

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

**BAYLOR UNIVERSITY MEDICAL  
CENTER**

**Respondent,**

**Case 16-CA-195335**

**and**

**DORA S. CAMACHO, an individual.**

**Charging Party.**

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**RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Respectfully submitted,

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## I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Baylor University Medical Center (“BUMC” or “Respondent”) files this Reply Brief to Counsel for the General Counsel’s Answering Brief to Respondent’s Exceptions to the Administrative Law Judge’s Decision. While Respondent takes issues with many of the response arguments raised by the General Counsel in its Answering Brief, it has limited its reply to the following: (1) Camacho was not an employee under the Act when she was offered the Separation Agreement, (2) the No Participation in Claims and Confidentiality provisions are lawful under *Boeing*, and (3) even if the analysis set forth in *S. Freedman & Sons* were applied to the No Participation in Claims and Confidentiality provisions as advocated by the General Counsel for the first time in this proceeding, these provisions are lawful under the Act.

## II. REPLY

### A. **Neither Camacho, nor the 26 individuals who entered into Separation Agreements with BUMC, are statutory employees under the Act.**

Despite the General Counsel’s contention otherwise, Camacho was not an employee under the Act when she received the agreement, and therefore BUMC could not violate any of her Section 7 rights by offering the Agreement to her as a non-employee. The cases cited by the General Counsel are inapposite and inapplicable, in that none of the cases stand for the proposition that a lawfully terminated employee, such as Camacho, who is merely offered a severance agreement following termination is a statutory employee under the Act.

For example, *Little Rock Crate*, cited by the ALJ and the General Counsel, involved a discharged employee, who after his termination, lawfully remained on his employer’s property as he was waiting for his final paycheck and passed out union literature. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977). In determining that this former employee’s Section 7 rights were

violated by the employer's threats, the Board found it critical that the employer's threat was motivated "by his possession of the organizational material" and "that as a discharged employee waiting for his last check [the employee] would have been tolerated on the premises until he was paid." *Id.* Also equally distinguishable is *M.D.V.L.*, cited by the General Counsel, where the Board determined that a former employee was a statutory employee under the Act where, upon his voluntary resignation from his employment, he sent a demand letter to his former employer for unpaid wages. *M.D.V.L., Inc.*, 363 NLRB No. 190, slip op. at 1, n. 2 (May 11, 2016). The Board found that the individual was an employee under the Act for the purpose of determining whether the demand letter was protected activity. *Id.* Finally, in *Cowabunga*, the Board determined that a former employee was a statutory employee under the Act after the former employer sought to compel arbitration in a wage and hour collective action filed by the former employee. *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 2 (Feb. 26, 2016). None of the cases support General Counsel's erroneous argument that Camacho, a lawfully terminated former employee offered a severance agreement following termination, is an employee under the Act.

Furthermore, the General Counsel disingenuously attempts to recast BUMC's argument as one that "suggests employees' Section 7 rights only last for some short period of time after the employment relationship is severed."<sup>1</sup> This is not the argument BUMC has made throughout this proceeding. Rather, BUMC has consistently maintained that an otherwise lawfully terminated employee is not an employee under the Act for purposes of determining whether a severance agreement offered violates any Section 7 rights she may have.

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<sup>1</sup> Under the General Counsel's argument, a former employee's status as a statutory employee under the Act presumably extends into perpetuity following her termination of employment. This is an untenable position, and contrary to applicable Board and Supreme Court precedent.

Respondent's argument is consistent with the Supreme Court's clear pronouncement in *Allied Chemical* that "the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning *embracing only those who work for another for hire.*" *Allied Chem. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). While the General Counsel has attempted to distinguish the Supreme Court's holding, this interpretation by the Court of the term "employee" as "embracing only those who work for another for hire" was made in the context of a discussion regarding the congressional intent behind the meaning of the term "employee." *Id.* at 165-68. Accordingly, because Camacho was undisputedly lawfully terminated, and as a former employee of BUMC, was not engaged in any union related activity or any protected activity when she was offered the agreement, and was not threatened by BUMC for engaging in any union or protected activity, she is not a statutory employee under the Act. Moreover, the General Counsel presented no evidence regarding the circumstances surrounding the severance agreements offered to the other employees to establish whether the employees were statutory employees under the Act. Accordingly, Camacho and the other employees at issue were not statutory employees when agreements were offered to them.

