

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**VALLEY HEALTH SYSTEM, LLC,
et al.**

Petitioners,

and

**NATIONAL LABOR RELATIONS
BOARD,**

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Valley Health System LLC (d/b/a Spring Valley Hospital Medical Center and Centennial Hills Hospital Medical Center and Desert Springs Hospital Medical Center and Valley Hospital Medical Center), and Summerlin Hospital Medical Center LLC (d/b/a Summerlin Hospital Medical Center) (“Petitioners”) hereby petition the Court for review of the Order of the National Labor Relations Board styled *Valley Health System LLC d/b/a Spring Valley Hospital Medical Center and Centennial Hills Hospital Medical Center and Desert Springs Hospital Medical Center and Valley Hospital Medical Center and Summerlin Hospital Medical Center LLC d/b/a Summerlin Hospital Medical Center LLC and Kathy Morris and Katrina Alvarez-Hyman*, Cases 28-CA-123611 and 28-CA-127147 (reported at 363 NLRB No. 178) (attached as Exhibit A) which was issued on May 5, 2016, and prays that

said Decision and Order be set aside, modified and/or remanded for further proceeding.

Venue properly lies in this Circuit under 29 U.S.C. § 160(f) because Petitioner transacts business within the geographical boundaries of this Circuit and the unfair labor practice in question was alleged to have been engaged in this Circuit.

As required by 29 C.F.R. § 101.14, Petitioner will serve a file-stamped copy of this Petition on National Labor Relations Board Appellate Court Branch Deputy Associate General Counsel Linda Dreeben, 1099 14th Street N.W., Washington, D.C. 20570.

Dated: May 24, 2016

Respectfully submitted,

/s/ Haven L. Claytor

Henry D. Lederman

California State Bar No. 079498

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Petition for Review has been forwarded by certified mail return receipt requested to Respondent, and each Party admitted to participate in the National Labor Board proceedings as addressed below on this 24th of May, 2016.

Richard Griffin
General Counsel
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Washington, D.C. 20570

Executive Secretary
National Labor Relations Board
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/s/ Haven L. Claytor
Henry D. Lederman
Haven L. Claytor

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Valley Health System LLC d/b/a Spring Valley Hospital Medical Center and Centennial Hills Hospital Medical Center and Desert Springs Hospital Medical Center and Valley Hospital Medical Center and Summerlin Hospital Medical Center LLC d/b/a Summerlin Hospital Medical Center and Kathy Morris and Katrina Alvarez-Hyman.
Cases 28-CA-123611 and 28-CA-127147

May 5, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

On March 18, 2015, Administrative Law Judge Lisa D. Thompson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondents filed an answering brief, and the General Counsel filed a reply brief. The Respondents also filed limited and contingent cross-exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions,¹ cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ only to the extent consistent with this Decision and Order.⁴

¹ The Respondents request that the Board disregard the General Counsel's exceptions and supporting brief because they fail to comply with the requirements of Sec. 102.46 of the Board's Rules and Regulations. Specifically, the Respondents contend that the documents are deficient because the legal arguments in the General Counsel's brief fail to reference the exceptions to which they relate. We find that the General Counsel's filings substantially comply with Sec. 102.46. We therefore deny the Respondents' request. See, e.g., *Solutia, Inc.*, 357 NLRB 58, 58 fn. 1 (2011).

² In deciding the issues before us, we do not rely on the judge's citations to administrative law judge decisions that had not been subject to Board review.

³ There were no exceptions to the judge's findings that the Respondents violated Sec. 8(a)(1) by maintaining rules that prohibit employees from (1) engaging in conduct that "brings discredit on the System or Facility"; (2) speaking negatively about a coworker or Respondents; (3) disclosing the confidentiality of business-related and employee information, including written, verbal or electronic information; and (4) communicating in a language other than English.

⁴ We shall amend the judge's conclusions of law consistent with our findings herein, modify the judge's recommended Order to conform to the Board's standard remedial language and the violations found, and substitute new notices to conform to the Order as modified.

1. For the reasons stated below, we find, contrary to the judge, that the Respondents violated the Act by maintaining a rule in their Employee Handbook that prohibits conduct that is "offensive" to fellow employees. That rule provides, in relevant part:

Certain rules and regulations regarding employee behavior are necessary for the efficient operation of the System and the Facility and for the benefit and protection of the rights and safety of all. Conduct that interferes with System or Facility operations, brings discredit on the System or Facility, or is offensive to patients or fellow employees will not be tolerated.

The General Counsel alleged that the Respondents violated Section 8(a)(1) of the Act by maintaining that portion of the rule prohibiting employees from engaging in conduct that "brings discredit on the System or Facility" and that "is offensive to fellow employees." The judge found a violation based on the "brings discredit" language, but recommended dismissing the complaint allegation based on the language prohibiting conduct "offensive" to fellow employees.

An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule explicitly restricts activities protected by Section 7." *Id.* at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(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." *Id.* at 647.

The rule at issue here is not alleged to explicitly restrict protected activities or to have been promulgated in response to or applied to restrict Section 7 activities. Thus, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity. In construing rules, *Lutheran Heritage* teaches that they are to be given a reasonable reading, and are not to be considered in isolation. *Id.* at 646. Further, any ambiguity in the rule must be construed against the drafter—here, the Respondents. *Lafayette Park*, above at 825.

Applying the *Lutheran Heritage* standard, the judge found that employees would not reasonably construe the

bar on conduct that is “offensive” to fellow employees to prohibit Section 7 activity. See *Lutheran Heritage*, above at 646.⁵ Specifically, she found that the rule at issue here is similar to a civility rule that the Board found lawful in *Palms Hotel & Casino*, 344 NLRB 1363 (2005). We disagree. Considered in context, the rule in *Palms Hotel* was clearly directed at egregious and unprotected misconduct, banning conduct that is “injurious, offensive, threatening, intimidating, coercing, or interfering with” employee or patrons. *Id.* at 1367. The accompanying context for the term “offensive” in that case helped to define the type of conduct being targeted, providing sufficient clarity for workers to understand that the object of the rule was to target egregious misconduct, not to encompass conduct protected under the Act.

In contrast, in this case the broad prohibition against conduct “offensive” to coworkers stands in relative isolation. “Offensive” does not appear among a list of serious forms of objectively clear misconduct that would help employees understand its contours. It is not accompanied by any other descriptive language that would help employees interpret what types of “offensive” conduct the rule is targeting. As previously explained, employees “should not have to decide at their own peril what [conduct] is subject to such a prohibition.” *Hyundai America Shipping Agency*, 357 NLRB 860, 871 (2011), *enfd. in part and reversed in part*, 805 F.3d 309 (D.C. Cir. 2015). Yet this is precisely the situation the Respondents’ rule places employees in.

In this regard, the rule is similar to other work rules that the Board has found to be unlawful. See, e.g., *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3 (2014) (finding rule prohibiting “inappropriate attitude or behavior to other employees” unlawful due to its “patent ambiguity”); *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014) (finding rule prohibiting “insubordination or other disrespectful conduct” unlawful as phrase “disrespectful conduct” so ambiguous that employees would reasonably read the rule as encompassing Section 7 activity); *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011) (finding rule subjecting employees to discipline for “inability or unwillingness to work harmoniously with other employees” unlawful as phrase “work harmoniously” was “sufficiently imprecise” that it could encompass any disagreement or conflict among employees, including interactions protected by Section 7).

But, here, we need not rely exclusively on the inherent ambiguity of the term “offensive” because its placement

within the context of the rule further supports our finding. The rule’s restriction on conduct that is “offensive” to fellow employees appears in the same sentence as, and immediately follows, the prohibition on conduct that “brings discredit on the System or Facility,” which the judge found, and we agree, is unlawfully overbroad. This sequence makes it *more* likely that a reader would reasonably interpret the rule to target workplace discussions of terms and conditions of employment that—while potentially bringing “discredit” on the Respondent or otherwise being subjectively “offensive” to fellow employees—clearly fall within the ambit of the Act’s protections.

To be sure, the rule also contains introductory language setting forth an intention to promote “efficient operation” and protect “the rights and safety of all.” But this language does little to cure its ambiguity or overbreadth. These references do not provide sufficient context for an employee to determine what types of “offensive” comments or behaviors the rule is targeting, or how the rule would or would not be applied in the context of Section 7 activity (which often involves controversy, blunt criticisms, and disagreements that may well be deemed “offensive” by management or fellow employees). As a result, employees would likely refrain from engaging in certain Section 7 activity due to a reasonable concern that their conduct could be perceived as running afoul of the rule. See, e.g., *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015) (“Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear.”).

For these reasons, we reverse the judge and find the Respondents’ maintenance of this rule violates Section 8(a)(1).

2. We also reverse the judge’s recommended dismissal of the complaint’s allegation that the Respondents violated Section 8(a)(1) by maintaining provisions prohibiting class and collective actions in their Alternative Resolutions of Conflicts Program (arbitration agreement). In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied in part* 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed its earlier decision in *D. R. Horton*, 357 NLRB 2277 (2012), *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013), which held that an employer violates the Act “when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against their employer in any forum,

⁵ We find no merit in the Respondents’ contingent exception contending that we should apply an alternative legal standard in analyzing whether the rule at issue is facially valid.

arbitral or judicial.” Id. at 2277. Such agreements improperly interfere with the substantive right of employees, under Section 7 of the Act, to engage in collective action to improve working conditions.

