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2) General Counsel, at 1, asserts that Mercy “relies heavily upon the import of General Counsel Memoranda, which are not binding² on the Board.” *Of course*, this Board is not bound by the General Counsel’s prior pronouncements. Nevertheless, in issuing OM 12-59, the General Counsel not only offered to Mercy, and the country, his opinion as to the legality of several policies; he also published one policy, as if a “model,” stating: “In the last case, I have concluded that the entire social media policy, as revised, is lawful under the Act, and I have

² General Counsel’s Brief calls to mind the well-known line: “Pay no attention to the man behind the curtain!” L. Frank Baum, *The Wonderful Wizard of Oz*. But, the Board should not look away from the General Counsel’s prior pronouncements, even though warned to do so.

attached this complete policy. I hope that this report, with its specific examples of various employer policies and rules, will provide additional guidance in this area.” And, again, in issuing OM 15-04, he stated: “I hope that this report, with its *specific examples of lawful and unlawful handbook policies and rules*, will be of assistance to labor law practitioners and human resource professionals.” Certainly, if the General Counsel has recommended policy language which (as Mercy believes and the General Counsel apparently fears) Mercy has previously shown dovetails with the language now under review, a serious question should now be asked as to why the General Counsel now asserts that a “reasonable” employee would necessarily assume that Mercy intended to unlawfully curb his Section 7 rights when it used language recommended by the General Counsel.

3) Upon reviewing all of the Briefs previously filed in this case, the Board will discover that, with few exceptions, the “Brief in Response to Notice to Show Cause” has merely been extracted, often verbatim³, from the same arguments made by General Counsel in his previously-filed briefs. The significance of this for the Board is that, on review of Mercy’s previous Briefs, the Board will discover not only that Mercy has already addressed General Counsel’s arguments, but also that General Counsel’s latest brief makes no attempt to add anything further to the contrary for the Board’s consideration. In the interests of brevity, here is just one example, from General Counsel’s very first point:

Relative to Mercy’s rule asking employees to maintain the confidentiality of HIPAA information, General Counsel, at 5, continues to cite to two cases (and only these two cases), just as he did in his original Motion for Summary Judgment, at 5: *Pontiac Osteopathic Hospital*, 284

³ To be sure, in a couple of places, the General Counsel has made some minor editorial revisions. For example, at page 11, General Counsel quotes certain language from OM 12-59, in footnote 4. In General Counsel’s original Brief, at 9, he cites this quote as part of the text.

NLRB 442 (1987) and *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8 (2014). But, in our prior Reply Brief, we addressed them both, as follows:

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.

So, General Counsel submits his Brief to the Board, continuing to cite to, and only to, two Board decisions which we have previously demonstrated do not support his argument; and he does so without (a) acknowledging that there is even an issue, or (b) attempting to demonstrate why Mercy's position is in error.

In sum, General Counsel must be hoping that, by his stating his position emphatically, the Board will not take the time to read the other briefs on file – which demonstrate the General Counsel is in error.

4) Truth be told, the General Counsel has added a couple of new citations to his latest arguments. Nevertheless, analysis demonstrates that these are window dressing that add no new substance to his position.

a. Paragraph 10(A)(iii) of the Complaint

In our original Motion, we argued that *Guideline* No. 5: (i) was aspirational in nature (not a disciplinary rule) and was therefore permissible, citing *Karl Knauss Motors*, 358 NLRB No. 164 (2012); and (ii) that the text tracked closely with language found permissible in the General Counsel's Memorandum 12-59. General Counsel responded, in turn, contending: (i) that the aspirational Guideline could be taken as being a rule

(without ever addressing *Knauss*) and (ii) that the language goes beyond Memorandum 12-59 and is unlawful, citing *Brockton Hospital*, 333 NLRB 1367 (2001) and *Costco*, 358 NLRB No. 106 (2012). In our Reply Brief, Mercy demonstrated that General Counsel's position on Memorandum 12-59 was inconsistent with the express text he relied upon; that the prohibitory clauses in *Brockton Hospital* and *Costco*, were not analogous to the aspirational language in Mercy's Guideline; and that the language construed in *Landry's Inc.*, 2014 NLRB Lexis 472, was much closer, to Mercy's – and it had been approved.

