

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

CORNERSTONE HEALTH CARE GROUP,

Respondent

and

Case 16-CA-154503

ROMAINE REEVES, An Individual,

Charging Party

REPLY IN SUPPORT OF CORNERSTONE HEALTH CARE GROUP'S BRIEF

Frederick C. Miner
LITTLER MENDELSON, P.C.
2425 E. Camelback Rd., Suite 900
Phoenix, Arizona 85016
TEL: 602.474.3653
FAX: 602.391-2836

Attorneys for CORNERSTONE
HEALTH CARE GROUP

I. INTRODUCTION

Counsel for the General Counsel's Brief turns a blind eye to the animating facts and applicable law. While failing to address controlling law, counsel for the General Counsel doggedly recites language from rulings which have been explicitly refused by the circuit court which shall ultimately hear this case if the General Counsel's arguments are accepted. Indeed, denying Cornerstone Health Care Group's ("Cornerstone") Brief seeking the dismissal of allegations related to the Class Action Waiver at issue in this case would be nothing short of an act of defiance and display of contempt for the judicial process and the proper bounds of the Board's authority. Counsel for the General Counsel has attempted no refutation of these circumstances nor justification for encouraging such a result.

Further, counsel for the General Counsel disregards the legitimate and prevailing concerns related to the privacy interests patients and families have in their protected health information. Cornerstone has, in its policies and practices, struck the balance between preserving employees' ability to pursue their Section 7 rights and meeting their legally mandated obligation to protect patient information, and done so admirably. A reasonable employee would not understand the Cornerstone's policies regarding audio and video recordings of conversations which are likely to contain private, confidential information to be a restriction on Section 7 rights, especially where those rights have numerous alternative avenues for expression which are untouched by the recording policy.

Thus, to deny Cornerstone's Brief is to disregard the mandates of the law and justice. The Class Action Waiver, Representative Action Waiver, and Policy Against Audio and Video Recordings do not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the National Labor Relations Act (the "Act"). The Complaint

should be dismissed.

II. THE CLASS ACTION WAIVER AND REPRESENTATIVE ACTION WAIVER DO NOT VIOLATE SECTION 8(a)(1) OF THE ACT

The General Counsel has premised its position as to Cornerstone's Class Action Waiver on the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. (2012) ("*D.R. Horton I*") and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 slip op. (2014) ("*Murphy Oil I*"). The reliance on these decisions is misplaced. As Cornerstone has made clear from the beginning of this matter, it will appeal any decision against it in this case to the Fifth Circuit. The Fifth Circuit (along with virtually every other court to be presented with the issue) has unequivocally disagreed with and rejected the reasoning in *D.R. Horton I* and *Murphy Oil I*. Enigmatically, counsel for the General Counsel has offered no explanation why, under these circumstances, a finding by the Board which follows the decisions in *D.R. Horton I* and *Murphy Oil I*, and which disregards the controlling precedent, would not be a miscarriage of justice, a waste of resources, and an improper overextension of the Board's authority. As counsel for the General Counsel has provided no satisfactory answer to this fundamental and dispositive question, little more need be said on this issue apart from a brief restatement regarding the applicable law.

In summary, the Fifth Circuit rejected the reasoning of *D.R. Horton I*, holding that an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement which prohibits the mechanism of a class or collective action, and requiring that employment-related claims be resolved through individual arbitration. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357-360 (5th Cir. 2013) ("*D.R. Horton II*"). Put as plainly as possible, arbitration agreements, like the one at issue in this case, *are enforceable and not unlawful*. *Id.* at 362. The Fifth Circuit, less than a year ago, reiterated this holding when confronting, and rejecting, the other case relied upon by counsel for the General Counsel, *Murphy Oil I*. *Murphy*

Oil v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015) (“*Murphy Oil II*”) (“Our decision [in *D.R. Horton II*] was issued not quite two years ago; we will not repeat its analysis here. *Murphy Oil* committed no unfair practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.”).

The law simply could not be any more clear in this regard. Neither can there possibly be any misunderstanding as to Cornerstone’s intent to have any adverse ruling to this regard reviewed by the Fifth Circuit. Thus, while the Fifth Circuit in *Murphy Oil II* reasoned that the Board’s failure to recognize the reasoning in *D.R. Horton II* was excusable because the Board could not know that the Fifth Circuit’s law would apply under a petition for review, such is not the case here and a holding against Cornerstone on this issue is simply without any viable justification. *Murphy Oil II*, 808 F.3d at 1018.

