

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

BAYLOR UNIVERSITY MEDICAL CENTER

and

Case 16-CA-195335

DORA S. CAMACHO, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF
CROSS-EXCEPTION TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Megan McCormick
Counsel for the General Counsel
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102
Tel: (682) 703-7233
Fax: (817) 978-2928
Email: Megan.McCormick@nlrb.gov

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I. INTRODUCTION

This case centers on the Separation Agreement and General Releases (Separation Agreements) that Respondent offered to Charging Party Dora S. Camacho (Camacho) upon her termination, and, since September 21, 2016, has entered into with twenty-six of its employees. Three provisions of the Separation Agreements are at issue in this case: *No Participation in Claims*, *Confidentiality*, and *Non-Disparagement*. In his February 12, 2018 Decision and Recommended Order, the Honorable Administrative Law Judge Robert A. Ringler found that the *No Participation in Claims* and *Confidentiality* provisions of the Agreements unlawfully restrict employees in the exercise of their National Labor Relations Act (NLRA or Act)-protected rights, including assisting and participating in Board investigations into other employees' cases, and discussing wages, hours and working conditions. On the other hand, the ALJ found the *Non-Disparagement* provision to be a valid civility standard under *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017) (*Boeing*).

Counsel for the General Counsel files this brief in support of its exception to the ALJ's Decision regarding the *Non-Disparagement* clause. In analyzing the provisions of the Separation

Agreements at issue in this case, the ALJ properly relied on *Metro Networks, Inc.*, 336 NLRB 63 (2001) and considered whether Respondent lawfully requested employees waive certain rights guaranteed by Section 7 of the Act, but he erred to the extent that he relied on the Board's decision and analytical framework in *Boeing* to conclude that the *Non-Disparagement* provision was lawful. The Board in *Metro Networks* and its progeny considered whether provisions of separation agreements unlawfully prohibit employees from assisting the Board in the investigation of charges filed by other individuals or impact the signatory's future Board access regarding unrelated matters, however, the Board has not yet considered whether separation agreements can lawfully restrict employees' right to criticize their employers through non-disparagement provisions. As the Board articulated in *S. Freedman & Sons, Inc.*, settlement agreements may condition settlement on an employee's waiver of Section 7 rights, but only if the waiver is narrowly tailored to the facts giving rise to the settlement, and the employee receives a benefit in return. 364 NLRB No. 82 (Aug. 25, 2016) enforced No. 16-2066, 2017 WL 5197406 (4th Cir. Nov. 7, 2017) (*S. Freedman & Sons*). The Board must therefore consider whether the waiver herein is properly tailored to the agreements at issue or whether it represents a broad and unjustified infringement on employee speech.

Boeing is a case addressing employer rules, policies and procedures in which the Board provided a framework for analyzing the legality of such rules. Inasmuch as it does not appear that the Board has had the opportunity to consider how it would analyze the legality of the language at issue herein in a severance or settlement agreement, Counsel for the General Counsel submits that *Boeing* provides useful guidance to the case at hand. In this case, the judge erred by finding the *Non-Disparagement* clause lawful a Category 1 civility work rule under *Boeing* and

he erred by finding that such a clause could lawfully be included in a separation agreement when it is not narrowly tailored to the facts giving rise to the issuance of the separation agreements.

II. FACTUAL BACKGROUND

Camacho was employed by Respondent, a Texas corporation and healthcare institution engaged in providing medical services to the public, at its Dallas, Texas location, as an administrative assistant in the Continuing Medical Education (CME) Department until her termination on September 30, 2016. (GC Exh. 1(i); Tr. 31, LL. 13-22). Camacho performed administrative tasks for the CME Department, which is responsible for coordinating educational opportunities for physicians to obtain CME credits. (Tr. 68, LL. 3-19). After Camacho's termination, Respondent's Human Resources Department issued her a Confidential Separation Agreement and General Release. (GC Exh. 2; Tr. 32, LL. 8-13, 19-25; 33, LL. 15-19). The proposed Separation Agreement included the following *Non-Disparagement* provision at issue here:

Non-Disparagement: CAMACHO agrees that she shall not directly or indirectly make, repeat or publish any false, disparaging, negative, unflattering, accusatory, or derogatory remarks or references, whether oral or in writing, concerning BSWH and the Released Parties collectively and/or individually, or otherwise take any action which might reasonably be expected to cause damage or harm to BSWH and the Released Parties collectively and/or individually.

