

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 4, 2016

TO: Dennis P. Walsh, Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Virtua Health, Inc.
Case 04-CA-165272

512-5012-0125
512-5012-0133-2200
512-5012-9300

This case was submitted for advice as to whether a healthcare system's policy restricting videotaping, photography, and other recordings violates Section 8(a)(1). We conclude that the policy is unlawfully overbroad because it goes beyond patient privacy concerns and by its language and in practice prohibits recordings of employee meetings with managers without their consent. Thus employees would reasonably interpret the policy as prohibiting Section 7 activity.

FACTS

Virtua Health, Inc. ("Employer") is a non-profit healthcare system that operates several hospitals and other medical facilities in New Jersey. Since 1996, the Employer has maintained a policy restricting recordings in the workplace. The policy states that the "[u]se of videotaping/photographing and recording devices (including cell phones) is prohibited throughout Virtua except in accordance with this policy." Under this general rule, the policy includes a list of procedures, as follows:

1. Obtain consent. (See [consent form¹]).
2. Consent is not required for an image de-identified in accordance with HIPAA regulations [sic].
3. Consent is not necessary for photography/videotaping/recording done by Virtua that is a part of the normal routine of patient care

¹ The consent form is a release that authorizes "representatives of Virtua Health to photograph, videotape, record, conduct media interviews and/or publish statements or images of myself or my child."

4. Any employee may refuse to be videotaped/photographed/recorded.
5. If videotaping/photographing/recording interferes with patient care it can be stopped immediately.
6. If an employee notes that a prohibited device being used, in [sic] violation of the policy the individual should be requested to stop and delete the recording
7. At times a patient/family may wish to video/record/photograph a patient care session. Permission must be obtained If approved, consent must be obtained No staff can be in session and no other patients etc., can be present.
8. Requests for public relations/marketing purposes should be referred to Marketing/Public Relations for management.

On (b) (6), (b) (7)(C), 2015, the Employer discharged an employee (the “discriminatee”) in connection with this recording policy. On (b) (6), (b) (7)(C) the discriminatee recorded an investigatory interview because (b) (6) believed (b) (6) was being treated unfairly because of his race. (b) (6), (b) (7)(C) informed the managers that (b) (6) had recorded the meeting, at which point the managers indicated that recording such conversations was not permitted at Virtua. On (b) (6), (b) (7)(C) when the managers met with the discriminatee to issue discipline for the underlying infractions unrelated to the recording, they asked whether (b) (6) was recording the session. The discriminatee denied that (b) (6) was recording the meeting and laid his cell phone on the table as a sign of sincerity. The next day, a manager sent the discriminatee an e-mail indicating that (b) (6) would not be disciplined for the (b) (6), (b) (7)(C) recording because (b) (6) may have been unaware that it was prohibited. The e-mail again confirmed that the discriminatee was “not permitted to tape record conversations at Virtua, including discussions with your managers.” The following day, the discriminatee called an Employer hotline to lodge a discrimination complaint challenging his discipline. In his message, (b) (6) indicated that (b) (6) had recorded all of his conversations with the managers. The discriminatee maintains that in fact (b) (6) did not record the (b) (6), (b) (7)(C) meeting and was merely bluffing about doing so on the hotline in order to ensure that the managers told the truth. During the Employer’s subsequent investigation into the discriminatee’s complaint, (b) (6) again asserted that (b) (6) had recorded all of his conversations with management, including the (b) (6), (b) (7)(C) meeting. As a result, the Employer terminated the discriminatee for insubordination and dishonesty.²

² The Region has already determined that the discriminatee was not discharged for earlier union activity, but that his discharge would be unlawful pursuant to *Continental Group, Inc.*, 357 NLRB 409 (2011), if we conclude that the recording policy violates Section 8(a)(1).

ACTION

We conclude that the Employer's recording policy is unlawfully overbroad because it goes beyond patient privacy concerns and by its language and in practice prohibits recordings of employee meetings with managers without their consent.

The maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1).³ The Board has developed a two-step inquiry to determine if a work rule would reasonably tend to chill protected conduct.⁴ First, a rule is clearly unlawful if it explicitly restricts Section 7 activities.⁵ Second, if it does not, the rule will violate Section 8(a)(1) only upon a showing that: (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.⁶ In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context.⁷ Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful.⁸ Finally, any ambiguity in an employer's rules is construed against the employer as the promulgator of that rule.⁹

Photography and audio or video recording in the workplace are protected by Section 7 if employees are acting in concert for their mutual aid and protection and

³ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) (table decision).

⁴ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

⁵ *Id.* at 646.

⁶ *Id.* at 647.

⁷ *Id.* at 646.

⁸ *See University Medical Center*, 335 NLRB 1318, 1320-21 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no . . . limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in relevant part sub nom. Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003).

