

Advice Memorandum

DATE: April 23, 2013

TO: Jonathan B. Kreisberg, Regional Director
Region 34

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

SUBJECT: MasTec North America
Case 34-CA-090246

506-6085
506-6090-7700
506-6090-8200
512-5012-0133-5000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by maintenance of specified rules in its employee handbook. We conclude that the following rules violate Section 8(a)(1) of the Act: a dispute resolution policy prohibiting employees from arbitrating disputes as a class; a policy prohibiting the recording of conversations at work; and a prohibition on the “use of abusive, threatening or derogatory language towards employees, customers or management.” On the other hand, the Employer’s policies prohibiting employees from disclosing confidential information, and an at-will employment clause that can only be modified by the Chief Executive Officer and the Group President, would not be reasonably construed to chill Section 7 activities and, therefore, do not violate the Act.

A. Dispute Resolution Policy

The Employer’s dispute resolution policy contained, in its handbook at pp. 44-45, states:

all [employment-related disputes]... to be resolved only by an arbitrator through final and binding arbitration, and not by way [of] court or jury trial...However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general on behalf of a class of persons or the general public.

Additionally, the Forward of the handbook earlier provides, at p. 5:

Please note that the Dispute Resolution will apply to you unless you choose to opt out. Please review the Dispute Resolution Policy immediately, as you will have a period of **thirty (30) days** from the date of receipt of this Handbook to return a form to the Company's Legal Department should it be your choice to opt out (emphasis in original).

Very similar provisions have been found unlawful by Advice in *24 Hour Fitness Worldwide*,¹ and (b) (7)(A)² based on the legal principles the Board set forth in *D.R. Horton*.³ In *D.R. Horton*, the Board held in that “an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.”⁴ We conclude that this provision explicitly limits employees from exercising their Section 7 rights to commence and prosecute employment-related legal actions in concert with other employees in “any forum arbitral or judicial” or, at least, would reasonably be construed by employees to do so.

Moreover, for the reasons set forth in *24 Hour Fitness*,⁵ the arbitration policy's provision in the Forward of the handbook, permitting employees to opt out of the Employer's arbitration policy during their first 30 days of employment, does not affect its unlawful interference with employees' Section 7 right to file and participate in collective and class litigation under *D.R. Horton*. Therefore, we conclude that the Employer's arbitration provision interferes with employees' Section 7 right to file and participate in collective and class litigation in violation of Section 8(a)(1) of the Act.

¹ 20-CA-035419, Advice Memorandum dated March 21, 2012, pp 1-2, & 3. (This position was affirmed by a subsequent ALJD, *24 Hour Fitness*, JD(SF)-51-12, slip op. at 16-18 (November 6, 2012).

² (b) (7)(A)
(b) (7)(A)

³ 357 NLRB No. 184, slip op. at 1-7 (2012).

⁴ *Id.*, slip op. at 1.

⁵ *24 Hour Fitness*, *supra*, Advice Memorandum at p. 6, 9.

B. Unlawful Rules

(1). The Employer's handbook contains the following prohibition against recording conversations:

The Company strictly prohibits the recording of conversations with a tape recorder or other recording device unless prior approval is received from your supervisor or a member of senior management and all parties to the conversation give their consent.

The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

Violation of this policy will result in disciplinary action, up and to and including immediate termination. Notwithstanding this policy, the Company reserves the right to monitor its technical resources including, but not limited to, its telephone systems, e-mail systems and the internet

Such a broad rule would reasonably be interpreted to prevent employees from recording statements or conversations that involve Section 7 activities such as picketing, or recording evidence to be presented in administrative or judicial forums in employment related matters.⁶ Indeed, Advice has found unlawful a rule that prohibited, among other things, recording conversations of patients, visitors, and staff of a rehabilitation center.⁷ Accordingly, complaint should issue, absent withdrawal, with regard to this allegation.

⁶ See, e.g., *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), *enforced*, 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected); *Hawaii Tribune-Herald*, 356 NLRB No. 63 slip op. at 1 (2011) (Employer's promulgation and maintenance of a rule prohibiting employees from making secret audio recordings of conversations in response to protected activity violates Section 8(a)(1)). Compare *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 4-5 (August 26, 2011) (holding lawful rule prohibiting employees from taking photographs of hospital patients or property in light of "weighty" privacy interests of hospital patients and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information).

⁷ *Rehabilitation Institute of Chicago*, 13-CA-66487, Advice Memorandum dated December 20, 2011, pp .1, 3.

(2). Page 42 of the Employer handbook contains a prohibition against the “[u]se of abusive, threatening or derogatory language towards employees, customers or management.”

We conclude that employees would reasonably construe this challenged provision as prohibiting Section 7 activity. The prohibition against the “use of abusive, threatening or derogatory language,” phrased in the disjunctive, prohibits derogatory language without any reference to whether it is abusive or threatening. The Board in *Southern Maryland Hospital*⁸ found a rule which contained both a lawful prohibition of “malicious gossip” and an unlawful prohibition of “derogatory attacks” on hospital representatives unlawful because the term derogatory would include protected conduct. Thus, “an assertion that the employer underpays its employees, which would constitute the most elementary kind of union propaganda, could fairly be regarded as ‘derogatory’ toward the employer...”⁹

In concluding that the Employer’s prohibition against “derogatory language” violates the Act, we are mindful of the Board’s instruction in *Lutheran Heritage Village-Livonia*¹⁰ to consider the rules in context. The “derogatory language” prohibition is contained in a section setting forth conduct that “may result in disciplinary action, including suspension, demotion, or termination of employment,” and is the last (14th) in a list of the following 13 bulleted points:

- Violation of safety or security rules, established policies, practices or procedures.
- Deliberate destruction or misuse of materials or property of the Company or personal property of others while on Company property.
- Fighting or horseplay on Company property for any reason.
- Gambling, disorderly or immoral conduct on Company property.
- Insubordination, refusing to follow instructions of management.
- Unauthorized use of Company equipment.

