

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

**BAYLOR UNIVERSITY MEDICAL
CENTER,**

and

DORA S. CAMACHO,

Respondent, Case 16-CA-195335

Charging Party.

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO COUNSEL FOR THE
GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION AND BRIEF IN SUPPORT**

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	1
A. Camacho’s employment with BUMC.....	1
B. Camacho was offered a severance agreement after her employment was terminated.	2
C. The ALJ’s Decision	2
III. ARGUMENT	6
A. The ALJ correctly found the Non-Disparagement Agreement is lawful under <i>Boeing</i>	6
1. The Non-disparagement provision’s impact on employees’ Section 7 rights is non-existent.	6
2. The Non-disparagement provision in the Agreement is adequately supported by business justifications.....	8
B. Even if the analysis set forth in <i>S. Freedman & Sons</i> was applied to the Non-Disparagement provisions, the provision is lawful.....	10
1. The General Counsel cannot meet its burden that the Non-Disparagement provision is unlawful under the <i>S. Freedman & Sons</i> framework it now contends applies to this case.	10
2. The analytical framework set forth in <i>S. Freedman & Sons</i> and the cases cited therein are inapplicable to the facts of this case.	12
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ark Las Vegas Restaurant Corp.</i> , 335 NLRB 1284 (2001)	8
<i>Boeing Company</i> , 365 NLRB No. 154 (December 14, 2017)	<i>passim</i>
<i>In Re Clark Distribution Sys., Inc.</i> , 336 NLRB 747 (2001)	14
<i>Coca-Cola Bottling Co. of Los Angeles</i> , 243 NLRB 501 (1979)	14
<i>Dish Network, LLC</i> , 365 NLRB No. 47 (Apr. 13, 2017)	7
<i>Flagstaff Medical Center</i> , 357 NLRB 659 (2011)	8
<i>Heartland Coca-Cola Bottling Co., LLC</i> , 2017 WL 4803581 (Oct. 23, 2017)	8
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998)	7
<i>Lutheran-Heritage</i> , 343 NLRB 646 (2004)	7, 11
<i>Metro Networks, Inc.</i> , 336 NLRB 63 (2001)	14
<i>NLRB v. IBEW Local 1229 (Jefferson Standard)</i> , 345 U.S. 464 (1953)	8
<i>Palms Hotel and Casino</i> , 344 NLRB 1363 (2005)	7
<i>Posadas De Puerto Rico Assocs.</i> , 247 NLRB 1421 (1980)	12
<i>S. Freedman & Sons, Inc.</i> , 364 NLRB No. 82 (Aug. 25, 2016)	<i>passim</i>

<i>Valley Hosp. Med. Ctr., Inc.</i> , 351 NLRB 1250 (2007)	7
<i>William Beaumont Hosp.</i> , 363 NLRB No. 162 (Apr. 13, 2016)	9

I. INTRODUCTION

Respondent Baylor University Medical Center (BUMC or Respondent) files this Answering Brief to Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge and the General Counsel's Brief in Support pursuant to Section 102.46(b) of the National Labor Relations Board's Rules and Regulations.

II. FACTS

A. Camacho's employment with BUMC.

Dora Camacho (Camacho) began working for BUMC in approximately April of 2000 and was terminated on September 30, 2016. Tr. 31:20-22; 75:12-15. At the time of her termination, Camacho was employed as an Administrative Assistant in the Continuing Medical Education (CME) Department. Tr. 31:17-19. The CME Department is primarily responsible for coordinating and sponsoring educational opportunities for physicians to obtain their required continuing medical education credits. Tr. 68:10-15. As an Administrative Assistant, Camacho was responsible for performing administrative tasks for the department, coordinating the continuing education events, participating in the events, and providing assistance to the director of the CME Department and its coordinators. Tr. 68:3-9.