Although the Respondents’ arbitration agreement prohibits employees from bringing class or collective actions in all forums, the judge found that the opt-out provision of the agreement placed it outside the prohibition against mandatory individual arbitration agreements in *Murphy Oil* and *D. R. Horton*. Subsequent to issuance of the judge’s decision, however, the Board rejected this rationale, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015). The Board further held in *On Assignment*, slip op. at 1, 5–8, that even assuming that an opt-provision renders an arbitration provision nonmandatory, an arbitration provision/agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. See also *Nijjar Realty, Inc., d/b/a Pama Management*, 363 NLRB No. 38 (2015). Accordingly, we reverse the judge and find that the Respondents’ maintenance of the provisions prohibiting class and collective actions in the arbitration agreement violates Section 8(a)(1).⁶

AMENDED CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and are health care institutions within the meaning of Section 2(14) of the Act.

2. By the following acts and conduct the Respondents have violated Section 8(a)(1) of the Act.

⁶ In cross-exceptions, the Respondents contend that *Murphy Oil* was incorrectly decided. We reject the Respondents’ argument for the reasons set forth in *Murphy Oil*.

In addition, the General Counsel argues that the judge erred in failing to find that the arbitration agreement interferes with employee access to the Board and its processes under *U-Haul Co. of California*, 347 NLRB 375 (2006). We reject this argument. Neither the complaint nor the parties’ stipulation of facts alleges that the agreement would restrict employee access to the Board. Nor did the parties file statements of position to accompany the joint stipulation that would put the Respondents on notice that the General Counsel was pursuing this additional theory. The Board has long held that a stipulation is conclusive on the parties making it and prohibits any further dispute as to the stipulated matters. E.g., *Woodland Clinic*, 331 NLRB 735, 741 (2000) (General Counsel could not allege a basis for unfair labor practice findings that went beyond parties’ stipulation). Accordingly, we find that the issue of whether the arbitration agreement unlawfully interferes with employee access to the Board is not properly before us.

(a) Maintaining a rule that prohibits employees from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

(b) Maintaining a rule that prohibits employees from speaking negatively about a coworker or the hospital.

(c) Maintaining a rule that prohibits employees from disclosing business-related and employee information.

(d) Maintaining a rule that requires employees, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

(e) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless employees individually opt out of the waiver.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondents, Valley Health System LLC d/b/a Spring Valley Hospital Medical Center and Centennial Hills Hospital Medical Center and Desert Springs Hospital Medical Center and Valley Hospital Medical Center and Summerlin Hospital Medical Center LLC d/b/a Summerlin Hospital Medical Center, Las Vegas, Nevada, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that prohibits employees from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

(b) Maintaining a rule that prohibits employees from speaking negatively about a coworker or the hospital.

(c) Maintaining a rule that prohibits employees from disclosing business-related and employee information.

(d) Maintaining a rule that requires employees, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

(e) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless employees individually opt out of the waiver.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the rule in their Employee Handbook that prohibits employees from engaging in conduct

that brings discredit on the System or Facility or is offensive to fellow employees;

(b) Rescind or revise the rule in their Service Excellence Expectations Handbook that prohibits employees from speaking negatively about a coworker or the hospital;

(c) Rescind or revise the rule in their Employee Handbook that prohibits employees from disclosing business-related and employee information;

(d) Rescind or revise the rule in their Employee Handbook that requires employees, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas;

(e) Furnish all current employees with inserts for the current Employee Handbook and Service Excellence Expectations Handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Employee Handbook and Service Excellence Expectations Handbook that (a) do not contain the unlawful rules or (b) provide the language of lawful rules;

(f) Rescind the Alternative Resolutions of Conflicts Program (arbitration agreement) in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums;

(g) Notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(h) Within 14 days after service by the Region, post a copy of the attached notices, in English and Spanish, marked "Appendix [A through E]" at the respective facility named in each notice.⁷ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondents customarily communicate with their employees by such means. Reason-

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

able steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notices marked "Appendix [A through E]" to all current employees and former employees employed by the Respondents at any time since September 3, 2013.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 5, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits you from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

VALLEY HEALTH SYSTEM LLC

5

WE WILL NOT maintain a rule that prohibits you from speaking negatively about a coworker or the hospital.

WE WILL NOT maintain a rule that prohibits you from disclosing business-related and employee information.

WE WILL NOT maintain a rule that requires you, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

WE WILL NOT maintain a mandatory arbitration agreement that requires you, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless you opt out of the waiver.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits you from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

WE WILL rescind or revise the rule in our Service Excellence Expectations Handbook that prohibits employees from speaking negatively about a coworker or the hospital.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits employees from disclosing business-related and employee information.

WE WILL rescind or revise the rule in our Employee Handbook that requires you, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

WE WILL furnish you with inserts for the current Employee Handbook and Service Excellence Expectations Handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Employee Handbook and Service Excellence Expectations Handbook that (a) do not contain the unlawful rules or (b) provide the language of lawful rules.

WE WILL rescind the Alternative Resolutions of Conflicts Program (arbitration agreement) in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the

arbitration agreement in all of its forms that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

VALLEY HEALTH SYSTEM LLC D/B/A SPRING VALLEY HOSPITAL MEDICAL CENTER

The Board's decision can be found at www.nlr.gov/case/28-CA-123611 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

NOTICE TO EMPLOYEES
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WE WILL NOT maintain a rule that prohibits you from disclosing business-related and employee information.

WE WILL NOT maintain a rule that requires you, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits you from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

WE WILL rescind or revise the rule in our Service Excellence Expectations Handbook that prohibits employees from speaking negatively about a coworker or the hospital.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits employees from disclosing business-related and employee information.

WE WILL rescind or revise the rule in our Employee Handbook that requires you, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

WE WILL furnish you with inserts for the current Employee Handbook and Service Excellence Expectations Handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Employee Handbook and Service Excellence Expectations Handbook that (a) do not contain the unlawful rules or (b) provide the language of lawful rules.

WE WILL rescind the Alternative Resolutions of Conflicts Program (arbitration agreement) in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in all of its forms that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

CENTENNIAL HILLS HOSPITAL MEDICAL CENTER

The Board's decision can be found at www.nlr.gov/case/28-CA-12361 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX C

NOTICE TO EMPLOYEES
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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits you from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

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ees from speaking negatively about a coworker or the hospital.

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WE WILL rescind the Alternative Resolutions of Conflicts Program (arbitration agreement) in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in all of its forms that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

DESERT SPRINGS HOSPITAL MEDICAL CENTER

The Board's decision can be found at www.nlr.gov/case/28-CA-123611 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX D

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WE WILL furnish you with inserts for the current Employee Handbook and Service Excellence Expectations Handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Employee Handbook and Service Excellence Expectations Handbook

that (a) do not contain the unlawful rules or (b) provide the language of lawful rules.

WE WILL rescind the Alternative Resolutions of Conflicts Program (arbitration agreement) in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in all of its forms that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

VALLEY HOSPITAL MEDICAL CENTER

The Board's decision can be found at www.nlr.gov/case/28-CA-123611 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX E

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits you from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

WE WILL NOT maintain a rule that prohibits you from speaking negatively about a coworker or the hospital.

WE WILL NOT maintain a rule that prohibits you from disclosing business-related and employee information.

WE WILL NOT maintain a rule that requires you, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

WE WILL NOT maintain a mandatory arbitration agreement that requires you, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless you opt out of the waiver.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits you from engaging in conduct that brings discredit on the System or Facility or is offensive to fellow employees.

WE WILL rescind or revise the rule in our Service Excellence Expectations Handbook that prohibits employees from speaking negatively about a coworker or the hospital.

WE WILL rescind or revise the rule in our Employee Handbook that prohibits employees from disclosing business-related and employee information.

WE WILL rescind or revise the rule in our Employee Handbook that requires you, while on duty, to communicate only in English with other employees, staff, customers, and visitors in all work and patient-access areas.

WE WILL furnish you with inserts for the current Employee Handbook and Service Excellence Expectations Handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Employee Handbook and Service Excellence Expectations Handbook that (a) do not contain the unlawful rules or (b) provide the language of lawful rules.

WE WILL rescind the Alternative Resolutions of Conflicts Program (arbitration agreement) in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in all of its forms that the agree-

ment has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

SUMMERLIN HOSPITAL MEDICAL CENTER LLC
D/B/A SUMMERLIN HOSPITAL MEDICAL CENTER

The Board's decision can be found at www.nlr.gov/case/28-CA-123611 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Randy M. Girer, Esq., for the General Counsel.
Bradley W. Kampas and Keahn N. Morris, Esqs. (Jackson Lewis, P.C.), for the Respondents.