⁸ 293 NLRB 1209, 1222 (1989) enfd. in relevant part, 916 F.2d 932, 940 (4th Cir. 1990), cited with approval in *Costco Wholesale Corp*, 358 NLRB No. 106, slip op. at 2 (2012) (finding unlawful a rule against statements that “damage the Company, defame any individual or damage any person’s reputation”).

⁹ *Southern Maryland Hosp.*, above at 1222.

¹⁰ 343 NLRB at 647.

- Theft, attempted theft or concealment of company goods or equipment or that of employees while on Company property.
- Possession of a dangerous weapon, firearm or destructive devise on Company property.
- Comments or behavior that could be perceived by a reasonable person as being threatening or indicating the possibility of violence.
- Dishonesty, including but not limited to, providing false or less than accurate information on any company documents or forms, employment applications, expense reports, time sheets, etc.
- Unauthorized release of Company operating status, proprietary information or Company confidential material.
- Sale, use, possession, distribution or being under the influence of alcohol and/or drugs while on Company property or company work time.
- Rudeness to a customer, partner, vendor, or person with whom the Company has a business relationship.

While this list includes several items that might be characterized as very serious infractions, it also includes several relatively minor infractions, such as horseplay, rudeness, and, generally, a violation of any “established policies, practices or procedures.”¹¹ In these circumstances, and given the established unlawfulness of the specific language at issue, we conclude that the the Employer’s policy violates Section 8(a)(1) of the Act.

C. Lawful Rule and Policy

(1). The Employer’s confidentiality provision at pages 51-52 of its handbook, entitled “Confidential Information,” prohibits primarily, if not entirely, disclosure of business and/or proprietary information. It makes no mention of any information relating to employees or employee’s terms and conditions of employment. Indeed, the

¹¹ *Cf. Tradesman, supra*, 338 NLRB at 462 (rule against “[v]erbal or other statements which are slanderous or detrimental to the company...” not found unlawful, in part, because it was found on a list of 19 rules which prohibited, among other things, such egregious conduct as sabotage and sexual or racial harassment, which are not protected by Section 7.)

first paragraph includes the following disclaimer: “Of course, the Company recognizes that employees have a right to discuss work-related matters and concerns, including those related to terms and conditions of work.” The second paragraph identifies the type of proprietary information which is considered confidential, e.g., customers, suppliers, marketing methods, pricing, etc., and one catch-all phrase, “all other confidential information of, about or concerning the business of the Company...”

In all the circumstances, we do not believe an employee viewing this rule in context would reasonably construe the language to prohibit Section 7 activity, particularly in light of its expressed disclaimer to cover employees discussing their own terms and conditions of employment. Moreover, the Company’s general prohibition of disclosing “all other confidential information of, about or *concerning the business of the Company...*” (emphasis supplied) does not appear to be directed at employee information and would not be reasonably construed to cover protected conduct.¹² Accordingly, this allegation should be dismissed, absent withdrawal.

(2). Finally, the Employer’s At-Will Employment policy cited at page 11 of its handbook, and the Employee Acknowledgement on the last page of the handbook, are lawful under *Lafayette Park Hotel* and *Lutheran Heritage* and their progeny. Both sections of the handbook describe a typical At-Will employment relationship, which is clearly lawful, absent a negotiated contractual “good cause” provision.¹³ The provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision confers the *Company’s* authority to modify the At Will provision on its Chief Executive Officer or its Group President, and then only in writing. Thus, the provision explicitly permits the Employer’s CEO or Group President to enter into written employment agreements that modify the employment at-will relationship,

¹² Cf. *Cintas Corp.*, 344 NLRB 943 (2005) (rule requiring employees to maintain “confidentiality of *any information* concerning the company, its business plans, its *partners*, new business efforts, customers, accounting and financial matters” found unlawfully overbroad, where the term “partners” referred to employees).

¹³ It is commonplace for employers to rely on policy provisions such as those at issue here as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract. See *NLRB v. Ace Comb Co.*, 342 F.2d 841, 847 (8th Cir. 1965) (“It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer’s policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act”); *Aeon Precision Company*, 239 NLRB 60, 63 (1978) (same); *Aileen, Inc.*, 218 NLRB 1419, 1422 (1975) (same).

and thus encompasses the possibility of a potential modification of the at-will relationship through a collective-bargaining agreement that is ratified by one of those officials.¹⁴ Accordingly, we conclude that employees would not reasonably construe this provision to restrict their Section 7 right to select a collective-bargaining representative and bargain collectively for a contract, and this allegation should be dismissed, absent withdrawal.

/s/
B.J.K.

ADV.34-CA-090246.Response.MasTec3. (b) (6), (b) (7)

¹⁴ See, e.g., *Rocha Transportation*, Case 32-CA-086799, Advice Memorandum dated October 31, 2012, pp 3-4. (Company President allowed to modify At-Will provision). See also, *SWH Corporation d/b/a Mimi's Café*, Case 28-CA-084365, Advice Memorandum dated October 3, 2012, pp. 3-4 (Provision does not prohibit employees from trying to change or modify At-Will provision, but merely prohibits its own managers from doing so.)