Additionally, as Administrative Assistant, Camacho was exposed to and had access to BUMC's important confidential and proprietary information, and confidential information of its patients. Tr. 73:7-22; 75:16-76:7. Specifically, Camacho had routine access to the BUMC's computer systems, personal information of the physicians who participated in the programs (such as biographical information and credit card information), metrics and data analytics regarding the continuing medical education programs offered by BUMC, and vendor information. Tr. 73:7-22. Also, as an employee of BUMC, Camacho was routinely exposed to confidential patient

information as a result of being employed by a healthcare institution, which BUMC has a legal duty to protect from disclosure. Tr. 75:16-76:7.

BUMC takes reasonable steps to prevent the disclosure of its confidential and proprietary information, such as issuing employees passwords to computer systems, limiting employees access to certain information, maintaining and enforcing a code of conduct which contains a confidentiality agreement, and maintaining and enforcing policies regarding confidentiality. Tr. 74:15-75:11.

B. Camacho was offered a severance agreement after her employment was terminated.

Camacho's employment was lawfully terminated on September 30, 2016. Tr. 31:20-22. After her termination, BUMC offered Camacho a Confidential Separation and Release Agreement (the "Agreement") on October 4, 2016. GC Ex. 2; Tr. 68:20-22. Camacho never contacted BUMC regarding the Agreement, never attempted to negotiate the terms of the Agreement,¹ and never executed the Agreement. Tr. 34:12-14; 72:8-73:2. Accordingly, the offer of the Agreement expired on October 26, 2016. GC Ex. 2. The General Counsel did not introduce any evidence that Camacho actually received or read the Agreement.

Relevant to the allegations in the General Counsel's Amended Complaint are the Confidentiality, Non-disparagement, and No Participation in Claims provisions contained in the Agreement offered to Camacho. GC Ex. 2 at ¶¶ 6-8.

C. The ALJ's Decision

Before the ALJ was the General Counsel's allegations that since about October 4, 2016, Respondent has issued Separation Agreements to employees containing the following provisions:

¹ Lisa Smith (Smith), an HR Business Partner at BUMC during the time frame relevant to this proceeding, testified that BUMC engaged in negotiations with former employees regarding specific terms of severance agreements offered to them. Tr. 69:17-22.

No Participation in Claims:

[The employee] agrees that, unless compelled to do so by law, [the employee] will not pursue, assist or participate in any Claim brought by any third party against BSWH or any Released Party. [The employee] agrees, unless compelled otherwise by an order from a court of competent jurisdiction, to notify BSWH upon learning that [the employee] is identified as a witness in any case in which she might be requested or compelled to testify against BSWH or any Released Party.

Confidentiality:

[The employee] agrees that she will not disclose any information regarding the existence or substance of this Agreement, directly or indirectly, except: (i) to members of her immediate family, provided that they agree to maintain confidentiality as set out herein; (ii) as may be necessary to obtain professional legal and/or tax advice, provided that any legal or tax advisors agree to maintain confidentiality as set out herein; and (iii) as required by applicable law or as necessary to enforce this Agreement. [The employee] further agrees that neither she nor her immediate family members, attorneys or tax advisors shall disclose any of the terms or provisions of this Agreement to any other third party without the express written consent of BSWH, unless compelled to do so by law. [The employee] may disclose that the terms of her separation from BSWH are part of a mutually satisfactory agreement which is covered by a confidentiality clause, and, therefore she is not at liberty to discuss the terms of her agreement or her separation.

[The employee] understands and agrees that she must continue to keep secret and confidential and not to utilize in any manner all trade secrets and proprietary and confidential information of BSWH or any of the Released Parties made available to her during her period of employment with BSWH or any of the Released Parties, including without limitation, information concerning operations, finances, pricing, employees, patients, clients, customers, vendors, donors and prospect lists; proprietary information; computer passwords and program designs; proprietary computer software designs and hardware configuration; proprietary technology; new product and service ideas; business plans; marketing, trading, research, and sales data; customer, prospect, vendor, or personnel lists; financial and other personal information regarding customers, patients, and employees; confidential information. .about other companies and their products, strategic plans or strategies; .information about any claim or lawsuits; information protected by the attorney-client, work product or investigative privileges; and any other information expressly designated "Confidential" (all such information being collectively referred to herein .as "Confidential Information").