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. This matter is before me on a stipulated record. On March 3, 2014, Kathy Morris (Charging Party Morris or Morris) filed a charge in Case 28-CA-123611 against Valley Health System LLC (VHS) d/b/a Spring Valley Hospital Medical Center (Spring Valley) and Centennial Hills Hospital Medical Center (Centennial) and Desert Springs Hospital Medical Center (Desert Springs)¹ and Valley Hospital Medical Center (Valley) and Summerlin Hospital Medical Center LLC (Summerlin) d/b/a Summerlin Hospital Medical Center (collectively, Respondents).² This charge was amended on April 29, 2014.³

On April 23, 2014, Katrina Alvarez-Hyman (Charging Party Hyman or Alvarez-Hyman) filed a charge in Case 28-CA-127147 against Respondents.⁴ This charge was amended on June 19, 2014.⁵ On July 19, 2014, the Regional Director for

¹ The parties jointly moved to correct the name of Desert Springs Medical Center by deleting the phrase "NC-DSH, d/b/a, LLC" from the name. The joint motion is granted.

² Jt. Exh. 4. Abbreviations used in this decision are as follows: "Jt. SOF" for the parties' Stipulation of Facts, Joint Motion to Submit Case on Stipulation and Joint Motion Requesting Permission to Forgo Submission of Short Position Statements; "Jt. Exh." for the parties' Joint Exhibits; "GC Exh." for the General Counsel's Exhibits; "R. Exh." for Respondents' Exhibits; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondents' brief.

³ Jt. Exh. 5.

⁴ Jt. Exh. 6.

⁵ Jt. Exh. 7.

Region 28 consolidated both cases and issued a complaint and notice of hearing.⁶ Respondents filed their answer, denying all material allegations and setting forth their affirmative defenses to the complaint.⁷

Regarding Case 28-CA-123611, the consolidated complaint alleges that Respondents violated Section 8(a)(1) of the National Labor Relations Act (the NLRA or the Act) when Respondents maintained overly broad and discriminatory work rules that prohibit employees from: (1) engaging in conduct that will "bring discredit on the System or Facility or is offensive to fellow employees;" (2) speaking negatively about a co-worker or Respondents; and/or (3) disclosing the confidentiality of business-related and employee information, including written, verbal or electronic information. The complaint also alleges that Respondents violated Section 8(a)(1) of the Act by maintaining an Alternative Resolution for Conflicts Agreement (ARC or Agreement) prohibiting employees from engaging in class or collective legal activity (collectively, the Morris allegations).

Regarding Case 28-CA-127147, the consolidated complaint alleges that Respondents violated Section 8(a)(1) and (3) of the Act when they maintained an overly broad and discriminatory work rule that requires all employees to communicate only in English (the Hyman allegation).⁸

On September 8, 2014, the parties submitted their joint stipulation of facts, motion to submit case on stipulation and joint motion requesting permission to forego submission of short position statements. I granted the parties' motion and directed them to submit posthearing briefs by October 24, 2014. However, upon the parties' request, the posthearing brief deadline was extended to November 14, 2014. On November 14, 2014, the parties submitted their posthearing briefs in this case.

Upon the stipulated record, and in full consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated to the following facts as to the nature of Respondents' business and jurisdiction:

1. At all material times, Respondent Summerlin has been a limited liability company with an office and place of business in Las Vegas, Nevada. It has been operating a hospital and medical center providing medical care.⁹

2. During a 12-month period ending October 30, 2013, Respondent Summerlin purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. During the same 12-month period, Re-

⁶ Jt. Exh. 1. Case Nos. 28-CA-115963, 28-CA-120097 and 28-CA-120294 were also included in the complaint. However, the parties entered into non-Board settlements regarding all of these cases. The undersigned approved the settlements on the record, severed and dismissed the complaint regarding the charges on July 22, 2014. See Jt. Exhs. 2-3.

⁷ Jt. Exhs. 8, 14.

⁸ Jt. Exh. 1, ¶¶ 4(1)-(m) and 6; see also, Jt. Exhs. 5, 7, and Jt. SOF ¶ 3.

⁹ Jt. SOF ¶ 5(a).

spondent Summerlin derived gross revenues in excess of \$250,000.¹⁰

3. Respondent Summerlin admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act and that it has been a health care institution within the meaning of Section 2(14) of the Act.

4. At all material times, Respondent VHS has been a limited liability company with an office and place of business in Las Vegas, Nevada. It has been operating Spring Valley, Centennial, Desert Springs and Valley, which are hospitals and medical centers in Las Vegas providing medical care.¹¹

5. During the 12-month period ending March 3, 2014, Respondent VHS purchased and received at its Spring Valley, Centennial, Desert Springs and Valley facilities' goods valued in excess of \$50,000 directly from points outside the State of Nevada. Also during that same 12-month period, Respondent VHS derived gross revenues in excess of \$250,000.¹²

6. Respondent VHS admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and that Spring Valley, Centennial, Desert Springs and Valley have been health care institutions within the meaning of Section 2(14) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Morris Stipulated Background Facts*

1. Charging Party Morris was hired by Respondent Summerlin on September 10, 2011.

2. It is undisputed that Respondents maintain an Employee Handbook as well as various policies and procedures on Respondents' internal employee website or Intranet.¹³ During new employee orientation, employees are required to sign and acknowledge receipt of the Employee Handbook.

3. Failure to comply with the Employee Handbook as well as Respondents' personnel policies and procedures may result in discipline or discharge.

4. Respondents also maintain a Service Excellence Expectations Handbook outlining standards of performance for their employees.¹⁴ Like the Employee Handbook, employees must sign a "commitment" form acknowledging receipt of the standards. Failure to adhere to the standards outlined in the Service Excellence Handbook may result in disciplinary action.

5. It is also undisputed that, since about September 3, 2013, Respondents have maintained the following rules in their Employee Handbook:

(a) Conduct that interferes with System or Facility operations, brings discredit on the System or Facility, or is offensive to patients or fellow employees will not be tolerated;¹⁵

(b) In addition to disclosures of health information, employees have an obligations to maintain the confidentiality of business-related and employee information, which includes, but is

not limited to all written, verbal and electronic information;¹⁶ and

(c) Don't speak negatively about a patient, co-worker, or the hospital.¹⁷

6. It is further undisputed that Respondents have maintained an Alternative Resolution of Conflicts (ARC) Agreement.¹⁸ The ARC Agreement is applicable to all employees employed by Respondents. The relevant provisions of the Agreement provide:

You (the employee) and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective or private attorney general representative action basis. Accordingly,

(1) There will be no right or authority for any dispute to be brought, heard or arbitrated as a class action ("Class Action Waiver"). The Class Action Waiver shall not be severable from this Agreement in any case in which (1) the dispute is filed as a class action and (2) a civil court of competent jurisdiction finds the Class Action Waiver is unenforceable. In such instances, the class action must be litigated in a civil court of competent jurisdiction; and

(2) There will be no right or authority for any dispute to be brought, heard or arbitrated as a collective action ("Collective Action Waiver"). The Collective Action Waiver shall not be severable from this Agreement in any case in which (1) the dispute is filed as a collective action and (2) a civil court of competent jurisdiction finds the Collective Action Waiver is unenforceable. In such instances, the collective action must be litigated in a civil court of competent jurisdiction. .¹⁹

7. The Agreement allows employees to bring claims before administrative agencies, including, but not limited to the NLRB.

8. It is also undisputed that employees may opt out of the ARC Agreement entirely. To do so, the Agreement provides:

Arbitration is not a mandatory condition of Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement. In order to Opt Out of Arbitration, the Employee must submit a signed and dated statement or, a "Alternative Resolution for Conflicts Agreement Opt Out Form" ("Form") that can be obtained from the Company's local or corporate Human Resources Department. In order to be effective, the signed and dated Form must be returned to the Human Resources Department within 30 days of the Employee's receipt of this Agreement. An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. Should an Employee not opt out of

¹⁰ Id.

¹¹ SOF ¶5(b).

¹² Id.

¹³ Jt. Exh. 9.

¹⁴ Jt. Exh. 10.

¹⁵ Jt. Exh. 9, p. 19.

¹⁶ Id. at p. 20.

¹⁷ Jt. Exh. 10, p. 8.

¹⁸ Jt. Exh. 12.

¹⁹ Id.

this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company. An employee has the right to consult with counsel of the Employee's choice concerning this.²⁰

9. Depending on the circumstances, employees were (and still are) introduced to the ARC Program either during the new-hire process (for employees hired after July 15, 2013) or during the roll-out of the program in November 2013.

10. In November 2013, Respondents designed a communications campaign to introduce the ARC program to existing employees. Information about the ARC Program was provided to all employees online. Employees were given an ARC Acknowledgement, ARC Agreement, and ARC Opt Out Form. These forms were also posted on Respondents' Intranet for employees to review.

11. Employees were also advised of their right to opt out of the ARC Program. To that end, employees can voluntarily opt out of the ARC Program by submitting a completed Opt Out Form by fax or mail, or by delivering it in person to their respective human resources department. Once it was received, the Opt Out form was date-stamped by a representative of Respondents' human resources department.²¹

12. If an employee did not sign the Opt Out Form within 30 days of receipt of the materials, the employee is bound by the Agreement.

13. The ARC Program is applicable to all employees employed by Respondents Summerlin and VHS (at its Spring Valley and Centennial facilities) except those who opted out.

14. The ARC Program is applicable to approximately 747 of Respondent VHS Valley's employees. Of those employees, 38 voluntarily signed Opt Out Forms.

15. The ARC Program is applicable to approximately 392 of Respondent VHS Desert Springs' employees. Of those employees, 76 voluntarily signed Opt Out Forms.

16. The ARC Program is applicable to approximately 1319 of Respondent Summerlin's employees. Of those employees, 343 voluntarily signed Opt Out Forms.