**B. The No Participation in Claims and Confidentiality provisions are lawful under *Boeing*.**

1. *The Confidentiality provision does not restrict Section 7 rights and is supported by adequate business justifications.*

The Confidentiality provision does not prohibit employees from exercising their Section 7 rights. Even if it is assumed it has any impact on Section 7 rights, which was not established by the General Counsel, it would be relatively slight when compared to BUMC's interest in preventing disclosure of proprietary and confidential information. A reasonable reading of the entire provision, which is required by Board precedent, evidences an effort by BUMC to maintain the secrecy of its confidential and proprietary information and not an effort to infringe

on employees' Section 7 rights.<sup>2</sup> Also, BUMC presented ample un rebutted business justifications to support that the Confidentiality provision is lawful. Tr. 73:3-74:14, 75:21-76:7, 76:16-77:15.

The Board has consistently upheld employer's efforts to protect their confidential information through agreements and policies so long as they are narrowly tailored to protect the employer's interest and would not be broadly construed to prohibit employees from engaging in protected activity, such as discussing wages, hours, or terms and conditions of employment. *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) ("Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information."). Moreover, an employee who discloses information an employer is privileged to protect for reasons of confidentiality is not engaged in protected activity, and therefore, an employee's rule regulating or preventing such disclosure does not run afoul of the Act. *See, e.g., Macy's, Inc.*, 365 NLRB No. 116, slip op. at \*4 (2017) ("[T]he Board has repeatedly held that employees may be lawfully disciplined or discharged for using for organizational purposes information improperly obtained from their employer's private or confidential records.").

Applying the first prong of the Board's balancing test in *Boeing*, the confidentiality provision contained in the Agreement is narrowly tailored to protect BUMC's confidential and

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<sup>2</sup> The General Counsel's reading of the Confidentiality provision in the Separation Agreement is unreasonable. The General Counsel argues that because the Confidentially provision in the Separation Agreement defines Confidential Information to include "personal information regarding . . . employees," it is *per se* unlawful. While this argument may have won the day applying the now overturned *Lutheran Heritage* standard, this argument by the General Counsel requiring linguistic precision from employer's was specifically rejected by the Board in *Boeing. Boeing Company*, 365 NLRB No. 154, slip op. at 2 (December 14, 2017) ("[The] requirement of linguistic precision stands in sharp contrast to the treatment of 'just cause' provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself.").

proprietary information and therefore would have no impact on employees' Section 7 rights, as it does not directly or indirectly prohibit employees from discussing wages, hours, or terms and conditions of employment. The General Counsel presented no evidence regarding the impact the confidentiality provision would have on Section 7 rights. Even if it did, a plain reading of the Agreement demonstrates that any impact on Section 7 rights, if any, is slight. Despite the General Counsel's attempts to unreasonably read in restrictions that are not present in the provision, it does not seek to prevent disclosure or discussion of employees' salary information, compensation, payroll information, hours, benefits, or any other Section 7 rights. GC Ex. 2.

Moreover, the last paragraph of the Confidentiality provision expressly states that the Confidential Information should not be disclosed to BUMC's competitors, which evidences the true intent behind the provision. GC Ex. 2. This language prevents a former employee, such as Camacho, from disclosing confidential and proprietary information to third-parties which could potentially cause harm to BUMC's business, and does not prevent employees from having discussions regarding their terms and conditions of employment. Accordingly, because the General Counsel failed to present any evidence regarding the impact the Confidentiality provision has on Section 7 rights and because a reasonable reading reveals that it does not prohibit any protected activity, BUMC's exceptions regarding the ALJ's finding that the Confidentiality provision violates the Act should be granted.

Applying the second prong of *Boeing*, the Confidentiality provision in the Agreement is lawful because BUMC's legitimate justifications associated with the Confidentiality provision in the Agreement is outweighed by any impact on Section 7 rights. "An employer may implement and maintain a rule restricting protected activity, so long as there is an overriding interest in doing so." *Heartland Coca-Cola Bottling Co., LLC*, 2017 WL 4803581, at \*2 (Oct. 23, 2017)

(citing *Flagstaff Medical Center*, 357 NLRB 659, 662-663 (2011)). Even before the Board's holding in *Boeing*, the Board found that an employer's work rules and policies do not infringe on Section 7 rights in violation of the Act when the rule or policy is supported by an important business justification. *See, e.g., Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 663 (2011). Specifically, in the context of health care providers, the Board has held that health care providers have significant justification for maintaining rules and policies related to confidentiality because health care providers have a "significant interest in preventing the wrongful disclosure of individually identifiable health information." *Id.*

