

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

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I. INTRODUCTION

Counsel for the General Counsel files this Reply Brief to Respondent's Answering Brief to Counsel for the General Counsel's Cross Exception to the Administrative Law Judge's Decision pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board. Counsel for the General Counsel submits that Respondent's arguments in support of its Answering Brief are without merit, and urges the Board to grant Counsel for the General Counsel's Cross Exception to the Administrative Law Judge's Decision and find that the Non-disparagement provision of the Separation and Realignment Agreements at issue in this case violates Section 8(a)(1) of the Act.

II. REPLY

A. The Non-disparagement provision explicitly restricts Section 7 activity.

Respondent contends that its Non-disparagement provision does not restrict employees in the exercise of Section 7 rights. This argument wholly ignores the Board's longstanding position that employees may lawfully criticize and speak negatively about their employers in the context of

a labor dispute, as long as that speech is not maliciously false, disloyal, or reckless. *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). In the context of concerted activities, even false and inaccurate employee statements are protected as long as they are not malicious. *See American Cast Iron Pipe Co.*, 234 NLRB 1126, 1130-1131 (1978). The Non-disparagement provision here prohibits “false, disparaging, negative, unflattering, accusatory or derogatory remarks or references” about Respondent. The Board has long found that employer policies prohibiting merely false, negative, or disparaging speech violate the Act. *See, e.g., Chipotle Services, LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn.3, 7 (2016), *rev. denied* 690 Fed. Appx. 277 (mem.) (5th Cir. 2017) (Board affirms ALJ’s determination that employer’s social media policy prohibiting spread of “disparaging, false, misleading, harassing or discriminatory statements” about the employer unlawfully restricted postings that are merely ‘false or misleading’, without requisite malicious motive); *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) (finding unlawful employer’s Non-disparagement provision prohibiting employees from publicly criticizing, ridiculing, disparaging or defaming the employer; ALJ notes employees have a Section 7 right to criticize their employer and its products within limits); *American Cast Iron Pipe Co.*, 234 NLRB at 1131 (Board affirms ALJ’s determination that employer’s rules prohibiting “false, vicious, or malicious” verbal or written statements about employees, employer, products or methods unlawful as they prohibit merely ‘false’ utterances or writings, noting “[t]he Board rule, enforced by the courts, is that, within the area of concerted activities, false and inaccurate employee statements are protected so long as they are not malicious.”).

Respondent argues that the Board has found non-disparagement policies lawful when they address conduct falling outside the protection of the Act, such “abusive, malicious, injurious, threatening, intimidating, coercing, profane, or unlawful” conduct, and the General Counsel agrees; although such an argument is misplaced here. The Non-disparagement provision at issue goes beyond the lawful prohibitions found by the Board. As noted above, the provision explicitly prohibits conduct that the Board has long declared protected by the Act in the context of protected activity. As written, the provision explicitly restricts signatory employees from exercising their NLRA-protected right to criticize or speak negatively about Respondent. Respondent also misconstrues the General Counsel’s use of examples to illustrate the Non-disparagement provisions’ potential effects on an employees’ right to criticize their employers in a non-malicious, non-disloyal manner when it suggests that the General Counsel attempts to invoke the overturned *Lutheran Heritage* standard. Instead, references to topics of discussion that might be restricted by the Non-disparagement provision, including organizing or supporting unions, or seeking to change some unfavorable term or condition of employment, demonstrate the problem with policies that fail to clarify the types of unlawful speech they prohibit, and leave within their broad purview protected subjects of discussion and other NLRA-protected activity. Respondent’s argument that the Non-disparagement provision does not restrict signatory employees in the exercise of Section 7 rights is contrary to longstanding Board precedent protecting employees’ rights to criticize their employer’s actions regarding wages, hours and working conditions.

B. Respondent’s business justification for its Non-disparagement provision does not outweigh its impact on Section 7 rights.

As noted in Counsel for the General Counsel’s Cross Exception and Brief in Support, the ALJ erred by concluding that the Non-Disparagement clause herein is a valid civility standard provision under *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017). Counsel for the

General Counsel submits, as an instructive analogy, that under the framework articulated by the Board in *Boeing*, the Non-disparagement provision at issue here would be properly characterized as a Category 2 rule, if it were a rule, because its impact on NLRA-protected rights outweigh the Respondent's asserted business justifications.