17. The ARC Program is applicable to approximately 1004 of Respondent VHS Spring Valley's employees. Of those employees, 196 voluntarily signed Opt Out Forms.

18. The ARC Program is applicable to approximately 658 of Respondent VHS Centennial Hills' employees. Of those employees, 117 voluntarily signed Opt Out Forms.

19. On November 8, 2013, Morris chose not to participate in the ARC Program and voluntarily signed an Opt Out Form.²²

B. The Alvarez-Hyman Stipulated Background Facts

1. It is undisputed that, since about September 3, 2013, Respondents have maintained a work rule in their Employee Handbook where employees are required to communicate only in English in the work environment, when conducting business at Respondents' hospitals or with each other, and when patients

or customers are present or in close proximity.²³

2. Employees are also required to communicate only in English when communicating between staff and patients, and visitors or customers unless interpretation or translation is requested or required.²⁴

III. ANALYSIS AND CONCLUSIONS

A. The Morris Allegations

The first issue is whether Respondents violated Section 8(a)(1) of the Act by maintaining various work rules on "discrediting" and "offensive" conduct, negative speech and disclosing confidential information.

1. "Discrediting" and "Offensive" conduct

Citing the Board's decision in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), counsel for the General Counsel (CGC) asserts that Respondents' work rule prohibiting conduct that "interferes with System or Facility operations, brings discredit on the System or Facility, or is offensive to patients or fellow employees" violates Section 8(a)(1) of the Act. The CGC avers that the rule is unlawful, because it is overbroad and ambiguous such that it could reasonably be construed as prohibiting employees from exercising their Section 7 rights. Respondents maintain that the code of conduct rule is lawful because it is clearly and unambiguously aimed at supporting Respondents' legitimate business interest of maintaining a peaceful and healing hospital environment.

Determining the legality of work rules requires a balancing of competing interests: the rights of employees to organize or otherwise engage in protected activity and the right of employers to maintain a level of discipline in the workplace. To that end, the Board set out a framework for evaluating whether an employer's work rule, such as those in Respondents' Employee Handbook and Service Excellence Expectation, violate the Act.

First, the rule must be examined to determine whether it explicitly restricts Section 7 activity. If it does, the rule is unlawful.²⁵ If the rule does not explicitly restrict Section 7 activity, the rule must be evaluated to determine whether: (1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 rights; or (3) employees would reasonably construe the language in the rule to prohibit Section 7 activity.²⁶ The Board must give the rule a reasonable reading and refrain from reading particular phrases in isolation or presume improper interference with employee rights.²⁷ However, "where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it."²⁸

On page 19 of their Employee Handbook, Respondents set

²³ Jt. Exh. 11, ¶ IV(C) – (C)(2).

²⁴ Id.

²⁵ *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

²⁶ *Lutheran Heritage*, supra.

²⁷ Id.

²⁸ *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

²⁰ Jt. Exh. 12, p. 108.

²¹ Jt. Exh. 12.

²² Jt. Exh. 13.

forth rules prohibiting “discrediting” and “offensive” conduct. The rule states:

Certain rules and regulations regarding employee behavior are necessary for the efficient operation of the System and the Facility and for the benefit and protection of the rights and safety of all. Conduct that interferes with System or Facility operations, brings discredit on the System or Facility, or is offensive to patients or fellow employees will not be tolerated.²⁹

Respondents argue that their rule prohibiting discrediting conduct is entirely proper and lawful citing the Board’s decision in *Ark Las Vegas Restaurant*, 333 NLRB 1284 (2001). I disagree.

In *Ark Las Vegas Restaurant*, the employer promulgated and maintained a work rule prohibiting employees from “participating in any conduct, on or off duty that tends to *bring discredit to*, or reflects adversely on, yourself, fellow associates, the Company or its guests, or that adversely affects job performance or your ability to report to work as scheduled.”³⁰ The General Counsel in that case argued that the rule, as stated, was so overbroad and vague that the rule could encompass conduct protected by the Act. However, the Board, agreeing with the Administrative Law Judge (ALJ), found that the rule, when viewed in the context with other language in the employer’s Handbook, was aimed at prohibiting conduct related to “crimes or other misconduct, such as giving proprietary information to competitors.” Given that context, the judge concluded that he “doubt[ed] that there would be any uncertainty . . . whether any employee, guided by knowledgeable union officials, would harbor uncertainty over the scope of the rule.”³¹

While the judge in *Ark Las Vegas Restaurant* found corresponding language in the Handbook that led him to resolve the rule’s ambiguity, I do not find any such language here. In fact, nothing in the preceding sentence or anywhere else within the rule tells employees anything about the type of “discredit[ing]” conduct Respondents intend to prevent. It is possible that the conduct being regulated is related to behavior considered disruptive, but without other clarifying language, an employee would be left speculating as to Respondents’ true intention. Such ambiguity must be resolved “against the promulgator of the rule.”³²

Respondents also point to *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), where the Board found that the employer did not violate Section 8(a)(1) by maintaining a rule prohibiting “off-duty misconduct that materially and adversely affects job-performance or tends to bring discredit to the Hotel.”³³ However, like in *Ark Las Vegas Restaurant*, the language in the employer’s work rule in *Flamingo Hilton* was sufficiently descriptive to decipher what type of conduct the employer intended to prohibit. That description is absent in this case. Rather, I find Respondents’ rule is so overbroad and ambiguous that there would be “uncertainty whether any employee would

harbor uncertainty over the scope of the rule.”³⁴ Accordingly, I conclude that Respondents’ rule prohibiting conduct that discredits it is unlawful as it would reasonably be construed as touching on conduct protected by the Act.

With respect to second half of rule prohibiting “offensive” conduct toward patients or fellow coworkers, Respondents assert that this language is lawful, because, on its face, it cannot reasonably be read or interpreted to interfere with Section 7 activity. Here, I agree.

The Board addressed a work rule similar to Respondents’ in *Fiesta Hotel Corp d/b/a Palms Hotel & Casino*, 344 NLRB 1363 (2005).³⁵ In *Palms Hotel & Casino*, the employer maintained a standard of conduct which prohibited employees from engaging in “any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons.”³⁶ Although the ALJ found that the rule was facially violative of the Act, the Board disagreed. In so doing, the Board determined that the handbook prohibition against using threatening, offensive, or abusive language was not inherent to Section 7 activities. As such, the mere fact that the rule could encompass or reasonably be interpreted as barring Section 7 activity did not, by itself, render the rule facially invalid. Thus, without evidence that the rule either touched on, had been applied or intended to apply to situations that relate to Section 7 activity, the Board held that an ambiguously worded rule barring threatening, offensive or abusive conduct will not, on its face, be deemed unlawful.³⁷

Like in *Palms Hotel*, in this case, I do not find that Respondents’ rule prohibiting offensive conduct violates the Act. First, I conclude that the language prohibiting conduct offensive to patients is lawful due to Respondents’ legitimate business concerns for patient care and maintaining a safe healing environment. Second, although the CGC argues that the language is overbroad, ambiguous and fails to provide examples of the prohibited versus acceptable conduct, the Board specifically rejected this argument in *Palms Hotel*. In fact, like in *Palms Hotel*, the CGC in this case failed to present any evidence that Respondents applied or intended to apply the ambiguously worded rule to conduct protected by Section 7. Without such evidence, the fact that Respondents’ rule could touch on conduct related to the Act does not render the rule facially invalid. Moreover, I decline to “engage in such speculation in order to condemn as unlawful a facially neutral work rule that is neither aimed at adopted in response to, nor enforced against” Section 7 activity.³⁸ Although Respondents certainly could (and should) have used more descriptive language to describe the “offensive” conduct they sought to prohibit (i.e., like in *Palms Hotel*, where Respondent prohibited “conduct . . . which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with . . .”), the fact that

²⁹ Jt. Exh. 9, p. 19.

³⁰ *Ark Las Vegas Restaurant*, 333 NLRB 1284, 1291 (2001) (emphasis added).

³¹ *Id.* at 1291.

³² *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

³³ *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

³⁴ *Ark Las Vegas Restaurant*, 333 NLRB at 1291.

³⁵ *Palms Hotel & Casino*, 344 NLRB 1363 (2005).

³⁶ *Id.* at 1367.

³⁷ *Id.* at 1367–1368.

³⁸ *Palms Hotel & Casino*, 344 NLRB at 1367.

Respondents' rule does not specify what it deems offensive does not automatically render the rule invalid.

The CGC also contends that Respondents have no business justification for promulgating the rule. This argument is also without merit. In fact, Respondents' business justification is set forth in the opening paragraph (i.e., patient care, hospital operations, and a safe healing environment). Indeed, as a hospital, Respondents have special business concerns (i.e., patient care and promoting a quiet, comfortable and healing environment) that justify tipping the balance in favor of maintaining the code of conduct.³⁹ Simply put, the CGC has failed to demonstrate that a reasonable employee reading Respondents' rule prohibiting offensive conduct would construe it to prohibit conduct protected by the Act.

Accordingly, I find that Respondents' rule prohibiting "discrediting" conduct violates Section 8(a)(1) as alleged but recommend that the charges as to Respondents' rule prohibiting "offensive" conduct be dismissed.