In agreeing not to make disparaging statements, CAMACHO agrees and acknowledges that she is making, after conferring with counsel, a knowing, voluntary and intelligent waiver of any and all rights she may, have to make disparaging comments, including rights under the First Amendment to the United States Constitution and any other applicable federal and state constitutional rights.

CAMACHO further agrees that in the event of a breach of this non-disparagement provision, BSWH may also pursue other remedies at law or in equity in the event of any breach of this Agreement. CAMACHO agrees and acknowledges that a court of competent jurisdiction may enter an injunction to prevent her from violating this Section and that such injunction would not constitute a prior restraint on constitutional rights and that she is waiving her legal right to make such an argument.

(GC Exh. 2).

The Separation Agreement also contained a provision that specifically addressed potential breach by the employee. In the event of breach, the employer could institute

proceedings in state court to seek repayment of the severance pay (less \$100), pursue injunctive relief as well as “other available relief.” No similar provision provided for employee recourse in the event of Respondent’s breach. (GC Exh. 2).

Camacho did not sign the Separation Agreement. (Tr. 34, LL. 12-14). Between September 21, 2016 and November 2, 2017, Respondent issued severance agreements to other employees that included the same or substantially similar language as in the above-referenced *Non-Disparagement* provision. (JD slip op. at 2, n. 4; GC Exhs. 2, 3). At least twenty-six of Respondent’s separated employees signed the agreement offered to them, and remain bound by its terms. (GC Exh. 3).¹

III. ANALYSIS

While the ALJ correctly found that the *No Participation in Claims* and *Confidentiality* provisions of the Separation Agreements unlawfully impact employees’ exercise of rights protected by Section 7 of the Act, he erred in determining that the *Non-Disparagement* provision is lawful. The ALJ, briefly and without discussion or significant analysis, concluded that this clause fell under the characterization of civility rules provided in *Boeing*. (JD slip op. at 4, LL. 26-31). First, applying a plain meaning, contractual construction to its language, the *Non-Disparagement* provision restricts employees in the exercise of their NLRA-protected right to criticize their employer in a non-malicious manner. Second, the ALJ erred in finding the *Non-Disparagement* provision lawful as it is not narrowly tailored to the facts giving rise to the issuance of separation agreements to Respondent’s employees. Third, analyzing the provision under the framework in *Boeing*, the ALJ erred in categorizing the *Non-Disparagement* provision

¹ Twenty-four of those employees were offered and signed Workforce Realignment Agreement and General Releases while two employees signed Confidential Separation Agreement and General Releases. The *No Participation in Claims*, *Confidentiality* and *Non-Disparagement* sections vary only slightly between the Workforce Realignment Agreements and Separation Agreements.

as a Category 1 rule, as the provision does not promote harmonious interactions or civility in the workplace, nor does it serve to prevent harassment or violence. Based on the provision's tendency to interfere with employees' rights, it is more appropriately characterized as a Category 2 rule, warranting scrutiny into whether its impact on NLRA-protected rights is outweighed by the employer's justification for its maintenance. Fourth, the provision's potential impact on employees' NLRA-protected rights is not outweighed by Respondent's interest in maintaining its reputation, especially because Board law provides significant protections for employers related to employee criticisms.

A. By a plain and literal reading of the *Non-Disparagement* clause, it prohibits employees' NLRA-protected right to criticize their employers' conduct related to wages, hours and working conditions.

Severance agreements constitute contracts between individual employees and their employers. Like all contracts, they should be interpreted "based on their plain and literal meaning so as to avoid interference with the private bargain." *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989) (citation omitted). A plain and literal reading of the *Non-Disparagement* clause in the instant case clearly shows that a broad category of Section 7 activity is prohibited by that provision.

