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Windsor Sacramento Estates, LLC d/b/a Windsor Care Center of Sacramento and Service Employees International Union, Local 2015. Case 20–CA–196183

July 30, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The Charging Party seeks summary judgment in this case on the grounds that the Respondent’s Alternative Dispute Resolution Policy (Policy) is unlawful and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining the Policy, portions of which would reasonably be read by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the Board. The General Counsel and the Respondent also each seek summary judgment, arguing that the Board should dismiss the complaint and find, as a matter of law, that the Respondent did not violate Section 8(a)(1) of the Act by maintaining the Policy.

Pursuant to a charge filed on March 31, 2017, and a first amended charge filed on August 15, 2018, by the Service Employees International Union, Local 2015, the General Counsel issued a complaint on October 31, 2018. The complaint alleges that at all material times, the Respondent has maintained the Policy, portions of which would reasonably be read by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the Board. On November 14, 2018, the Respondent filed an answer to the complaint.

On January 22, 2019,¹ the Charging Party filed a motion for summary judgment, arguing that the Board should find the Policy unlawful. On February 13, the General Counsel filed an opposing motion for summary judgment, arguing that the Policy is lawful and employees would not reasonably read it to prohibit them from filing or pursuing unfair labor practice charges before the Board. On February 21, the Charging Party filed an opposition to the General

Counsel’s motion. On February 25, the Respondent filed a motion for summary judgment, arguing for the dismissal of the complaint on two grounds: first, that the Policy is not unlawful, and second, that “forcing [it] to endure the burden and expense of a hearing when even the General Counsel does not support the allegations of the Complaint is a violation of [its] due process rights.” On February 28, the Charging Party filed an opposition to the Respondent’s motion.

On June 25, the Board issued an Order Transferring the Proceeding to the Board and Notice to Show Cause why summary judgment should not be granted in favor of any of the parties. On July 9 and July 23, the General Counsel and the Respondent, respectively, each filed a response to the Notice to Show Cause, arguing, among other things, that the Charging Party’s arguments lack merit and that the Board should find the Policy lawful and dismiss the complaint as a matter of law. Also on July 23, the Charging Party filed a response to the notice, arguing that the Board should grant its motion and find the Respondent’s Policy unlawful and, alternatively, that the Board should deny the General Counsel’s and the Respondent’s motions and send the case to a hearing before an administrative law judge. The Charging Party also argues that the General Counsel’s pursuit of a dismissal of the complaint is prohibited by the Act.

Ruling on Motions for Summary Judgment

The General Counsel and the Respondent argue, and we find, that there are no issues of material fact warranting a hearing.² The only issue therefore is whether, as a matter of law, the Respondent violates Section 8(a)(1) of the Act because portions of its Policy would reasonably be read by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the Board. For the reasons discussed below, we grant the Respondent’s motion for summary judgment and dismiss the complaint.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California limited liability company with an office and place of business in Sacramento, California, has been operating a skilled nursing facility providing inpatient medical care.

remand the case to an administrative law judge because a hearing is necessary to determine the Respondent’s business justifications for the Policy. As discussed below, because we find that the Policy is a lawful Category 1(a) rule under *Boeing Co.*, 365 NLRB No. 154 (2017) (*Boeing*), an analysis of the Respondent’s business justifications is not required. See below at fns. 3 & 6. We therefore agree with the General Counsel and the Respondent that there are no issues of material fact warranting a hearing.

¹ Dates hereafter are in 2019 unless otherwise indicated.

² In its motion for summary judgment, opposition to the General Counsel’s and Respondent’s motions for summary judgment, and response to the Notice to Show Cause, the Charging Party argues that the Board should find that the Policy is unlawful because portions of it would reasonably be read by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the Board. However, also in those same filings, the Charging Party argues that the Board should

During the calendar year ending December 31, 2016, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$5000 which originated outside the State of California.

The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, a health care institution within the meaning of Section 2(14) of the Act, and subject to the Board's jurisdiction.