2. "Negative" speech

Another of Respondents' rules prohibit employees from "speak[ing] negatively about a patient, co-worker, or the hospital."⁴⁰ Specifically, Respondents' rule states:

Our patients place their trust in use [sp] during some of the most vulnerable periods of their life. We have an obligation based on this relationship to treat them with respect. The community trusts us to care for their loved ones and negative discussions about colleagues or the hospital erodes the trust.⁴¹

The CGC asserts that this rule is unlawful as it is overly broad and ambiguous such that a reasonable employee would understand that such language would prevent Section 7 activity. However, Respondent counters, arguing that their rule is lawful, unambiguous and, when read in conjunction with the explanatory and other language in its Service Excellence Expectations, would not reasonably be construed to restrict Section 7 activity.

The Board distinguishes work rules prohibiting false, profane, and vicious statements that lack malice (lawful)⁴², rules prohibiting "abusive or threatening language" that seeks to maintain basic civility (lawful in most instances)⁴³ from rules that restrict "negative speech." In *Roomstore*, 357 NLRB 1690, 1691 at fn. 3 (2011), the Board found a rule prohibiting "any

type of 'negative energy or attitudes'" unlawful.⁴⁴ Also, a rule prohibiting "negative conversations" about managers was found unlawful, as it had no clarifying language.⁴⁵ Similarly, in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), the Board found unlawful a rule that prohibited loud, abusive, or foul language, as it was so broad that it could be interpreted as barring lawful union organizing propaganda.⁴⁶ The Board also found unlawful an employer's work rule that subjected employees to discipline for the "inability or unwillingness to work harmoniously with other employees."⁴⁷ In that instance, the employer neglected to define those terms; the prohibition was merely one of a laundry list of rules and "was sufficiently imprecise that it could encompass any disagreement or conflict among employees including those related to Section 7."⁴⁸ In all of these instances, the rules were ambiguous, and those ambiguities were resolved against the employer.

In this case, I find Respondents' rule prohibiting negative speech regarding patients lawful as it is clearly directed toward Respondents' legitimate business concerns of patient care and providing a safe and healing environment. This aspect of the rule cannot reasonably be read to prohibit protected activities. In making this finding, I note the special circumstances afforded hospitals where it may be appropriate to permit Respondents greater latitude to restrict union activities in patient-care areas in order to promote a "pleasing and comforting [environment] where patients are principal facets of the day's activities [such that patients and their families] need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one reminding of the tensions of the marketplace in addition to the tensions of the sick bed."⁴⁹ However, the remaining parts of Respondents' rule violate the Act.

Although not determinative, ALJ Susan Flynn's decision in *Williams Beaumont Hospital* is instructive on this issue. In that case, Respondent promulgated several codes of conduct rules, one of which prohibited "negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors."⁵⁰ Judge Flynn found this rule lawful because it was unambiguous (as to the type of comments prohibited) and could not be interpreted as prohibiting lawful discussions protected by the Act since it was legitimately directed toward Respondents' duty to provide a safe and healing environment (as a hospital).⁵¹

Unlike in *Williams Beaumont Hospital*, where the targeted "negative" comments referred to the "moral character or professional capabilities" of employees, physicians or others, Respondents' rule is unlawful because it is ambiguous and ill-

³⁹ See *St. John's Hospital*, 222 NLRB 1150, 1150 (1976) (in reviewing respondent hospital's blanket no solicitation rule, the Board recognized a presumption that a hospital's work rule prohibitions may be presumptively lawful, because the "primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted").

⁴⁰ Jt. Exh. 10, p. 8.

⁴¹ Jt. Exh. 10, p. 86.

⁴² See *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (false and inaccurate statements that are not malicious are protected).

⁴³ See *Palms Hotel & Casino*, supra at fn. 35 and *Lutheran Heritage*, 343 NLRB 646, 647 (2004).

⁴⁴ 357 NLRB 1690, 1691 fn. 3 (2011).

⁴⁵ *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005).

⁴⁶ 330 NLRB at 295.

⁴⁷ *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011).

⁴⁸ Id., slip op. at 2.

⁴⁹ See *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976), enf. in part 557 F.2d 1368 (10th Cir. 1977); see also, *NLRB v. Beth Israel Hospital*, 437 U.S. 483, 509 (1978).

⁵⁰ See *William Beaumont Hospital*, Case JD-04-14 (Jan. 30, 2014) (emphasis added).

⁵¹ Id.

defined even when read in conjunction with the explanatory paragraph. Moreover, it fails to describe with any particularity what type of “negative” comment is prohibited. Even the sentence that “negative discussions about colleagues or the hospital erodes the trust” fails to clarify what type of conduct is prohibited. Although Respondents have legitimate concerns regarding appropriate staff comments around patients and in promulgating work rules to maintain a safe atmosphere, particularly in patient care areas, I find that this portion of the rule so overbroad and ambiguous that it reasonably encompasses lawful discussions or complaints that are protected by Section 7 of the Act.

The Board has found similar prohibitions on “negative speech” unlawful. Specifically, in *Hill & Dales General Hospital*,⁵² the Board found respondent hospital’s rules prohibiting “negative comments about fellow team members,” “engag[ing] in or listen[ing] to negativity,” and requiring employees to “represent [the hospital] in the community in a positive and professional manner in every opportunity” overbroad, ambiguous and unlawful. Similarly, in *Claremont Resort & Spa*, 344 NLRB 832 (2005), the Board found the employer’s rule prohibiting “negative conversations” about managers, without any additional clarifications, unlawful, since such a rule would “reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing [them] to refrain from engaging in protected activities.”⁵³

Respondents attempt to distinguish their rule from “negative speech,” arguing that their rule is geared toward prohibiting “negative attitudes.” Respondents rely on the Board’s decision in *Cooper River of Boiling Springs*, 360 NLRB No. 60, slip op at 25 (2014) to support their contention.⁵⁴ However, *Cooper River* is inapposite. In *Cooper River*, the Board, through the ALJ, distinguished rules prohibiting “negative conversations” (unlawful) because they “cut to the very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees’ discussions about their wages, hours and other terms and conditions of employment . . .” from rules that restrict one from displaying a “negative attitude” (lawful), which do not limit an employee’s right to have conversations about certain subjects.⁵⁵

Here, Respondents’ rule seeks to restrict “speech,” (i.e., “do not speak negatively about . . . employees or the hospital”) and as such, I find it akin to prohibiting negative “conversations” which goes to the heart of an employee’s Section 7 activity.⁵⁶ Moreover, Respondents’ rule is vague, overbroad (i.e., applies whether in patient or non-patient care areas), ambiguous, and contains no clarifying language such that it reasonably encompasses discussions that are otherwise protected by the Act.

Finally, Respondents assert that their rule is lawful due to the special circumstances afforded hospitals.⁵⁷ But here, Respond-

ents set forth an interesting theory. According to Respondents, under the Affordable Care Act, their Medicare payments are directly related to their participation in federally sponsored surveys to improve patient outcomes. These Federal surveys have shown that patient outcomes are improved when hospitals create a positive environment for employees and patients. As such, Respondents contend that they must participate in these surveys and implement their code of conduct rules that maintain a positive patient experience in order to receive Medicare funding through the Affordable Care Act.

Even assuming, *arguendo*, that Respondents’ theory is correct, they fail to set out this explanation in their Handbook or Service Expectation and cite no case law or Board precedent that tips the balance in their favor based on these funding considerations. Moreover, Respondents’ rule would be applicable in patient and non-patient care areas; thus, the Board has not given hospitals like Respondents’ latitude to implement such broad work restrictions.⁵⁸ While I agree that Respondents’ restrictions on speaking negatively about patients are justified, the restrictions on speaking negatively about employees and/or the hospital would reasonably be interpreted to include comments/conversations protected by the Act.

Accordingly, I find Respondents’ rule that prohibits speaking negatively about employees and the hospital violates Section 8(a)(1) of the Act. However, I recommend that the charges as to Respondents’ rule prohibiting speaking negatively about patients be dismissed.

3. Prohibiting confidential information

Lastly, the CGC alleges that Respondents’ confidentiality rule violates the Act, because it is overbroad, ambiguous, and, as such, employees would reasonably interpret this provision as precluding their discussion of wages and other terms and conditions of employment. I agree.

The pertinent part of Respondents’ confidentiality policy states:

In addition to disclosure of health information, employees have an obligation to maintain the confidentiality of business-related and employee information, which includes, but is not limited to, all written, verbal and electronic information.⁵⁹

“Business-related” and “employee” information is not defined.

Respondents argue that their confidentiality policy is lawful because it is geared toward protecting patient information.⁶⁰

solicitation and insignias in patient and non-patient care areas are lawful because such activity “might be unsettling to patients— particularly those who are seriously ill and . . . need quiet and peace of mind”).

⁵² See *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), *enfd.* 95 F.3d 681 (8th Cir. 1996), *cert. denied* 521 U.S. 1118 (1997) (Board, agreeing with ALJ, found the employer’s work rules unlawful which limited employee speech in order to protect clients and vulnerable adults who were unable to handle stress).

⁵³ *Jt. Exh. 9*, p. 69.

⁵⁴ See e.g. *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 212–213 (D.C. Cir. 1996) (local hospital’s confidentiality rule preventing employee from discussing patients’ medical information and grievances “within earshot of patients” found lawful due to importance of hospital’s interest in protecting patients from disturbances).