Employees have a Section 7 right to engage in communications with their co-workers and third parties about their wages, hours and working conditions, and other terms and conditions of employment. The Act does not impose a requirement that all such communications be positive; on the contrary, employees may lawfully criticize their employers regarding their conduct related to employees' terms and conditions of employment. The Board has long held that those critical communications remain protected under the Act, including when engaged in with third parties such as customers, advertisers, reporters, and the public, as long as they do not include

maliciously false, disloyal, or reckless statements about the employer, its products, or its services. See *Mastec Advanced Technologies*, 357 NLRB 103, 106-108 (2011), *affirmed sub nom.*, *DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 92 (2017) (finding employee statements on local television program about company policy essentially requiring employees to lie to customers protected under the Act where the interviews did not contain “unprotected disloyalty or reckless disparagement” of employer’s services); *TNT Logistics North America*, 347 NLRB 568, 569 (2006), *reversed on other grounds sub nom.*, *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008) (determining letter sent by employees to employer’s corporate management and customer lost the Act’s protection because statement therein regarding employer doctoring logbooks was made with “knowledge of its falsity or at least reckless disregard for its truth”); *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 230-231 (1980) (concluding letter sent by employee to employer’s customers protected where, though relating to sensitive issue of safety in airline industry, it did not rise to the level of public disparagement of the employer or its product that would deprive it of the Act’s protections). This protected speech includes employee communications to third parties in an effort to obtain their support “where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” *Mastec Advanced Technologies*, 357 NLRB at 107 (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)). Statements are maliciously untrue and unprotected if made with knowledge of their falsity “or with reckless disregard for their truth or falsity”; however, “[t]he mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue.” *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252-1253 (2007), *enfd. sub nom.*

Nevada Service Employees Local 1107 v. NLRB, 358 Fed. Appx. 783 (9th Cir. 2009) (citing *TNT Logistics North America, Inc.*, 347 NLRB at 569, revd. sub nom. *Joliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008); *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003)).

The *Non-Disparagement* provision here prohibits signatory employees from engaging in far more than maliciously untrue or disloyal speech, instead it broadly bans all speech about Respondent, written or oral, that is “false, disparaging, negative, unflattering, accusatory, or derogatory.” Signatory employees are also prohibited from taking any other action “which might reasonably be expected to cause damage or harm to [Respondent].” Plainly within the provisions’ purview is employee criticism about any aspect of her employment with Respondent that does not reach the level of being malicious, reckless, or disloyal. Broad prohibitions on unflattering, disparaging or accusatory speech might encompass any topic of discussion that paints Respondent in a negative light, including complaints about employees’ perceived low wages, long hours, poor working conditions, or improper or inappropriate treatment by supervisors. Section 7 activities, including organizing or supporting unions, or banding together with co-workers to seek to change some term or condition of employment, are generally spawned by employer actions, policies, or conditions, which the employees view in an unfavorable or negative light. Positively received or neutral aspects of employment do not lead to protests, picket lines or strikes. Prohibiting former employees from spreading the word to current employees or third parties about issues regarding working conditions would stifle Section 7 activity before it even begins, because employees cannot voice concerns about policies, practices or working conditions without speaking negatively or painting the Employer in an “unflattering” light.

Indeed, a ban on negative or unflattering speech could result in the same conclusion contemplated by the ALJ in his Decision regarding the *No Participation in Claims* provision: signatory employees may be discouraged from providing testimony in connection with charges with the NLRB or other agencies because the relevant information they possess about Respondent's conduct regarding employee wages, hours and working conditions could be perceived as 'negative,' 'unflattering,' or 'accusatory' and employees providing that testimony might fear their conversations with investigators violate that provision of the Separation Agreement and could lead to legal action against them. (JD slip op. at 3, LL. 31-41; 4, LL. 1-7).

The Board has found, in the context of work rules, that broad prohibitions on simply false or disparaging speech are unlawful, especially where those rules do not clarify that only maliciously false or disloyal speech is prohibited. *See, e.g. Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1, n. 1 (Nov. 3, 2014) affirming 359 NLRB 1201 (2013), *enfd.* 830 F.3d 542 (D.C. Cir. 2016). Whether the validity of these decisions are placed into question by *Boeing* in the context of work rules, their analysis as to the plain meaning of such clauses remains relevant in interpreting separation agreements.