[The employee] agrees not to cause or to permit the disclosure, reproduction, use, transfer, or dissemination of any information concerning or related to the

Confidential Information to any third-party including, but not limited to, any third-party BSWH considers to be a competitor, potential competitor, or associate or client of a competitor or potential competitor (collectively "Competitor"), without the prior written consent of BSWH. In all cases where [the employee] is not certain whether information is Confidential Information or whether a third-party is a Competitor; [the employee] shall assume that the information is Confidential Information and that the third-party is a Competitor. CAMACHO agrees to use her best efforts to protect the Confidential Information.

Non-Disparagement:

[The employee] 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, [the employee] 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.

[The employee] 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: [the employee] 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.

Applying the balancing test set forth in *Boeing*, the ALJ determined that the Non-Disparagement provision in the Separation Agreement was lawful, and the No Participation in Claims and Confidentiality provisions were unlawful. Specifically, the ALJ made the following legal findings regarding each of the provisions at issue:

- “The *No Participation in Claims* clause is unlawful. This rule falls under *Boeing* Category 3, inasmuch as the adverse impact on core NLRA-protected rights is not outweighed by the rule’s justification. Specifically, this rule has the very ‘predictable’ impact of barring NLRA protected conduct because it bans former employees from, ‘pursu[ing], assist[ing] or participat[ing] in any Claim brought by any third party against ... [Baylor].” ALJ Dec. at 3.

- “The *Confidentiality* provision is similarly unlawful. This rule also falls under *Boeing* Category 3, inasmuch as its adverse impact on NLRA-protected rights is not outweighed by any justification. The Confidentiality provision would reasonably be construed by former employees to prohibit §7 activities by banning discussion of wages, hours, and working conditions with current employees, unions or others after their separation.” ALJ Dec. at 4.
- “The *Non-Disparagement* provision is lawful. The Board has held that, ‘rules requiring employees to abide by basic standards of civility’ are generally lawful under *Boeing* Category 1. See *Boeing*, 365 NLRB No. 164, slip op. at 4. The Non-Disparagement provision, which bars ‘false, disparaging, negative, . . . or derogatory remarks,’ is a valid civility standard. *Id.*” ALJ Dec. at 4.

Respondent filed its Exceptions to the ALJ’s decision excepting to, among other things, the ALJ’s finding that the No Participation in Claims and Confidentiality provisions outlined above violate the Act. Subsequently, the General Counsel filed its Cross-Exceptions and Brief in Support, and excepted to the ALJ’s finding that the Non-Disparagement provision was lawful. In excepting to the ALJ’s decision, and for the first time in this proceeding, the General Counsel maintains that the ALJ erred in applying the balancing test set forth in *Boeing* for determining whether employer work rules violate the Act, and instead argues that the ALJ should have applied the Board’s analytical framework set forth in *S. Freedman & Sons* since the provisions in the separation agreements are not “work rules.” The General Counsel contends that the ALJ erred in applying the *Boeing* framework despite its contention throughout this proceeding that the Board’s precedent regarding the lawfulness of work rules (*Boeing*, and the now-overturned *Lutheran Heritage* decision) applies to the provisions in the Separation Agreement, its argument in its Brief in Support of its Cross-Exceptions that the ALJ should have characterized the Non-disparagement provision as a Category 2 rule under *Boeing*, and its reliance on decisions regarding work rules to support its arguments that the Non-disparagement provision is unlawful in its Brief in Support of its Cross-Exceptions. However, regardless of the standard the General

Counsel now argues applies to this case, the ALJ properly found the Non-disparagement provision does not violate the Act.

III. ARGUMENT

A. **The ALJ correctly found the Non-Disparagement Agreement is lawful under *Boeing*.**

Applying the Board's new standard in *Boeing*, the ALJ correctly determined the Non-disparagement provision was lawful as written as it has no impact on employee's Section 7 rights. Moreover, while not fully articulated in the ALJ's decision, BUMC has compelling business justifications in preventing former employees from making false and defamatory remarks after they are no longer employed by BUMC.