⁵² 360 NLRB No. 70, slip op. at 1 (2014).

⁵³ 344 NLRB at 836 (2005).

⁵⁴ 360 NLRB No. 60, slip op at 25 (2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See generally *St. John’s Hospital*, 222 NLRB 1150, 1150 (1976) (generally hospitals entitled to presumption that work rules prohibiting

But Respondents clearly intended to protect more than simply patient information because they included the phrase “in addition to disclosure of health information” in their policy. In fact, Respondents distinguish confidential patient information in the preceding paragraph which states: “All patient health information is to be maintained confidentially and the release of such sensitive patient information must comply with all state and federal laws as well as Facility policy(s).”⁶¹ So the language in question was intended to protect something more.

The problem with Respondents’ confidentiality policy is that the terms are ill-defined. I dealt with a similar confidentiality provision in *MUSE School CA*, JD(SF)-43-14 2014 WL 4404737 (Sept. 8, 2014), *affd.* 2014 WL 5338539 (Oct. 20, 2014). In that case, the employer maintained a confidentiality policy that required all employees, “both during and after the time that [they] provid[e] services to MUSE, [to] maintain the confidentiality of all Confidential Information.” Confidential information included “any material or information about MUSE, MUSE employees, MUSE students, the families of MUSE students, including but not limited to the Cameron Family, and the Cameron Entities that is not generally known to the general public or business competitors.” It also included “information, however acquired, relating to: MUSE’s financial and business affairs, budgets, compensation paid to MUSE owners and employees.”

Because MUSE failed to clearly define the “prohibited conduct” it sought to restrict, and in fact, precluded, without limitation, any discussion about any nonpublic information regarding its founders, clients and employees, I determined that the rule, as written, encompassed “various kinds of information about employees, including their wages.” Accordingly, I found MUSE’s ambiguous confidentiality rule unlawful because it “could reasonably be construed to include a prohibition on discussing employee wages” such that it tended to chill protected activity.

Like in *MUSE School*, Respondents’ confidentiality policy is equally vague and ill-defined on the meaning of confidential “business-related” or “employee” information. Such a broad, undefined prohibition of confidential information, which includes information in written, verbal and electronic formats, without clarification, violates the Act as it could reasonably encompass discussion of and information related to employees’ wages and terms and conditions of employment.

Accordingly, I find that Respondents’ confidentiality policy preventing disclosure of “business-related” and “employee” information violates Section 8(a)(1) of the Act.

4. The ARC agreement

Next, I turn to the “more difficult question” left unanswered by the Board in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012). That is—whether Respondents’ violated Section 8(a)(1) of the Act by requiring employees to sign their ARC Agreement that prohibits all class and collective actions and requires employees to individually arbitrate all employment related disputes but allows employees to opt-out of the agreement altogether.

In *D. R. Horton*, the Board found that the employer violated

Section 8(a)(1) of the Act when it required its employees, as a condition of employment, to sign an “agreement” that any and all future employment claims against the company would be determined on an individual basis by final and binding arbitration. The Board held that the mandatory arbitration “agreement” was unlawful because: (1) it did not contain an exception for unfair labor practice (ULP) allegations, and thus would reasonably lead employees to believe that they could not file charges with the Board; and (2) it required employees to waive their substantive right under the NLRA to pursue concerted (i.e., classwide or collective) legal action in any forum, arbitral or judicial. The Board recently reaffirmed its holding and reasoning from *Horton* in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

However, in this case, Respondents’ arbitration agreement allows employees to file ULPs with the Board and permits them to opt out of arbitration entirely, thereby preserving their right to pursue future claims in court on either an individual or collective/class basis. Respondents argue that this is a significant difference because, as found by numerous Federal and State courts, it renders their arbitration procedure truly voluntary, and as such, lawful.

The CGC, on the other hand, argues that the ARC Agreement is unlawful, despite the opt-out provisions, because: (1) the agreement prevents employees from engaging in collective/concerted activities; (2) the agreement is effectively a mandatory condition of employment for employees; and (3) the opt-out provisions do not render the ARC Agreement “lawful,” because those employees who opt out are denied the opportunity to engage in collective/class activities with those employees who opt-in.

Having carefully considered the parties’ arguments and cited cases, in agreement with Respondents, I find Respondents’ ARC Agreement is voluntary, thus it is distinguishable from the agreements decided in *Murphy Oil* and *D. R. Horton*. In *Murphy Oil* and *D. R. Horton*, the Board held unlawful an employer’s mandatory arbitration program that requires, as a condition of employment, individual arbitration of all employment related claims and precludes class/collective actions of those claims without the ability to opt out of the program. However, here, because there is a written opt-out provision in Respondents’ Agreement, I find that Respondents’ ARC Agreement is voluntary. In fact, Respondents’ policy falls “squarely within footnote 28 of the Board’s decision in *D. R. Horton*” where the Board left open:

[W]hether, if arbitration is mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.⁶²

Indeed, the Ninth Circuit, in *Johnmohammadi v. Bloomington, Inc.*, found a similar arbitration agreement with a written opt-out clause lawful, reasoning that:

If [an employee] wanted to retain [the right to file a class ac-

⁶¹ *Id.*

⁶² *D. R. Horton, Inc.*, 357 NLRB 2277 at fn. 28, see also *R. Br.* at 22.

tion) nothing stopped [him or her] from opting out of the arbitration agreement. [The employer] merely offered [the employee] a choice: resolve future employment-related disputes in court, in which case s/he would be free to pursue [their] claims on a collective basis; or resolve such disputes through arbitration, in which case [they] would be limited to pursuing [their] claims on an individual basis. In the absence of any coercion influencing the decision, we fail to see how asking employees to choose between those two options can be viewed as interfering with or restraining their right to do anything.⁶³

I find Respondents' Agreement almost identical to the one ruled lawful in *Johnmohammadi*.

The CGC argues that Respondents' Agreement, on its face, "binds employees to an irrevocable waiver of prospective Section 7 rights [which] precludes [them] from making [a choice] as to . . . future claim[s]." In essence, the CGC contends that Respondents' Agreement effectively does not give employees a choice to waive their Section 7 rights. But it does. Indeed, the language in the ARC Agreement clearly and unequivocally allows the employee to choose to participate in the class action waiver or opt out. Thus, as the Ninth Circuit found, asking employees to choose between participation in the class action waiver/arbitration program or opting out of it does not interfere with or restrain an employee's Section 7 rights.⁶⁴

Similarly, as to the CGC's argument that Respondents' Agreement is a mandatory condition of employment, particularly for those who do not "affirmatively extricate [themselves] from the policy,"⁶⁵ again, I disagree. Nor does the very act of requiring employees to decide to opt in or out render the Agreement mandatory. Here, the CGC borrows from ALJ William Cates' reasoning in *Pama Management*, JD(ATL)-31-13 2013 WL 6384517 (2013). Although not precedent, Judge Cates found that the company's arbitration program that contained an opt-out provision:

has a reasonable tendency to chill employees from exercising their statutory rights because they are required to take an affirmative action simply to preserve Section 7 rights they already have. State differently, the waiver unlawfully compels, as a condition of employment, employees to affirmatively act (check an "opt-out" box at the end of a long paragraph, with little explanation, as to its far reaching effects) in order to maintain rights they already have under Section 7.

Judge Cates also found the company's waiver invalid, because it imposed "a waiver of Section 7 rights, or to 'opt-out' at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action."

However, ALJ Jeffrey Wedekind found otherwise in *Bloomingtondale's Inc.*, JD(SF)-29-13 2013 WL 3225945 (June 25, 2013). Again, while not precedent, Judge Wedekind found, and I adopt his rationale, *Bloomingtondale's* individual arbitration

⁶³ *Johnmohammadi v. Bloomingtondale's Inc.*, 755 F.3d at 1076 (effectively affirming ALJ Jeffrey Wedekind's decision in *Bloomingtondale's Inc.*, JD(SF)-29-13 2013 WL 3225945 (Jun. 25, 2013))

⁶⁴ *Johnmohammadi*, 755 F.3d at 1076.

⁶⁵ See GC Br. at 43.

program, such as the one here, voluntary, because it adequately notified employees about the class action ban, and gave employees, particularly, new hires, 30 days in which to learn more about the "benefits and limitations" of arbitration and opt in or out. Judge Wedekind also found no allegation or record evidence that *Bloomingtondales* threatened employees with reprisals or retaliated against them for opting out.

Like in *Bloomingtondales*, I am persuaded that Respondents in this case adequately notified employees in writing about the class action ban; gave employees a 30-day window to opt in or out of the program; and advised all employees to consult with an attorney if necessary for further explanation of the terms of the agreement. Moreover, record evidence reveals CP Morris opted out of the program and was never retaliated against for doing so. I find no evidence, and the CGC has not alleged, that Respondents have threatened any employees with reprisals for opting out of the program.