Indeed, not only must separation agreements be held to a stricter interpretation than work rules because they are contracts, but the stakes are also higher in separation agreements. In *Pratt (Corrugated Logistics), LLC*, the ALJ distinguished a non-disparagement work rule that he had found lawful in another case (*Heartland Catfish Co.*, 358 NLRB No. 125 (2012)) from a separation clause containing nearly identical language. 360 NLRB 304, 316-317 (2014). The provision prohibited employees from making statements or engaging in conduct that "disparages, criticizes...or otherwise casts a negative characterization upon...any Pratt Entity...nor...encourage or assist anyone else to do so." *Id.* The ALJ found the provision

prohibited employees from engaging in Section 7 activity, to include “criticizing their employer, for taking the very unlawful activity that spawned this case.” *Id.* The ALJ distinguished the lawful work-rule provision from the unlawful severance agreement provision on the basis of their differing context and enforcement mechanisms. *See id.* at 316-317. The ALJ reasoned that while the handbook rule in *Heartland Catfish Co.* was part of a larger ‘common sense’ rule covering conduct in the workplace and had no penalty attached to it, in *Pratt*, the provision of the separation agreements constituted a “post-employment prohibition, a condition for receipt of severance pay” that carried penalties for a breach of the provision, and therefore was unlawful. *Pratt*, 360 NLRB at 316-317. Although the decision carries no precedential weight as that part of the ALJ’s ruling was not excepted to, the ALJ’s analysis therein is persuasive.

Here, similarly, the *Non-Disparagement* provision constitutes an ongoing post-employment obligation to refrain from saying anything negative or even unflattering about Respondent, the breach of which includes serious legal consequences. If a signatory employee were to breach the agreement by engaging in Section 7 activity, she could find herself defending a state court action with the Respondent seeking to make her repay the entire amount of the severance pay, to enjoin her from further actions (the violation of which would be contempt of court) and to force her to provide Respondent with “all other relief.” Such a proceeding involves more serious consequences than those faced by employees who violate workplace rules. Because signatories to Respondent’s Severance Agreement are faced with serious monetary and legal consequences for breach and because participation in a wide range of Section 7 activities would amount to a breach of the *Non-Disparagement* provision, that provision unlawfully chills their free exercise of Section 7 protected activities.

B. The *Non-Disparagement* provision is not narrowly tailored to the facts giving rise to the Separation Agreements as required by *S. Freedman & Sons* and cases cited therein.

As the Board recently articulated in *S. Freedman & Sons*, it has long favored private, amicable dispute resolution between parties, even where those resolutions include a waiver of employees' Section 7 rights. See 364 NLRB No. 82, slip op. at 2. However, the Board made clear in that case that such a waiver included in a contractual settlement must be "narrowly tailored to the facts giving rise to the settlement" and the employee must receive "some benefit in return for the waiver." *Id.* (citing *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979); *Regal Cinemas*, 334 NLRB 304, 305-306 (2001)). Thus, the Board will find unlawful settlements that prevent signatory employees from "exercising rights that are unrelated to the facts giving rise to the settlement." *Id.* (citing *Clark Distribution Systems, Inc.*, 336 NLRB 747, 748 (2001); *Metro Networks*, 336 NLRB at 67).

The *Non-Disparagement* provision in this case requires signatory employees to agree not to directly or indirectly "make, repeat, or publish any false, disparaging, negative, unflattering, accusatory or derogatory remarks or references" about Respondent, or "otherwise take any action which might reasonably be expected to cause damage or harm" to Respondent. As analyzed above, the provision requires signatory employees to waive their Section 7 right to criticize their employer in a non-malicious manner. The record established that Respondent issued Separation Agreements to employees upon their separation from the company, whether by termination or position elimination. The *Non-Disparagement* provision, rather than restrict an employee's negative speech about the Respondent related to her separation from employment with Respondent, broadly restricts any kind of negative speech about Respondent, including speech about the working conditions employees experienced before their separations, and that of other

employees going forward. Further, the record reflected, and the ALJ found, that the provisions at issue in this case, including the *Non-Disparagement* clause, are a normal part of every severance agreement offer made by Respondent. Therefore, there is little argument to be made that such terms were narrowly tailored to the specific circumstances of the separation of employment of each employee to whom it was offered.

Because the *Non-Disparagement* provision is clearly not narrowly tailored to the specific facts giving rise to the issuance of each agreement, the provision is unlawful under the standard set forth in *S. Freedman & Sons*, and does not constitute a proper waiver of employees' Section 7 rights.

C. Applying a *Boeing* analysis to the Separation Agreements at issue, the ALJ erred in characterizing the *Non-Disparagement* provision as a Category 1 civility standard and should have characterized it as Category 2.