Respondent's argument that its interest in maintaining its reputation outweighs the Non-disparagement provisions' effect upon employee Section 7 rights similarly fails. By this premise, Respondent would have the Board accept its basic, unsubstantiated argument about the importance of its reputation as sufficient to render the Non-disparagement provision lawful without regard to its impact on employee rights under Section 7 of the Act. In *Boeing*, the Board stated that when a rule, when reasonably interpreted, "would prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful" and imposes the requirement that the Board "carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications." 365 NLRB No. 154, slip op. at 17. The rule's maintenance then violates the Act if the justifications are outweighed by the adverse impact on Section 7 rights. *See id.* The Non-disparagement provisions' potential impact on employee Section 7 rights is far-reaching and obvious: a signatory employee would be prohibited from speaking to employees or third parties about any negative aspect of his or her employment with Respondent, and similarly, current employees are prohibited from discussing those topics with signatory employees. Where "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." *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*) (citing *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252, n. 7 (2007)).

As the ALJ noted at hearing, Respondent's argument about the value of its reputation to its success is obvious and needed little explanation. (Tr. 79, LL. 12-18). Indeed, one would be hard-pressed to find a company or healthcare institution not concerned with its reputation. Although Respondent may have an interest in prohibiting maliciously false, disloyal, or reckless statements about it made by current or former employees that could serve to seriously harm its reputation, this interest does not give it the right to silence signatory employees about any potential, decidedly negative aspects of employment with Respondent. Here, Respondent has provided insufficient evidence to prove that a ban on all negative or unflattering speech is the only way to achieve its goal of prohibiting maliciously false, disloyal, or reckless statements, and has provided no evidence whatsoever regarding specific circumstances leading to its inclusion of a provision prohibiting signatory employees from engaging in all negative speech. Respondent's Non-disparagement provision also covers activity it has no substantial or articulated interest in prohibiting, including discussions about negative aspects of employment related to wages, hours and working conditions engaged in among current and former employees with a look towards collective action, or discussions with third party organizations or agencies about those conditions in seeking to effectuate change in the workplace impacting current employees. Where Respondent's legitimate interests could be served by a more clearly defined provision that does not so explicitly cover protected activity, an overbroad provision like the Non-disparagement section of the Separation and Realignment Agreements here is unlawful.

C. 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.

In *S. Freedman & Sons, Inc.*, the Board considered whether an employer violated Section 8(a)(1) by including a confidentiality clause in a settlement agreement it issued to its employee. 364 NLRB No. 82 (Aug. 25, 2016). As Respondent notes, the case involved a terminated employee and a settlement agreement providing for the conversion of the employee's termination to a suspension in exchange for his agreement to the terms of the settlement. *See id.*, slip op. at 2. Although *S. Freedman & Sons* involved a settlement agreement, rather than a separation agreement like that involved here, the Board has indicated that the same considerations apply to each type of agreement. For example, the Board has held that the validity of waiver and release agreements should be governed by the same standards as private non-Board settlement agreements under *Independent Stave Co.*, 287 NLRB 740, 742 (1987), *overruled on other grounds*, *United States Postal Service*, 364 NLRB No. 116 (Aug. 27, 2016). *See, e.g., Hughes Christensen Co.*, 317 NLRB 633, 634 (1995), *enforcement denied on other grounds*, 101 F.3d 28 (5th Cir. 1996); *Clark Distribution Systems*, 336 NLRB 747, 750 (2001). Additionally, the Board has relied upon prior Board decisions involving separation and severance agreements in order to assess and determine the legality of settlement agreements, including in *S. Freedman & Sons*, 364 NLRB No. 82, slip op. at 2 (noting the Board has found unlawful settlement agreements that prevent employees from exercising rights unrelated to facts giving rise to the settlement and citing *Clark Distribution Systems, Inc.*, 336 NLRB at 748 and *Metro Networks*, 336 NLRB 63, 67 (2001) in support, both cases involving severance agreements). Therefore, Respondent's argument that *S. Freedman & Sons* is 'wholly inapposite and inapplicable' to the case at hand because of the differing circumstances at play is frivolous and unsubstantiated. As the Board's reference clearly

suggested in *S. Freedman & Sons*, the same principles involving an employees' waiver of Section 7 rights are involved in settlement separation agreements.

D. The Non-disparagement provisions at issue are not narrowly tailored to the facts giving rise to their issuance as they are identical.