The Confidentiality provision in the Agreement is lawful because BUMC has an overriding interest in—and a legal obligation to—protect the confidential information of its patients and its proprietary information that gives it a competitive advantage in the marketplace. Indeed, in *Boeing*, the Board found that "[i]n some instances, . . . the justifications associated with particular rules may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself of the Board's experience with particular types of workplace issues." In no workplace is a rule protecting confidentiality more justified and the purpose behind the rule more self-evident than in the healthcare setting. Lisa Smith gave credible and un rebutted testimony regarding BUMC's legitimate business justifications for its Confidentiality provision. Tr. 73:132-74:14, 75:21-76:7, 76:16-77:15. The General Counsel failed to rebut any of Smith's testimony regarding BUMC's business justifications of preventing confidential and proprietary from disclosure to third parties. Accordingly, the confidentiality provision in the Agreement does not violate the Act because BUMC has an overriding interest in protecting the confidential information of its patients and its own confidential and propriety information.

2. *The No Participation in Claims provision does not violate the Act.*

Despite the General Counsel's contention and the finding of the ALJ, the No Participation in Claims provision is lawful. As discussed above, Camacho was not an employee under the Act when she received the Agreement. Even assuming Camacho was a statutory employee, the provision, as written, does not violate her, or any other former employee's, Section 7 rights. The General Counsel cannot overcome the fact that it presented no evidence at the hearing regarding the nature and extent of the potential impact the provision would have on Section 7 rights as required under *Boeing*, presented no evidence that Camacho ever read the Agreement offered to her, and presented no evidence that she ever executed the Agreement. The General Counsel also presented no evidence that BUMC ever applied this provision against its former employees in an effort to restrict Section 7 rights. *Boeing Company*, 365 NLRB No. 154, slip op. at 16 (“[T]he Board may find that an employer may lawfully maintain a particular rule, notwithstanding some possible impact on a type of protected activity, even though the rule cannot lawfully be applied against employees who engage in NLRA protected conduct.”). Accordingly, there is no basis for the General Counsel's argument or the ALJ's finding that the No Participation in Claims provision in the Agreement violates Section 8(a)(1) of the Act.

**C. Even if the analysis set forth in *S. Freedman & Sons*<sup>3</sup> were applied to the No Participation in Claims and Confidentiality provisions, these provisions are lawful.**

1. *The General Counsel cannot meet its burden that the provisions are unlawful under the S. Freedman & Sons framework it now contends applies.*

The General Counsel now alleges that the determination of whether the waivers at issue in this case are lawful requires an analysis of whether each “waiver is narrowly tailored to the events giving rise to the separation and issuance of the agreement” and that the 26 separation agreements at issue in this case were unlawful under this standard because they “were not narrowly tailored to the facts giving rise to the settlements.” The General Counsel must make this conclusory assertion because it presented no evidence at the hearing regarding the circumstances and facts giving rise to Camacho’s termination and the issuance of the Separation Agreement offered to Camacho, or the facts and circumstances giving rise to the Separation Agreements entered into with the 26 other employees. Arguably, the only fact that the General Counsel established at the hearing was that Camacho was offered, and 26 other unknown former

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<sup>3</sup> While the General Counsel now contends that *S. Freedman & Sons*, and not *Boeing*, is the applicable framework under which to analyze the provisions in the Separation Agreement, this argument is inconsistent with the General Counsel’s previous position that the provisions in the Separation Agreement are work rules and should be analyzed as such under *Boeing* or the recently-overturned *Lutheran Heritage* decision. *See, e.g.*, GC Ex. 1(C), Complaint and Notice of Hearing (“Respondent, by issuing a proposed Severance Agreement to former employee Dora S. Camacho, promulgated and since then has maintained the following rules . . . .”); GC Ex. 1(h) at 10, Response Opposing Motion for Summary Judgment (“Respondent’s issuance of the proposed Agreement to Camacho has far-reaching implications for Camacho and Respondent’s workforce as a whole . . . . The Board can find a violation of Section 8(a)(1) based on the very existence of rules that could reasonably be construed to prohibit protected activity, even where, as here, those rules are not actually enforced.”); GC Brief to ALJ at 5 (“This section will next analyze the provisions of the Realignment and Separation Agreements under the Board’s decision in *The Boeing Company*, 365 NLRB No. 154, slip op. (2017)”). Despite this new found agreement by the General Counsel with Respondent’s position throughout this case that the provisions in the Agreement are not “work rules” and cannot be properly analyzed as such, the General Counsel nevertheless continues to cite work rule cases throughout its Answering Brief for the proposition that the provisions in the Separation Agreement are unlawful. *See* GC Answering Brief at 23-26. This duplicitous argument by the General Counsel is prejudicial, untenable, and nonsensical.