⁹ *See Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

the employer does not have an overriding interest in prohibiting such conduct.¹⁰ Examples of protected conduct include recording images of protected picketing, documenting unsafe equipment or working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, and recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.¹¹ Whether a recording garners protection under the Act does not turn on whether the employee obtained the consent of all parties to a conversation, and an employer cannot require that employees secure management's permission as a precondition to engaging in protected concerted activity.¹² Indeed, covert recordings have been instrumental in vindicating employees' Section 7 rights.¹³

In *Flagstaff Medical Center*,¹⁴ the Board found a hospital rule banning "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities" to be lawful.¹⁵ The Board reasoned that employees would reasonably interpret the rule as a "legitimate means of protecting the privacy of patients and their hospital surroundings" as opposed to prohibiting protected activity.¹⁶ In so finding, the Board noted the weighty privacy interests of hospital patients and the employer's significant interest in preventing the wrongful disclosure of individually identifiable health information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹⁷

¹⁰ *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 (Dec. 24, 2015) (rules prohibiting the recording of conversations, phone calls, images, or company meetings without prior approval or without all parties' consent violated Section 8(a)(1)); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (Aug. 27, 2015) (rules banning photography on employer property without permission and the use of recording devices except for authorized business purposes unlawfully overbroad).

¹¹ *Whole Foods*, 363 NLRB No. 87, slip op. at 3.

¹² *Id.*, slip op. at 3-4, nn.9 & 10.

¹³ *See id.*, slip op. at 3 & n.8 (collecting cases).

¹⁴ 357 NLRB 659 (2011), *enforced in part*, 715 F.3d 928 (D.C. Cir. 2013).

¹⁵ *Id.* at 662-63.

¹⁶ *Id.* at 663.

¹⁷ *Id.* (citing 42 U.S.C. § 1320d-6). *But see id.* at 670 (Member Pearce, dissenting) (concluding that the rule is unlawful because employees would construe it as banning all photography of hospital property, including concertedly photographing an unsafe working condition).

We conclude that the Employer's recording policy is unlawfully overbroad and is distinguishable from the rule in *Flagstaff* because it goes beyond protecting patient privacy. The initial statement of policy broadly prohibits the use of recording devices "throughout Virtua," except in accordance with the Employer's procedures. Unlike in *Flagstaff*, the Employer's policy does not mention patients at the outset. Although the policy references HIPAA in the procedures section, it also specifically provides that employees may refuse to be recorded, indicating that the policy is designed to protect more than just patient privacy. Furthermore, the employer has applied the policy so as to preclude employees from recording closed-door meetings with managers concerning discipline, thereby confirming the broad scope of the policy. Documenting the content of employee meetings with management is the type of conduct that would warrant Section 7 protection if it were concerted because such recordings could be used as evidence in an employment-related action, including to vindicate rights under the Act.¹⁸ Thus, the Employer's policy would clearly prohibit certain protected activities. We do not find persuasive the Employer's argument that a prohibition on recording meetings with managers is justified by patient privacy concerns. The Employer has not supported its claims that patient-related information might be inadvertently captured in such recordings, and we find it implausible that individually identifiable health information is being broadcast over the hospitals' PA systems. Accordingly, in light of the broad language of the policy, as well as the Employer's practice of applying it to employee meetings with managers, we conclude that employees would reasonably read the policy as prohibiting protected recordings.¹⁹

We additionally find that the policy is unlawful even though it could be interpreted as permitting recordings of other employees and managers so long as their consent is obtained. An employee's recording activity may be protected whether or not he or she has secured the recorded employee's consent.²⁰ Moreover,

¹⁸ See *Whole Foods*, 363 NLRB No. 87, slip op. at 3 & n.8. See also *Hawaii Tribune-Herald*, 356 NLRB 661, 661 (2011) (employee did not lose the Act's protection by secretly recording meeting with newspaper editor in order to document a perceived violation of employee rights under *NLRB v. Weingarten*, 420 U.S. 251 (1975)), enforced *sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

¹⁹ See *Whole Foods*, 363 NLRB No. 87, slip op. at 4 (taking into account the employer's admission as to the scope of the recording rules in finding that employees would reasonably interpret them to prohibit protected activities); *Longs Drug Stores California*, 347 NLRB 500, 500-01 (2006) (reading confidentiality rule in context of surrounding provision and employer testimony that wage rates constitute confidential information).

²⁰ See *Whole Foods*, 363 NLRB No. 87, slip op. at 3 n.9.

in the circumstance of an employee recording a meeting with managers, requiring consent is tantamount to making permission from management a precondition to engage in Section 7 activity, which is unlawful.²¹ Finally, we note that a consent requirement cannot be construed as merely incorporating state law, since New Jersey permits recordings with just one party's consent.²²

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining an overbroad recording policy.

/s/
B.J.K.

ADV.04-CA-165272.Response.Virtua (b) (6), (b) (7)

²¹ See *id.*, slip op. at 4 n.10.

²² See N.J. STAT. ANN. § 2A:156A-4. See also *Whole Foods*, 363 NLRB No. 87, slip op. at 4 n.13 (rejecting employer's argument that no-recording rules were lawful because nonconsensual recording is prohibited under state law in many places where it operates, since the rules were not limited to stores in those states, they did not reference any state laws, and they did not specify that the restrictions were limited to recordings that fail to comply with state law).