/no lockout policy for Union employees).
15. Failure to attend mandatory training which is general in nature and applicable to all employees.
 16. Violation of department/unit and/or MSVMC policies or procedures.
 17. Use of vulgar or abusive language which is unrelated to a major infraction.
 19. Discourtesy to, or improper treatment of patients, visitors, or other employees.
 21. Unauthorized accessing and use of information stored on any computer system of MSVMC, including unauthorized use of such equipment for other than MSVMC business.
 22. Unlawful or improper conduct off Employer premises or during non-work hours which affects the employee's relationship to his job.

Major Infractions

Infractions of a major nature will result in discipline which may begin with a four (4) to seven (7) day suspension or immediate discharge. If discharge is viewed as too severe and a suspension is issued instead of termination, the employee may be discharged for any subsequent violation (major or minor infraction of Medical Center policy which occurs within two (2) years following the issuance of the suspension).

A representative list of violations of major work rules and regulations includes, but is not limited to:

1. Unauthorized possession of intoxicants or illegal drugs, or working under the influence of drugs or intoxicants on MSVMC premises.
2. Refusing to submit to medical evaluation including testing when suspected of being unfit for duty or under the influence of or impaired by drugs and/or alcohol.
3. Harassment – sexual, racial, or other legally impermissible forms of discrimination.
4. *Accessing and/or* divulging information that becomes accessible through association with MSVMC that should be considered as confidential *and/or proprietary*, including information related to patients and their care.
5. Theft or removal from the hospital, or possession off Hospital premises, without proper authorization, property belonging to the hospital, patients, visitors, or co-workers; or other forms of serious dishonesty.
6. Recording another employee's time, allowing another employee to record your time, or in any way altering or falsifying time records.
7. Forgery or alteration of MSVMC documents, records, or identification.
8. Behavior which creates a hostile work environment such as threatened or actual physical violence, harassment, or verbal abuse of a patient, visitor, or another employee.
9. Failing to assist a patient if such service is within the scope of the employee's duties or is required by reason of an emergency relating to a patient.
10. Accepting money from patients for services rendered as an employee of MSVMC or other violations of the employer's Conflict of Interest Policy.
11. Immoral or indecent behavior, or any form of lewd or vulgar conduct.
12. Destruction or abuse of MSVMC property or equipment, physical or verbal abuse.
13. Falsifying or omitting information concerning application form or post-offer physical exam forms which is discovered within twenty-four (24) months of employee's first date of employment with MSVMC.
14. Deliberate violation or refusal to obey instructions of your supervisor.
15. Failing to attend mandatory training/education which is specifically related to the employee's job.

16. Falsely stating or making claims of injury, or falsification or misuse of MSVMC forms, reports, or records.
17. Possession of firearms or other weapons on the Employer's premises.
18. *Poor Job performance, carelessness, negligence, loafing or inefficiency in performing assigned duties which pose a serious hazard or risk for a patient.*
19. *Sleeping or nesting while on duty.*
20. *Failure to maintain required licensure, certification, and/or registration.*

The bargaining history reflects that number 10 of 11.11 will be deleted from each of the collective bargaining agreements.