In this case, the terms of Respondent's separation agreements call for broad waivers of Section 7 rights that are not narrowly tailored to the facts giving rise to the settlements. The record established, as the ALJ noted in his decision, that the provisions at issue are a normal part of every severance agreement offer made by Respondent. (JD slip op. at 2, LL. 32 n. 4). Respondent's argument against the General Counsel's assertion that the Non-disparagement provisions were not narrowly tailored to the factual circumstances underlying the agreements is therefore disingenuous.

Respondent misconstrues the burdens of proof involved. Respondent contends that the General Counsel bears the burden of showing that these twenty-six agreements were *not* narrowly tailored because the General Counsel bears the overall burden of proving the allegations of the Complaint. Here, Respondent mistakes an available defense as an element of the General Counsel's case. The General Counsel's burden is to establish that Respondent offered severance agreements, which include these terms, and that by the language of these terms, employees are restricted in their rights. Once those two elements are established, it is Respondent's burden, as the party restricting employee rights, to show that circumstances justify this infringement. *See, e.g. P.S.K. Supermarkets*, 349 NLRB 34, 34 (2007) (dress codes); *Mead Corp.*, 314 NLRB 732, 733 & n.4 (1994), enforced, 73 F.3d 74 (6th Cir. 1996) (dress codes); *Am. Fed'n of Gov't Employees*, 278 NLRB 378, 385 (1986) (insignia); *Mack's Supermarkets*, 288 NLRB 1082, 1098

(1988) (supervisory status); *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953) (strikers). Respondent failed to meet this burden.¹

Respondent's production at hearing of twenty-six Separation and Realignment Agreements, all with identical Non-disparagement clauses to that offered to Dora Camacho, made clear that Respondent's form template for such agreements had not been changed to fit the circumstances of the employment separations they sought to settle. Presenting additional evidence related to the facts giving rise to the issuance of the agreements in order to prove that the Non-disparagement agreement unlawfully restricted employees' Section 7 rights without being narrowly tailored to the circumstances of the terminations of signatory employees was unnecessary, as the identical Agreements, on their face, demonstrate the agreements were not narrowly tailored and therefore speak for themselves.

The Board has found agreements adequately tailored to warrant waiver of employees' Section 7 rights where a waiver is limited to the specific incident(s) giving rise to the need to issue such an agreement, such as specific employee discipline, and where employees receive a benefit in return for the waiver. *See, e.g., S. Freedman & Sons*, 364 NLRB No. 82, slip op. at 2 (employee received reinstatement in exchange for agreeing not to discuss the terms of the settlement, but not any future discipline or other terms and conditions of employment); *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979) (finding lawful a settlement that reduced an employee's discipline in exchange for waiving future litigation about that specific discipline, but not future discipline); *Regal Cinemas, Inc.*, 334 NLRB 304, 305-306 (2001) (finding lawful settlement that conditioned the employees' receipt of severance pay on waiver of right to file Board charges over terminations), *enfd.* 317 F.3d 300 (D.C. Cir. 2003). Similar circumstances are not at play in this

¹ Respondent has also failed to establish that it was prejudiced by the General Counsel's reference to the *S. Freedman & Sons* analysis in the General Counsel's Brief in Support of Cross-Exception.

case. All twenty-seven employees received the Separation and Realignment Agreements at issue here, regardless of the circumstances of their separations, which included, according to Respondent, terminations, realignments, and position eliminations. (Tr. 53, LL. 24-25; 54, LL. 1-25). All twenty-seven Agreements included identical Non-disparagement provisions requiring employees to give up their NLRA-protected right to speak negatively about their former employer. Facially, the Non-disparagement provisions prohibit employees from criticizing or speaking negatively about any of the terms and conditions of their employment with Respondent, not just the aspects of their employment relating to their ultimate separations. Unlike in *S. Freedman & Sons*, where the settlement agreement restricted the employee only from speaking about the terms of the settlement, the Non-disparagement provision in this case is much broader in its restriction, and prohibits all negative, unflattering speech about employment with Respondent, forever. *See* 364 NLRB No. 82, slip op. at 2-3. It is difficult to comprehend a manner in which Respondent could argue that such agreements were narrowly tailored to fit the circumstances giving rise to their issuance, and Counsel for the General Counsel respectfully submits that they were not.

III. 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 in that Cross Exception.

DATED at Fort Worth, Texas, this 7th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Reply to Respondent's Answering Brief to 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 7th day of June, 2018 upon the following parties:

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