1. *The Non-disparagement provision's impact on employees' Section 7 rights is non-existent.*

Despite the contention of the General Counsel, when the Non-disparagement provision is read and examined as a whole, it does not impact employees in the exercise of their Section 7 rights. Most importantly, the provision does not explicitly or implicitly prohibit the discussion of wages, hours, or any other terms and conditions of employment. GC Ex. 2. Rather the provision refers to unprotected conduct, such as disloyal statements which are false or negative that could cause BUMC damage or harm. GC Ex. 2.

In an attempt to rewrite the Non-disparagement provision and insert restrictions that do not appear therein, the General Counsel unreasonably reads the provision and contends it is unlawful because it "might encompass" bans to the following: "complaints about employees' perceived low wages, long hours, poor working conditions, or improper or inappropriate treatment by supervisors." It further contends that the Non-disparagement provision could prohibit "Section 7 activities, including organizing or supporting unions, or banding together with co-workers to seek to change some term or condition of employment." This argument is not

based on a reasonable reading of the provision, as required by Board law. *See, e.g., Dish Network, LLC*, 365 NLRB No. 47 (Apr. 13, 2017) (“Additionally, in determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, and particular phrases may not be read in isolation.”) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). Moreover, this argument by the General Counsel that the Non-disparagement provision is unlawful because it “might encompass” prohibitions on the foregoing Section 7 activity is a not-so-veiled attempt to invoke the overturned *Lutheran-Heritage* standard as grounds for finding the provision unlawful. *Boeing Company*, 365 NLRB No. 154, slip op. at 2 (December 14, 2017) (“The *Lutheran Heritage* ‘reasonably construe’ test . . . has rendered unlawful every policy, rule and handbook provision an employee might ‘reasonably construe’ to prohibit any type of Section 7 activity.”).

The Non-disparagement provision is also lawful because the activity prohibited by the provision is not protected under the Act. Employees do not have an absolute right to make disparaging and negative comments about their employers. The Board has found that “[o]therwise protected communications with third parties may be so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection. *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007). Because employees do not have the absolute right to disparage their employers, the Board has found non-disparagement rules and policies to be lawful when they address conduct that is reasonably associated with actions that fall outside the protection of the Act, such as conduct that is abusive, malicious, injurious, threatening, intimidating, coercing, profane, or unlawful. *See e.g. Palms Hotel and Casino*, 344 NLRB 1363, 1367-1368 (2005) (rule addressing “conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with” other employees). A reasonable reading of the entirety of the Non-

disparagement provision evidences an effort by BUMC to prevent Camacho, and any other employee who entered into a similar agreement, from making disloyal, reckless, or maliciously untrue statements, which are not protected under the Act. The provision specifically refers to “false” and “disparaging” statements which could cause damage or harm to BUMC. The Board has consistently held that such disloyal statements are not protected under the Act, and that an employer does not violate the Act by restricting employees from engaging in such conduct. *See e.g., Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1291 (2001) (employer did not violate the Act by maintaining rule prohibiting employees from “[p]articipating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company”); *see also NLRB v. IBEW Local 1229 (Jefferson Standard)*, 345 U.S. 464, 475 (1953) (“The legal principle that . . . disloyalty for discharge is plain enough.”). Accordingly, the General Counsel’s Cross-Exception that the ALJ erred in concluding the Non-disparagement provision was lawful should be denied by the Board.

2. *The Non-disparagement provision in the Agreement is adequately supported by business justifications.*

Under the Board’s new *Boeing* standard, a work rule is lawful so long as the legitimate justifications associated with the rule outweigh any potential impact on employees’ Section 7 rights. *Boeing Company*, 365 NLRB No. 154, slip op. at 14 (December 14, 2017); *see also, Heartland Coca-Cola*, 2017 WL 4803581, at *2 (Oct. 23, 2017) (“An employer may implement and maintain a rule restricting protected activity, so long as there is an overriding interest in doing so.”) (citing *Flagstaff Medical Center*, 357 NLRB 659, 662-663 (2011)). As Smith testified, BUMC’s reputation is exceedingly critical to its success as a health care provider. Tr.