The ALJ utilized the Board's *Boeing* employment rule framework to analyze the legality of the *Non-Disparagement* provision of Respondent's separation agreements at issue here. As noted above, in the absence of directly applicable Board precedent on this matter, Counsel for the General Counsel agrees that the analytical framework in *Boeing* provides the closest analogy for analyzing the provisions of separation agreements that require employees to waive their Section 7 rights in exchange for some benefit. Utilizing the *Boeing* framework here, the *Non-Disparagement* provision would not constitute a valid 'civility rule' as it is broad in scope and is unlikely to achieve the goals contemplated by the *Boeing* Board for civility rules in the workplace. Instead, the ALJ should have analyzed the provision as a Category 2 rule under *Boeing*, permitting a balancing test that weighs the provisions' impact on employee rights and the Respondent's justification for its inclusion in the separation agreements.

In *Boeing*, the Board set forth three categories of rules to guide its analysis on whether a particular work rule violates Section 8(a)(1) of the Act. *See Boeing*, 365 NLRB No. 154, slip op. at 15-16. Category 1 rules are lawful for employers to maintain, either because “(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.” *Id.*, slip op. at 16. Examples of Category 1 rules provided by the Board include the no-camera rule at issue in *Boeing*, the ‘harmonious interactions and relationships’ rule in *William Beaumont Hospital*, 363 NLRB No. 162 (Apr. 13, 2016), and “other rules requiring employees to abide by basic standards of civility.” *Id.* *Boeing* also overruled all cases finding it unlawful to maintain rules that require employees to foster harmonious interactions and relationships. *Id.* The Board reasoned that those rules:

reflect common-sense standards of conduct that advance substantial employee and employer interests, including the employer’s legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.

Boeing, 365 NLRB No. 154, slip op. at 4, n. 15.

Category 2 rules warrant scrutiny on a case-by-case basis to determine whether the rule, when reasonably interpreted, would prohibit or interfere with employees’ exercise of NLRA rights, and whether the adverse impact is outweighed by legitimate justifications. *See id.*, slip op. at 16. Finally, Category 3 rules prohibit or limit NLRA-protected conduct, and their adverse impact on NLRA rights is not outweighed by the rule’s justifications. *See id.*

The *Non-Disparagement* provision, contrary to the ALJ’s finding, does not fit into the category of rules requiring employees to act civilly and maintain harmonious relationships in the

workplace. Instead, the provision prohibits signatory employees from speaking negatively about their former employer upon separation from the company. Preventing negative or unflattering speech about an employer by its former employees does little to foster employee harmony in the workplace where that employee is no longer present in the workplace on a daily basis. In the same way, such a provision cannot prevent harassment, workplace violence, and unnecessary conflict that interferes with the employer's business or patient care if a signatory employee is no longer physically there. Former employees do not interact with current employees at work on a day-to-day basis and it follows that the discussions they prompt or engage in cannot have any significant impact on the civility or harmony of Respondent's workplace.

As analyzed above, prohibiting negative or unflattering speech prevents former employees from engaging in lawful discussions with former co-workers and third parties outside of their former workplaces about the unfavorable aspects of employment with Respondent that may continue to affect current employees, including those unappealing working conditions that may have motivated or played a role in their separation from the company. Thus, the *Non-Disparagement* clause is more accurately categorized as a Category 2 rule, as the provision, when reasonably interpreted, interferes with the right of former employees to criticize their former employer and engage in conversations with their former co-workers and third parties about working conditions, and the rights of current employees to discuss these topics with former employees. Contrary to the ALJ's finding, the proper inquiry into the legality of this provision is whether its potential adverse impact on employees' Section 7 rights is outweighed by legitimate business justifications from the Employer. *See Boeing*, 365 NLRB No. 154, slip op. at 16.

D. Respondent's interest in maintaining a good reputation does not outweigh the *Non-Disparagement* provision's impact on employee rights.

Employers, including hospitals like Respondent, have a clear business-related interest in maintaining positive reputations. At hearing, Respondent offered vague testimony from Human Resources Manager Lisa Smith related to the importance of its reputation. (Tr. 78, LL. 13-25; 79, LL. 1-6; 80, LL. 10-20; 81, LL. 20-23). Smith testified that Respondent's reputation is important to it as a healthcare institution so that people want to receive their healthcare from Respondent. (Tr. 78, LL. 13-25; 79, LL 1-6). Smith did not testify regarding Respondent's interest in prohibiting negative speech about employees' wages, hours, or working conditions, or about how its interest in maintaining its reputation is or has been impacted by employee speech about those protected topics.