III. CORNERSTONE’S POLICY PROTECTING PATIENT INFORMATION BY PROHIBITING AUDIO AND VIDEO RECORDINGS IS NOT OVERLY BROAD

The parties seem to agree that Cornerstone’s Policy against Audio and Video Recordings (“Recording Policy”) does not, on its face, restrict any protected activity. Accordingly, as the policy was not promulgated in response to any union activity, nor has it been applied to restrict the exercise of Section 7 rights, the lawfulness of the Policy comes down to whether or not employees would *reasonably* construe it to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

As the Board held in *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), *enfd.* in relevant part 715 F.3d 928 (D.C. Cir. 2013), the significant concerns surrounding the confidentiality of patient health information explains policies related to the prohibition of digital/tape recordings in the health care industry far more cogently and cohesively than does an explanation based on potential perceived obstruction of Section 7 rights. *Id.*, slip op. at 6. Thus,

where the confidentiality of patient health information is at issue, a reasonable employee could not construe a policy reasonably restricting audio or video recordings as prohibiting Section 7 activity. The reasoning of, and need for, such a decision could not be more clearly demonstrated than it is in the context of Cornerstone's operations.

Specifically, Cornerstone specializes in the treatment of medically complex patients who require individualized, interdisciplinary acute care for an extended recovery time. Cornerstone consists of numerous Long Term Acute Care Hospitals, 24-hour physician support, laboratory and radiology services, procedure rooms, intensive care units, and telemetry units. Simply put, Cornerstone's business *requires* the collaboration of numerous professionals, departments, and services to coordinate highly individualized and specialized treatments. That is, it must be assumed that discussions of patients and their highly confidential medical information will need to occur regularly and often and between a broad spectrum of individuals ranging from employees to patients, to service providers. Indeed, as individualized patient treatment information is at the very heart of Cornerstone's business, any conversation dealing with Cornerstone, its employees, its patients, or its service providers may involve such confidential details.

Thus, there are two relevant concerns that derive from these circumstances. First, the chances that confidential health information will be discussed among employees in any conversation which has to do with Cornerstone's operations is extremely high. Second, Cornerstone must create an environment where such conversations may take place as freely as possible to allow for the coordination that the medically complex cases in which the Company specializes require.

Counsel for the General Counsel argues that, while he concedes that privacy interests,

where they concern patient health information, are sufficiently weighty to justify a rule banning audio and video recordings to some extent, that the Cornerstone Recording Policy goes too far. To support this belief, counsel for the General Counsel points out that the policy restricts audio and video recordings of all communications and events which involve the Company or employees of the Company, customers or clients, or individuals with whom the Company is doing business. Apparently the General Counsel's point here is that such a policy would potentially include communications which may not ultimately contain sensitive and confidential health information, though counsel does not state how he believes the policy might be narrowed without losing its efficacy. Indeed, when examined more closely and without the presumption of improper interference, it is clear, and would be clear to a reasonable employee, that the subgroup of communications identified in the Recording Policy is *precisely* that which would have a high likelihood of containing confidential patient health information, requiring heightened protection.

More specifically, any discussion which involves the Company or its employees is likely to touch upon the specific topics with which the Company and its employees are primarily concerned. As explained above, Cornerstone exists to treat, and support the treatment of patients in an environment where that treatment often requires collaboration and discussion related to that treatment. Accordingly, any conversation involving the Company or its employees is likely to implicate and even openly discuss confidential health information. This is obviously also true for conversations with or about clients and conversations with those with whom the Company does business as, again, Cornerstone's business is the individualized treatment of medically complex patients. Further, given the highly individualized nature of the treatments involved, the likelihood that even small details could positively identify a patient and his or her confidential

treatment is much greater than with other more generalized health care providers.

In addition to concerns directly related to maintaining confidentiality, Cornerstone relies on an environment in which healthcare professionals and their support staff can discuss, and collaborate on, sometimes urgent life or death issues of patient care without the concern that they may need to guard the information from recording devices. The Recording Policy ensures that Cornerstone employees and service providers need not choose between their desire to ensure patient care with their obligation to maintain confidentiality of health information. As pointed out in Cornerstone's brief, the Board has long noted the chilling and inhibiting effect that recordings can have on free and open discussion in high-stakes, high-stress environments, causing people to worry about their words more than reaching a beneficial goal. *See Architectural Fiberglass*, 165 NLRB 238 (1967) (insistence on recording negotiations unlawful, inasmuch as the recording process inhibits free and open dialog and frustrates and delays bargaining).