78:13-79:6.² ALJ Ringler likewise took notice of this point, stating “clearly a hospital doesn’t want to have a bad reputation. Clearly hospitals that have good reputations are ones that people want to go to, so these are all, I think, really quite obvious things.” Tr. 79:12-17. While the General Counsel contends in its Brief in Support of its Cross-Exceptions that Smith offered “vague testimony . . . related to the importance of [BUMC’s] reputation,” the General Counsel failed to present any evidence to rebut Smith’s testimony regarding BUMC’s business justifications for the Non-disparagement provision. Smith testified that the Non-disparagement provision in the Agreement is an effort by BUMC to maintain its good reputation in the communities it serves by preventing its former employers from making defamatory statements regarding it or the services it provides to its patients. The General Counsel presented no evidence to rebut this point. Accordingly, BUMC established its substantial business justification for the Non-disparagement provision in the Agreement that outweighs any potential impact the provision has on Section 7 rights, and therefore the ALJ was correct in his finding that the Non-disparagement provision does not violate the Act.

² Indeed, as acknowledged by Chairman Miscimarra in his dissent in *William Beaumont Hospital* critiquing the Board’s *Lutheran Heritage* decision, in passing the NLRA, it was not the “intent of Congress to require hospital patients and family members to hear ‘negative’ and ‘disparaging comments’ about the ‘professional capabilities’ of doctors and nurses.” *William Beaumont Hosp.*, 363 NLRB No. 162 (Apr. 13, 2016) (Miscimarra, dissenting).

B. Even if the analysis set forth in *S. Freedman & Sons*³ was applied to the Non-Disparagement provisions, the provision is lawful.

1. *The General Counsel cannot meet its burden that the Non-Disparagement provision is unlawful under the S. Freedman & Sons framework it now contends applies to this case.*

In arguing that the Non-disparagement provision is unlawful under *S. Freedman & Sons*, the General Counsel concludes that “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.” GC Brief in Support at 11. Respondent is perplexed on how the General Counsel can reach such a “clear” conclusion on this point when no evidence was presented at the hearing by the General Counsel regarding any of the factual circumstances surrounding the issuance of the separation agreement to Camacho, or any of the other 26 individuals who entered into separation agreements with BUMC.⁴ Respondent asserts that the General Counsel must make

³ 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 Brief in Support of its Cross Exceptions for the proposition that the Non-disparagement provision in the Separation Agreement is unlawful. *See* Brief in Support of Cross Exceptions, at 11-15. This duplicitous argument by the General Counsel is prejudicial, untenable, and nonsensical.

⁴ Notably, the General Counsel had the opportunity to introduce evidence on this point, as Camacho was present for the duration of the hearing, a BUMC HR Representative testified at the

such a conclusory argument since this lack of evidence prevents it from making the requisite showing and establishing its burden that the agreement offered to each of the 27 individuals at issue in this case was not narrowly tailored to the specific facts giving rise to each agreement.⁵

Certainly other evidence is relevant to determine—and required to establish—that a separation agreement is or is not 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) which 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*.

hearing, and the BUMC records custodian was present at the hearing to testify, but did not do so. Moreover, following the hearing and in light of the Board’s decision in *Boeing*, the ALJ provided the opportunity for the parties to show cause to reopen the hearing to put on additional evidence, and the General Counsel asserted the record should not be reopened. Accordingly, the parties are in apparent agreement that the record before the Board is sufficient to properly dispose of the issues in this case.

⁵ The factual showing required by the General Counsel under *S. Freedman & Sons* is much higher than the now-overturned *Lutheran-Heritage* standard. Compare *Lutheran-Heritage*, 343 NLRB 646, 647 (2004) (violation of Act if “employees would reasonably construe the language to prohibit Section 7 activity”), with *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (Aug. 25, 2016) (analysis required to determine whether waiver “narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver.”).