BUMC employees entered into, a Separation Agreement containing a No Participation in Claims, Confidentiality, and Non-Disparagement provision. However, the evidence presented by the General Counsel at the hearing starts and ends there.

Certainly under the *S. Freedman* framework, other evidence is relevant to determine—and required to establish—that a separation agreement is narrowly tailored to the events giving rise to the separation and issuance of the agreement, such as the severance amount, the employee’s position, the employee’s tenure at the Company, the employee’s salary, the reason for separation, had the employee made previous claims against BUMC, was the employee being reinstated, did the employee have access to confidential and proprietary information of BUMC, and was the employee leaving to work for a competitor, to name a few. Despite Camacho being present during the entire hearing, a BUMC HR representative testifying, and the records custodian being present, the General Counsel did not put on any evidence (or even attempt to put on evidence) that would shed light on any of these highly-relevant circumstances that led to BUMC offering Camacho a separation agreement, or the circumstances that led to BUMC entering into separation agreements with 26 other former employees as is necessary under *S. Freedman & Sons*. Accordingly, because the General Counsel failed to introduce any evidence regarding the circumstances surrounding Camacho’s termination as required by the standard it now argues applies, the General Counsel’s argument and the ALJ’s finding regarding the Confidentiality and No Participation in Claims provision are incorrect.

2. *The analytical framework set forth in S. Freedman & Sons and the cases cited therein are inapplicable to the facts of this case.*

While the General Counsel now contends that the framework set forth in *S. Freedman & Sons* and the cases cited therein apply to the provisions at issue in this case, these cases are

factually dissimilar to the circumstances surrounding the Separation Agreement offered to Camacho, and thus this framework is inapplicable to this case for the reasons discussed below.

- *S. Freedman & Sons* involved an employee whose reinstatement to the company was conditioned on him signing a settlement agreement with a confidentiality clause. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (Aug. 25, 2016).
- *Coca-Cola Bottling* involved an employee whose reinstatement to the company was conditioned on him signing a settlement agreement with a clause that required him to withdraw the unfair labor practice charge and to refrain from filing further claims concerning his suspension. *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979).
- *Clark Distribution* involved numerous severance agreements that were offered to current employees and required employees to resign their positions and sign a release with a confidentiality clause that prevented them from participating in claims against the company. This practice, the Board found, was part of a broader unlawful attempt by the employer to rid itself of union supporters. *In Re Clark Distribution Sys., Inc.*, 336 NLRB 747, 748-49 (2001).

These cases relied on by the General Counsel, particularly *S. Freedman & Sons*, are inapplicable because they involve employees who were offered severance agreements to resolve ongoing disputes with their employer, the acceptance of which was a condition of returning to work, or substantiated unfair labor practices related to the attempts to avoid union activity. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (Aug. 25, 2016); *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979); *In Re Clark Distribution Sys., Inc.*, 336 NLRB 747, 748-49 (2001). Obvious and important distinctions exist between an employee who was offered a broad waiver agreement as a condition of returning to work and the circumstances in this case where a former employee was offered a monetary settlement following her lawful termination in exchange for a waiver of certain rights. Here, the separation agreements were offered to individuals following their termination of employment, reinstatement was not conditioned upon accepting the terms of the agreement, the individuals were offered a monetary settlement for their waiver, and the individuals were free to negotiate the terms of the separation agreement. Tr. 69:17-70:6.

Accordingly, the framework set forth in *S. Freedman & Sons* cannot properly be applied to the No Participation in Claims and Confidentiality provisions at issue in this case.

### III. CONCLUSION

For the foregoing reasons and the reasons advanced in BUMC's exceptions and brief in support to the ALJ's decision, BUMC respectfully requests that the Board grants its Exceptions and modify the ALJ's decision as set forth in those Exceptions.

Respectfully submitted this 24th day of May, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on the 24<sup>th</sup> day of May, 2018, I caused Respondent's Reply to Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision to be electronically filed with the National Labor Relations Board at <http://nrlb.gov> and a copy of same to be served on the following parties of record via e-mail:

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