Respondent's interest in maintaining a positive reputation as a healthcare institution is insufficient to justify its ban on all criticism, including simply unflattering or negative speech, regarding employees' wages, hours and working conditions. While employers of any kind have an interest in preventing employees or former employees from making maliciously false, disloyal statements about the company, its products or services, there is no similar legitimate justification for preventing employees or former employees from speaking negatively about their terms and conditions of employment. Employees may speak about these topics among themselves in order to determine whether or not they want to accept or stay in a particular job, or whether they recommend employment for a prospective employee. Employees and former employees might also speak to third parties, including government agencies or the press, to advance concerns about or make changes to employees' terms and conditions of employment at a particular employer.

Although a hospital may value its reputation, this concern with reputation as a healthcare institution does not extend to employees' communications about their workplace concerns and

conditions. Further, Board law provides that employees and former employees are not privileged to make maliciously false, disloyal, or reckless statements regarding their employer's product or services. "The Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation (and the reputation of its agents as to matters within the scope of their agency) from defamation." *Triple Play Sports Bar & Grill*, 361 NLRB 308, 311 (2014) *affirmed sub nom.*, *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015) (unpublished decision). Where, on the other hand, "the purpose of employee communications is to seek and provide mutual support looking toward group action to encourage the employer to address problems in terms or conditions of employment, not to disparage its product or services or undermine its reputation, the communications are protected." *Id.* (citing *Valley Hospital Medical Center, Inc.*, 351 NLRB at 1252, n. 7). Respondent's interest in maintaining a broad *Non-Disparagement* provision in its separation agreements in order to protect its reputation is therefore undermined by longstanding Board law. Through that provision, Respondent prohibits not only speech targeted towards its services as a hospital, and not only maliciously false or disloyal speech, but also protected speech related to employees' working conditions. As outlined above, employees have a strong interest in exercising their rights to criticize their employers' conduct related to employees' terms and conditions of employment, to assist their former co-workers, and to pursue the assistance of third party agencies and individuals, and Respondent's interest in maintaining its reputation as a healthcare institution does not outweigh the *Non-Disparagement* provision's impact upon employees' exercise of those Section 7 rights.

IV. CONCLUSION

For the reasons advanced above, Counsel for the General Counsel respectfully requests that the Board grant its Cross Exception and modify the ALJ's decision as set forth above. Counsel for the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) of the Act by issuing to and entering into Separation Agreements with its employees that include the unlawful *Non-Disparagement* provision, in addition to the *No-Participation in Claims* and *Confidentiality* provisions the ALJ properly found unlawful and to accordingly order Respondent to cease and desist from such practices, to notify in writing all former employees who have entered into severance agreements containing such provisions that Respondent rescinds those provisions, and to post an appropriate Notice to Employees, including via email and intranet, and order any other relief as may be necessary and appropriate to effectuate the purposes of the Act.

DATED at Fort Worth, Texas, this 10th day of May, 2018.

Respectfully submitted,

/s/ Megan McCormick
Megan McCormick
Counsel for the General Counsel
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102
Tel: (682) 703-7233
Fax: (817) 978-2928
Email: Megan.McCormick@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Brief in Support of Cross-Exception to the Decision of the Administrative Law Judge has been electronically served this 10th day of May, 2018 upon the following parties:

Via E-Mail

Amber M. Rogers
Hunton & Williams, LLP
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2799
arogers@hunton.com

David C. Lonergan
Hunton & Williams, LLP
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2799
dlonergan@hunton.com

Mary L. Harokopus
Saunders, Walsh & Beard
6850 TPC Dr., Ste. 210
McKinney, TX 75070-3145
mary@saunderswalsh.com

/s/ Megan McCormick

Megan McCormick
Counsel for the General Counsel
National Labor Relations Board, Region 16
819 Taylor St. Room 8A24
Fort Worth, TX 76102
Tel: (682) 703-7233
Fax: (817) 978-2928
Megan.McCormick@nlrb.gov