As to the CGC's argument that Respondents' Agreement restricts employees who opt out of the program from engaging in concerted activity (i.e., pursuing collective/class actions) with those who opted into the program, here again, I find it does not. What it does do is require employees to choose whether to participate in the program. While those who "opt-in" are bound by the Agreement, and thus, are prohibited from filing class/collective actions (i.e., engaging in concerted activity), the important factor which the CGC ignores is—those employees chose to forego that right. Although the CGC argues that the voluntariness of the Agreement "misses the point," the fact that employees are allowed to opt out of the program is the point that distinguishes Respondents' Agreement from those found unlawful in *Horton and Murphy Oil*.⁶⁶

The CGC further contends that Respondents' opt-out procedure is onerous and unlawfully burdens employees. However, a one-time requirement that employees must either notify Respondents in writing (in their own words) that they intend to opt out of the arbitration program or sign and deliver a preprinted form of their intent to opt out, seems a minimal administrative burden, and no authority is cited holding otherwise. Similarly, the ARC Agreement, and particularly the opt-out provision, is not so burdened with legalese that employees, including new employees, cannot read and understand their right to choose between participation and opting out. Moreover, if they find the language difficult, employees are advised to consult an attorney. I further find that the 30-day notice to opt out is a sufficient period of time upon which an employee can determine whether s/he intends to be subject to the Agreement.⁶⁷

Alternatively, the CGC contends that Respondents' class ac-

⁶⁶ *Johnmohammadi*, 755 F.3d at 1076.

⁶⁷ See e.g., *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-2000 (9th Cir. 2002) (mandatory arbitration agreement was not procedurally unconscionable because it only allowed employees to opt out during the first 30 days of employment), *Bloomingtondales, Inc.*, JD(SF)-29-13 2013 WL 3225945 (Jun. 25, 2013) (ALJ Jeffrey Wedekind held employer's 30-day opt out procedure sufficient to render employer's arbitration program voluntary), see also, *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116 (7th Cir. 1996), cert. denied 117 S.Ct. 1426 (1997) ("life is full of deadlines, and [there is] nothing particularly onerous about this one.")

tion waiver unlawfully burdens employees by requiring them to prospectively trade away their statutory right to engage in collective or class actions, including litigation in any forum. However, I am again persuaded by Judge Wedekind's rationale when he spoke on why this argument has little merit. When faced with a similar argument by the General Counsel, Judge Wedekind explained that, if the Board intended to find arbitration agreements unlawful because they trade away substantive Section 7 rights even in the face of an opt-out clause, then

[T]he Board's comment in *Horton* that voluntary agreements presented a "more difficult question" would have to be considered gratuitous. What makes the issue here "more difficult" is that there is no "emphatic federal policy" in favor of employees getting severance pay, a raise, or a parking space. [However], there is such a policy in favor of arbitrating disputes. In short, arbitration is not just any benefit; it is a federally favored and supported benefit. The question, therefore, is whether it is a benefit of such overriding Federal importance that the Board must or should look away when employees voluntarily enter into mandatory arbitration agreements, even if they are conditioned on employees completely and irrevocably relinquishing their right under the NLRA to engage in collective legal action against their employer."

Like the General Counsel in *Bloomington*, the CGC provides no real answer to this question. Rather, she simply contends that concerted activity is a substantive right and Board precedent and Supreme Court opinions indicate that arbitration agreements may not require a party to forgo such rights. However, again, if the answer were so straightforward, there would be nothing "more difficult" about this case than *D. R. Horton*.

Finally, because I have determined that Respondents' ARC Agreement is voluntary, and thus lawful under the Act, it is unnecessary to address the CGC's remaining arguments concerning the Agreement's savings clause or Respondents' affirmative defenses.

Accordingly, for all the foregoing reasons, I find that the CGC has failed to carry the burden of proof and/or persuasion regarding Respondents' ARC Agreement, and I am persuaded that Respondents did not violate Section 8(a)(1) of the Act by maintaining their Agreement. For that reason, I recommend that the charges as to Respondents' ARC Agreement be dismissed.

B. The Alvarez-Hyman Allegations

Lastly, the CGC alleges that Respondents' "English-only" rule violates Section 8(a)(1), because it is overbroad and, thus, would reasonably chill employees from engaging in Section 7 activity.

Respondents rule requires all employees to speak and communicate only in English "when conducting business with each other," "when patients or customers are present or in close proximity," and "while on duty between staff, patients, visitors [and/or] customers unless interpretation or translation is requested or required." The CGC argues that Respondents' rule is so overbroad, it inhibits employees, particularly non-native English speaking employees, from being able to freely communicate (in their native language) about working conditions and/or other terms and conditions of employment.

However, Respondents contend that their English-only rule is lawful relying on the Equal Employment Opportunity Commission's (EEOC) guidance that allows for English-only rules if justified by business necessity.⁶⁸ While not binding on the Board, EEOC's guidance provides that a rule prohibiting employees, at all times in the workplace, from speaking their primary language or the language they speak most comfortably "disadvantages an individual's employment opportunities because of [their] national origin."⁶⁹ Accordingly, EEOC will presume that such a rule, like the one in this case, violates Title VII, unless the employer can show that requiring employees to speak only in English at certain times is justified by business necessity.⁷⁰ An English only rule is justified by business necessity if it is necessary for the employer to operate safely or efficiently.⁷¹ Situations where business necessity will justify an English-only rule include those: (1) "in which business necessity would justify an English-only rule," (2) where "workers must speak a common language to promote safety," (3) where cooperative work assignments require an English-only rule to promote efficiency, or (4) "to enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers."⁷²

Before delving into Respondents' English only rule, I note two important points. First, both parties admit that the Board has not addressed this issue in any of its decisions; thus, it is an issue of first impression.

Second, the Board disfavors adopting precedent from other administrative tribunals unless the Board finds it is materially related to the goals and purposes of the NLRA.⁷³ Although I find EEOC guidance instructive, I will follow Board precedent and analyze Respondents' English-only rule under the doctrine set forth in *Lutheran Heritage Village-Livonia* and its progeny.⁷⁴ That is—whether Respondents' English only rule would reasonably tend to chill employees from exercising their Section 7 rights. Under this standard, Respondents' English-only rule does not explicitly restrict Section 7 activity. Nor is there any evidence that the rule was promulgated in response to union activity. Thus, if the rule is unlawful, employees must reasonably construe the language to prohibit Section 7 activity.

In this case, I conclude that employees would reasonably construe Respondents' English-only rule to restrict them from engaging in concerted activity. To that end, I find Respondents' rule akin to rules that infringe upon an employee's right to engage in "negative speech" and "negative conversations." Be-

⁶⁸ See 29 C.F.R. § 1606.7(b); EEOC Compliance Manual Section 13, "National Origin Discrimination," No. 915.003 (Compliance Manual on National Origin Discrimination), at 13–22 (Dec. 2, 2002).

⁶⁹ 29 C.F.R. § 1606.7(a).

⁷⁰ Id. § 1606.7(b).

⁷¹ EEOC Compliance Manual, at 13–22.

⁷² Id. at 13–23.

⁷³ See *HTH Corporation, Pacific Beach Corp., and KOA Management, LLC*, 361 NLRB No. 65 (Board adopts front pay remedies from precedent under Title VII because it is materially similar to afford make whole relief under the NLRA.)

⁷⁴ 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

cause Respondents' English-only rule is vague as to time and location (i.e., must use English in patient and non-patient areas, in patient access areas, and between employees, staff, customers, patients and visitors), it infringes on an employee's ability to freely discuss and communicate about work conditions, wages and other terms and conditions of employment. As such, I find that Respondents' language restrictions would prohibit speech that "cut(s) to the very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees' discussions about their wages, hours and other terms and conditions of employment."⁷⁵

Even assuming EEOC's standard is applicable in this case, I find Respondents' rule is not justified by business necessity. Here, Respondents argue that their rule is justified in order to maintain hospital efficiency and minimize disruption in patient care by employees speaking in languages other than English. This argument is similar to the Board's special circumstances presumption afforded hospitals when their work rules restrict union activity.⁷⁶ However, Respondents' English-only rule goes far beyond patient-care areas, where courts have afforded hospitals latitude in restricting Section 7 rights. Instead, Respondents' rule requires employees to speak only English while on duty, between themselves, staff, customers, visitors, and in non-patient areas.

Respondents also contend that their English-only provision specifically allows "[e]mployees who speak languages other than English [to] speak to each other in their language on their own time, i.e., before and after their designated work schedule and on breaks and lunch."⁷⁷ As such, Respondents compare their English-only rule to "presumptively lawful" no-solicitation rules which allow employers to restrict union related solicitation except during non-work hours (i.e., such as during breaks and before and after work). Respondents rely on the Board's decision in *St. John's Hospital*.⁷⁸

In *St. John's Hospital*, the Board, agreeing with the ALJ, found that, while the hospital's no solicitation rule may be lawful in patient care areas even during nonworking time, (due to its need to have patients "free of the disruption which might result from solicitation and distribution of literature in any public area"), its "broad [no-solicitation] restrictions [were] not justified . . . insofar as they apply to other areas." Specifically, regarding the hospital's restrictions in visitor access areas (other than those involved in patient care), the Board determined that the "possibility of any disruption in patient care resulting from solicitation or distribution of literature was remote."⁷⁹ The Board further determined that the hospital's no-solicitation rule in "patient access areas such as cafeterias, lounges, and the like" was unlawful particularly since the Board could "not per-

⁷⁵ Id.

⁷⁶ See generally *St. John's Hospital*, 222 NLRB 1150, 1150 (1976) (generally hospitals entitled to presumption that work rules prohibiting solicitation and insignias in patient and non-patient care areas are lawful because such activity "might be unsettling to patients—particularly those who are seriously ill and . . . need quiet and peace of mind").