The Recording Policy is exactly and precisely tailored to fit the concerns for which it was put into place and is, therefore, not overly broad. Counsel for the General Counsel seems to indicate that the policy might be narrowed with either a time and place restriction or more specific rules as to the kinds of conversations which may not be recorded. These options do not, however, address the concerns at issue. A narrowed policy identifying only conversations in a particular location or during particular times would be insufficient as any conversation involving the Company, its employees, its patients, or its business partners would be extremely likely to include some fact which could implicate the highly confidential details of a patient's treatment, whenever or wherever that conversation may take place. Neither could a policy be sufficient which merely restricts recordings of conversations which contain confidential information as,

once it is known that some participant in the conversation has mentioned some piece of confidential information, the recording of that information would have already been made. The conversations which are likely to contain confidential health information, and the conversations which must proceed for Cornerstone without the chilling effects that digital/tape recording, are those that involve the Company, its employees, its patients and clients, and its business partners. These are the conversations which the policy addresses.

Counsel for the General Counsel also makes much ado about the fact that the Company reserves a right to record conversations under specifically defined circumstances, identifying this as an indication that confidentiality is not truly the animating concern behind the Recording Policy. The argument borders on the ridiculous. The Company maintains numerous records which contain confidential information and which do not pose a risk of a breach of confidentiality because the Company maintains protocols and infrastructures to ensure the confidentiality of those records. Indeed, such protocols and infrastructures are undermined if employees are able to freely maintain their own records of the confidential information without reliance on the guarding mechanisms. Even more simply put, an employee's recording made on his or her cell phone obviously presents a much more serious privacy risk than does a controlled recording made by the company or an enforcement authority, as permitted under the Policy.

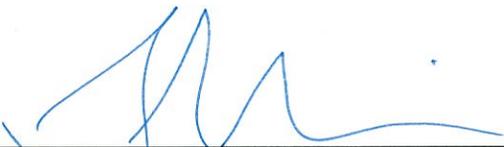
Of as great importance as the restrictions in the Recording Policy are the avenues of information gathering and expression left available to Cornerstone employees. Specifically, the Recording Policy does not prevent employees from taking photographs of working conditions nor does the policy restrict the discussion and written record of any circumstance related to employees' work. There is nothing in the policy that restricts employees from preserving information related to their workplace, from voicing their concerns, or from communicate such

information with others, apart from the narrow restriction that such activities may only not take place by use of audio or video recordings. In short, the Recording Policy does not purport to restrict or otherwise interfere with employees' ability to preserve information relating to the workplace through non-video or audiotape means, and as noted above, it places no restriction on employees' ability to disseminate information or otherwise communicate with one another, or the public, regarding their wages, hours or other terms and conditions of employment. A reasonable employee, understanding these facts, could not construe such a policy as a restriction on Section 7 rights.

Thus, where, as here, there is a pervasive and compelling patient privacy interest at issue and where the relevant policy is tailored to address that interest, the policy does not violate Section 7 of the Act.

IV. CONCLUSION

As clearly set forth under controlling law, Cornerstone's Class Action Waiver and Representative Action Waiver are enforceable and do not violate the Act. Further, the Policy Against Audio and Video Recordings is tailored to meet the grave concerns under which it is justified and is not overly broad. As such, the Complaint in this matter has no merit and must be dismissed.



Frederick C. Miner
LITTLER MENDELSON, P.C.
2425 E. Camelback Rd., Suite 900
Phoenix, Arizona 85016
TEL: 602.474.3600
FAX: 602.957.1801
Attorneys for CORNERSTONE HEALTH CARE
GROUP

CERTIFICATE OF SERVICE

I certify that I have this 20th day of May, 2016, caused an electronic copy of the foregoing **Reply in Support of Cornerstone Health Care Group's Brief**, containing the signature of counsel for Cornerstone, in .PDF format, to be filed electronically using the National Labor Relations Board's E-Filing System.

I also certify that I have cause a copy of the foregoing document to be served via electronic mail on the following:

Bryan Dooley, Esq. (Bryan.Dooley@nlrb.gov)

I further certify that a copy of the foregoing document has been sent via Federal Express to the following:

Romaine Reeves
16631 Vance Jackson Ap. 1310
San Antonio, TX 78257-5029



Tisha Davis