Because of this complete lack of evidence put on by the General Counsel, Respondent finds it difficult to cogently formulate a counter argument that the Non-disparagement provisions in the separation agreements were, in fact, narrowly tailored to the facts giving rise to their issuance. However, the burden was not on Respondent to prove the provisions were narrowly tailored and were therefore lawful; rather, it was on the General Counsel to prove the allegation in the Complaint that the Non-disparagement provisions in the separation agreements were unlawful because they were not narrowly to the circumstances giving rise to their issuance. *Posadas De Puerto Rico Assocs.*, 247 NLRB 1421, 1422 (1980) (“It is fundamental that the General Counsel has the burden of proving all allegations in the complaint.”). The General Counsel has not met this burden.

Accordingly, there is no merit to the General Counsel’s contention that the Non-disparagement provisions are not narrowly tailored to the facts giving rise to the issuance of the separation agreements, and its Cross-Exception should be denied.

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 analytical framework set forth in *S. Freedman & Sons* and the cases cited therein should apply to the provisions at issue in this case, these cases are not factually similar to the circumstances surrounding the Separation Agreement offered to Camacho, and thus this framework proposed by the General Counsel is inapplicable to this case.

Most notably, the principle case on which the General Counsel relies to support its argument that the Non-disparagement provision is unlawful, *S. Freedman & Sons*, is wholly inapposite and inapplicable to the facts of this case. *S. Freedman & Sons* involved allegations that an employer disciplined an employee in violation of the Act when he engaged in protected

concerted activity, and further violated the Act “by requiring [the employee] to sign a settlement agreement that contained a confidentiality clause in exchange for reinstatement.” *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (Aug. 25, 2016). The settlement agreement stated, in relevant part “that the terms of this agreement will remain confidential and that any disclosure of this Agreement may lead the Company to take disciplinary action against me, up to and including the termination of my employment.” *Id.* In the discussion of whether the settlement agreement violated the Act, the Board noted that it “has found that an employer may condition a settlement on an employee's waiver of Section 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver.” *Id.* While Respondent does not contest that this standard may be appropriate to analyze whether a settlement agreement offered to an employee as a condition of reinstatement of employment violates the Act, the standard is not appropriate in analyzing the lawfulness of the Non-disparagement provision contained in the Separation Agreement in this case. Obvious and important distinctions exist between an employee who was offered a broad waiver agreement as a condition of returning to work (like in *S. Freedman & Sons*) and the circumstances in this case where a former employee is offered a monetary settlement following her lawful termination of employment 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, the individuals were free to negotiate the terms of the separation agreement, and the individuals were free to reject the agreements without the rejection affecting their ability to regain or retain their job with BUMC. Accordingly, the framework set forth in *S.*

Freedman & Sons cannot properly be applied to the Non-disparagement provision at issue in this case.

The cases cited in *S. Freedman & Sons* that the General Counsel now contends are also controlling in this case are equally inapplicable. Similar to *S. Freedman & Sons*, *Coca-Cola Bottling* also involved an employee whose reinstatement was conditioned on 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 during a layoff 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). *Metro Networks* is also distinguishable from the facts of this case, as the severance agreement offered by the employer would have prevented the employee from cooperating with the Board in the unfair labor practice charge filed by the employee regarding his termination of employment. *Metro Networks, Inc.*, 336 NLRB 63, 66-67 (2001). Accordingly, the framework set forth in *S. Freedman & Sons* and the cases cited therein cannot properly be applied to the Non-disparagement provision at issue in this case as asserted by the General Counsel. Even if the standard were applied, the General Counsel produced no evidence regarding any of the factual circumstances surrounding the issuance of the separation agreement to Camacho, or any of the other 26 individuals who entered into separation agreements with BUMC. Accordingly, the General Counsel's Cross-Exception should be denied.

IV. CONCLUSION

For the foregoing reasons, BUMC respectfully requests the General Counsel's Amended Complaint be dismissed in its entirety.

Respectfully submitted this 24th day of May, 2018.

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CERTIFICATE OF SERVICE

I certify that on this 24th day of May, 2018, I caused the foregoing 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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