⁷⁷ Jt. Exh. 11, p. 102.

⁷⁸ See *St. John's Hospital*, 222 NLRB 1150 (1976).

⁷⁹ Id.

ceive how patients would be affected adversely by such activities."⁸⁰

Like the Board found in *St. John's Hospital*, I fail to see how patient care would be disrupted by Respondents restricting employees to speaking only English in non-patient care areas and even between employees, staff, visitors, and customers, particularly if a non-native English-speaking employee desires to converse with another non-native English speaking employee about their respective working conditions. More importantly, communication, unlike solicitation and distribution, is different. Rather, requiring employees to speak only English infringes on an employee's ability to exercise their Section 7 rights since concerted activity hinges upon effectively communicating with other employees about working conditions, wages and/or terms and conditions of employment. Thus, employees cannot be restricted from communicating in their native language in nonpatient and patient access areas where patient disruption would be minimized. In this case, Respondents' language restrictions are not sufficiently limited in time and location, and as such, employees, especially non-native English speaking employees, would reasonably believe that they could not engage in concerted activity.

Accordingly, I find that Respondents violated Section 8(a)(1) by maintaining an unlawful English-only rule to the extent it requires employees to speak and communicate only in English in all areas to which patients and visitors have access, other than immediate patient care areas.

CONCLUSIONS OF LAW

1. Respondents Valley Health System LLC d/b/a Spring Valley Hospital Medical Center and Centennial Hills Hospital Medical Center and Desert Springs Hospital Medical Center and Valley Hospital Medical Center, and Summerlin Hospital Medical Center LLC d/b/a Summerlin Hospital Medical Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. Respondents violated Section 8(a)(1) of the Act by:

(a) Promulgating, maintaining and/or enforcing an ambiguous and overly broad rule that prohibits conduct which discredits Respondents.

(b) Promulgating, maintaining and/or enforcing an ambiguous and overly broad rule that prohibits employees from speaking negatively about employees and Respondents.

(c) Promulgating, maintaining, and/or enforcing an ambiguous and overly broad confidentiality rule that prevents disclosure of "business-related" and "employee" information.

(d) Promulgating, maintaining and/or enforcing an overly broad English-only rule to the extent it requires employees to speak and communicate only in English in all areas other than immediate patient care areas.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that the Respondents must be ordered to

⁸⁰ Id.

cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸¹

ORDER

Respondents, Valley Health System LLC d/b/a Spring Valley Hospital Medical Center and Centennial Hills Hospital Medical Center and Desert Springs Hospital Medical Center and Valley Hospital Medical Center and Summerlin Hospital Medical Center LLC d/b/a Summerlin Hospital Medical Center, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining and/or enforcing overly broad and ambiguous work rules that prohibit or may reasonably be read to prohibit employees from engaging in conduct that may discredit Respondent.

(b) Promulgating, maintaining, and/or enforcing overly broad and ambiguous work rules that employees could reasonably understand would prohibit them from participating in concerted activity by speaking negatively about other employees or Respondents.

(c) Promulgating, maintaining, and/or enforcing overly broad and ambiguous provisions in its confidentiality policy that employees could reasonably interpret to prohibit them from exercising their Section 7 rights if they disclose of "business-related" and "employee" information.

(d) Promulgating, maintaining, and/or enforcing an overly broad English-only rule that prohibit or may reasonably be read to prohibit employees from engaging in concerted activity by requiring employees to speak and communicate only in English while on duty, with other employees, staff, customers and visitors, and in all work and patient access areas.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise their Employee Handbook and Service Excellence Expectations to remove any language that prohibits or may be read to prohibit employees from engaging in conduct that may discredit Respondents;

(b) Rescind or revise their Employee Handbook and Service Excellence Expectations to remove any language that prohibits or may be read to prohibit employees from speaking negatively about other employees or Respondents;

(c) Rescind or revise their Employee Handbook and Service Excellence Expectations to remove any language that prohibits or may be read to prohibit employees from disclosing "business-related" and "employee information";

(d) Rescind or revise their Employee Handbook and Service Excellence Expectations to remove any language that requires

employees to speak and/or communicate only in English while on duty, with other employees, staff, customers and visitors, and in all work and patient access areas;

(e) Furnish, publish and/or distribute to all current employees a new Employee Handbook, Service Excellence Expectations and confidentiality agreement that: (1) does not contain the unlawful provisions noted in paragraph (a)-(d) above; (2) advises employees that the unlawful provisions above have been rescinded; or (3) provides lawful language that describes, with specificity, which types of conduct or communication is proscribed by the Handbook/Agreement and the conduct/communication that is protected by the Act. Respondents also may comply with this aspect of my Order by either: (i) rescinding the unlawful provisions noted in paragraphs (a)-(d) above and republishing the new rules without the unlawful language; (ii) supplying employees at all of their Nevada facilities with an insert to the Handbook and Service Excellence Expectations stating that the unlawful rules have been rescinded; or (iii) supplying employees with new and lawfully worded rules on adhesive backing that will cover the unlawful rules until Respondents republish new rules without the unlawful provisions;

(f) Notify all current and former employees in writing that the relevant provisions detailed in paragraphs (a)-(d) above, contained in the Employee Handbook and Service Excellence Expectations, that were promulgated and/or distributed since September 3, 2013, have been rescinded, are void and that Respondents will not prohibit employees from engaging in protected concerted activity as described in paragraphs (a)-(d) above;

(g) Within 14 days after service by the Region, post at all facilities, copies of the attached notice marked "Appendix"⁸² in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees and former employees by such means. Respondents also shall duplicate and mail, at their expense, a copy of the notice to all former employees who were affected by Respondents' unlawful conduct. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility (ies) involved in these proceedings, Respondents shall duplicate and mail, at their expense, a copy of the notice to all current

⁸¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸² If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees and former employees employed by the Respondent at any time since January 1, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

Dated: Washington, D.C. March 18, 2015

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT promulgate, maintain or enforce an overly broad rule that prohibits you from engaging in conduct which could be viewed as discrediting us.

WE WILL NOT promulgate, maintain or enforce an overly broad rule that prohibits you from speaking negatively about us or other employees.

WE WILL NOT promulgate, maintain or enforce an overly broad confidentiality rule that prohibits you from disclosing "business-related" or "employee" information.

WE WILL NOT promulgate, maintain or enforce an overly broad rule that requires you to speak and/or communicate only in English while on duty, between your fellow employees, staff, customers and visitors, and in all work and patient access areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing that the unlawful provisions in our Employee Handbook and Service Excellence Expectations that was implemented since September 3, 2013, are void and rescinded and/or modified and will not be enforced to prohibit you from engaging in protected concerted activity by: (1) engaging in conduct which could be viewed as discrediting Respondent, (2) speaking negatively about other employees or Respondent, (3) disclosing "business-related" or "employee" information and/or (4) requiring you to speak and communicate only in English while on duty, between your fellow employees, staff, customers and visitors, and in all work and patient access areas.

VALLEY HEALTH SYSTEM LLC D/B/A SPRING VALLEY
HOSPITAL MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-123611 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL NOT promulgate, maintain or enforce an overly broad confidentiality rule that prohibits you from disclosing "business-related" or "employee" information.

WE WILL NOT promulgate, maintain or enforce an overly broad rule that requires you to speak and/or communicate only in English while on duty, between your fellow employees, staff, customers and visitors, and in all work and patient access areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing that the unlawful provisions in our Employee Handbook and Service Excellence Expectations that was implemented since September 3, 2013, are void and rescinded and/or modified and will not be enforced to prohibit you from engaging in protected concerted activity by: (1) engaging in conduct which could be viewed as discrediting Respondent, (2) speaking negatively about other employees or

VALLEY HEALTH SYSTEM LLC

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Respondent, (3) disclosing “business-related” or “employee” information and/or (4) requiring you to speak and communicate only in English while on duty, between your fellow employees, staff, customers and visitors, and in all work and patient access areas.

CENTENNIAL HILLS HOSPITAL MEDICAL CENTER

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**APPENDIX C
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

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WE WILL NOT promulgate, maintain or enforce an overly broad confidentiality rule that prohibits you from disclosing “business-related” or “employee” information.

WE WILL NOT promulgate, maintain or enforce an overly broad rule that requires you to speak and/or communicate only in English while on duty, between your fellow employees, staff, customers and visitors, and in all work and patient access areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing that the unlawful provisions in our Employee Handbook and Service Excellence Expectations that was implemented since September 3, 2013 are void and rescinded and/or modified and will not be enforced to prohibit you from engaging in protected concerted activity by: (1) engaging in conduct which could be viewed as discrediting Respondent, (2) speaking negatively about other employees or Respondent, (3) disclosing “business-related” or “employee” information and/or (4) requiring you to speak and communicate only in English while on duty, between your fellow employees, staff, customers and visitors, and in all work and patient access areas.

DESSERT SPRINGS HOSPITAL MEDICAL CENTER

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**APPENDIX D
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

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VALLEY HOSPITAL MEDICAL CENTER

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APPENDIX E
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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SUMMERLIN HOSPITAL MEDICAL CENTER LLC D/B/A
SUMMERLIN HOSPITAL MEDICAL CENTER

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