Now, in his latest Brief, the General Counsel asserts the same arguments and authorities as before, cut-and-pasted from his old briefs. The sole addition is a citation of *The Continental Group*, 357 NLRB No. 39 (2011) to support the statement that an overbroad rule may have a chilling effect on employees in the exercise of their rights – but this is not adding anything of substance to the discussion. The issue before the Board is *whether* this Guideline language, which seems to track with language approved in both Memorandum 12-59 and *Landry's* is, in fact, “overbroad” as a matter of law. If it is not, then *Continental Group* is irrelevant.

b. Paragraph 10(a)(iv) of the Complaint

This *Guideline* (part of a document listed as a series of “tips,”) is obviously focused on individuals who may serve as the “official spokesperson” for Mercy. As we have outlined in prior Briefs, the language is analogous to that in two policies considered in Memorandum 12-59, pages 15-17, as parts of larger rules and expressly found to be lawful, notwithstanding other language that was not as successful. General Counsel responded that the Mercy language did not match up with some other language that had been approved in the “model” language, appearing at page 23 of the Memorandum – but,

his Brief entirely ignored the other two clauses which had been approved at pages 15-17 of the Memorandum. He continues in his new Brief with the same artifice – urging that Mercy’s language does not match up with the “model” language, quoted in his footnote 4 – language that has never been relied on by Mercy, but simply ignoring the other two analogous clauses that were also considered and approved in Memorandum 12-59.

General Counsel does, however, add several case cites for the first time in this Brief. They do not compel a different outcome.

Direct TV, 359 NLRB No. 54 (2013), construed a rule stating: “Do not contact the media.” Obviously, that prohibition is broader than the language used by Mercy. Moreover, General Counsel paraphrases a quote from the opinion, “the rule makes no attempt to distinguish unprotected communications, such as statements that are maliciously false, from those that are protected” – but, General Counsel makes no reference to the footnote (no. 5) that follows the quote, which provides: “Nor is clarification offered to employees by the rule as a whole. It broadly addresses communication **but remains silent⁴ on whether an employee is impermissibly representing DIRECTV** under the rule when engaged in Sec. 7 activity.” (emphasis added) We submit that, in contrast, being the “official spokesman” is precisely what Mercy’s Guideline is about.

Trump Marina, 354 NLRB 1027, **14-15 (2009), is a case in which the employer suspended an employee for protected activity and, subsequently, interrogated him about later protected activity that came within the scope of a work rule. It can’t be extrapolated to the present case because any conclusions about the theoretical application of the rule

⁴ Note also that, the Board comments, at *4, that the employer in that case “has presented no alternative construction or interpretation of the rules, focusing instead on its purported repudiation of them.”

are inextricably intertwined with the facts of the case: “[T]he very nature of the Lew-
Spina meeting shows that the rules did not simply amount to an authorization policy; the
rules were applied to and enforced against Spina. * * * In these circumstances,
Respondent’s attempt to distinguish *Crowne Plaza* is unavailing.” Similarly, *Crown
Plaza Hotel*, 352 NLRB 382 (2008), is distinguishable because the rule in question
consisted of two sentences, the second of which was: “Under no circumstances will
statements or information be supplied by any other employee.” The Opinion, at *21,
expressly holds that this second sentence was the nail in the employer’s coffin: “[T]he
second sentence renders the rule ambiguous, and as such it is susceptible to the
reasonable interpretation that it bars Section 7 activity.” Mercy’s Guideline has no second
sentence.

Finally, General Counsel cites to *Target Corporation*, 359 NLRB No. 103 (2013).
That case concerned an employee’s right to wear a union insignia notwithstanding an
employer’s dress code that barred such clothing “unless approved by your team leader.”
It is a bridge too far to extrapolate from that that an employer cannot designate its own
official spokesperson.

c. Paragraph 10(A)(v)

Once again, Mercy’s language is a “Guideline”; and, in this instance, the essence
of that Guideline is a suggestion that employees “Think about consequences” and use
“their best judgment.” General Counsel has added to his argument, at 12, a citation to
Flamingo Hilton-Laughlin, 330 NLRB 287 (1994), which construed a completely
different work rule against “Making false, vicious, profane, or malicious statements
regarding another employee, guest, patron, or the Hotel itself.” In *Flamingo*, the
employer’s rule was expressly deemed problematic “to the extent” that it *prohibits* union

activities. *Id.*, at *39. But nothing in *Flamingo* suggests that an employer's mere *advice* to *think* before doing something is unlawful. *Compare General Motors*, 2012 NLRB Lexis 304, *19.

CONCLUSION

For these reasons, in addition to those already briefed by Mercy, the Board should grant Mercy's Motion for Summary Judgment.

Respectfully submitted,

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The undersigned hereby certifies that on this 28th day of August 2015, a copy of the forgoing was filed electronically and a copy of the forgoing was also served via e-mail and via regular U.S. Mail to the following:

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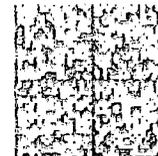
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