We also find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a skilled nursing facility. Since at least about September 2015, it has maintained the three-page Policy, which includes the following provisions (emphasis in original).

In the middle of the first page of the Policy, under the heading "WHO IS COVERED BY THE ADR POLICY," it provides in relevant part:

The ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES . . . AND [THE RESPONDENT]. Any disputes which arise and which are covered by the ADR Policy must be submitted to final and binding resolution through the procedures of the Company's ADR Policy.

For parties covered by this Alternative Dispute Resolution Policy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought in court or in any other forum. This agreement is a waiver of all rights to a civil court action for a covered dispute; only an arbitrator, not a Judge or Jury, will decide the dispute.

The next section of the Policy, spanning the bottom of the first page to the middle of the second page and headed "COVERED DISPUTES," states:

Nothing in this Alternative Dispute Resolution Policy is intended to require arbitration of any claim or dispute which the courts of this jurisdiction have expressly held are not subject to mandatory arbitration.

....

Covered disputes include any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of your employment, including, but not limited to, the following:

- Alleged violations of federal, state and/or local constitutions, statutes or regulations;
- Claims of unlawful harassment, discrimination, retaliation or wrongful termination that cannot be resolved by the parties or during an investigation by an administrative agency
-
- Claims of unfair demotion, transfer, reduction in pay, or any other change in the terms and conditions of employment;
-
- Claims of defamation, pre and post-termination[.]

....

The following types of disputes are expressly excluded and are not covered by this ADR Policy:

- Disputes related to workers' compensation and unemployment insurance;
- Disputes or claims that are expressly excluded by statute or are expressly required to be arbitrated under a different procedure pursuant to the terms of a team member benefit plan.

....

Next, a "CLASS ACTION WAIVER" section in the middle of the second page states that employees

understand and agree this ADR Program prohibits me from joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others.

Approximately one-page later at the end of the three-page document, in a section headed "SEVERABILITY," the Policy provides:

In the event that any provision of this ADR Policy is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable to any extent, such term or provision shall be enforced to the extent permissible under the law and all remaining terms and provisions of this ADR Policy shall continue in full force and effect.

Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with . . . the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR Policy.

A. Contentions of the Parties

In its motion for summary judgment and subsequent filings, the Charging Party argues, among other things, that the Policy should be found unlawful because portions of it would reasonably be read by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the Board. The Charging Party argues that the Policy's savings clause is inadequate, in part because it is contained in the section headed "SEVERABILITY."

Conversely, in their motions for summary judgment and subsequent filings, the General Counsel and the Respondent argue, among other things, that the Policy should be found lawful because it would not be reasonably read by employees to prohibit them from filing or pursuing unfair labor practice charges. Specifically, the General Counsel and the Respondent argue that because the Policy does not prohibit conduct protected by the Act, it is lawful under *Boeing*. 365 NLRB No. 154, slip op. at 3–4.³

B. Analysis

In *Prime Healthcare Paradise Valley, LLC*, the Board held that "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful" because "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). Where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the Board determines whether the agreement, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Id.* (quoting *Boeing*, supra, slip op. at 3).⁴ This standard is an objective one and looks solely to the wording of the rule, policy, or other provision at issue interpreted from the perspective of an objectively reasonable employee, who does not view every employer policy through the prism of the NLRA. See *LA Specialty*, supra, slip op. at 2.

Subsequently, the Board addressed the lawfulness of an arbitration agreement that required employees to arbitrate

federal statutory claims but also included "savings" language that clearly and prominently informed employees that they were free to file charges with the Board. See *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019) (*Briad Wenco*) (finding that employees could not reasonably interpret the arbitration agreement to prohibit them from filing Board charges or participating in Board proceedings because the savings clause explicitly informed employees that they retained the right to file charges with the Board and access its processes).

More recently, the Board found lawful an alternative dispute resolution policy which contained, at the end of its three-page agreement, a savings clause permitting the filing of charges with the Board. See *San Rafael Healthcare & Wellness, LLC*, 369 NLRB No. 105, slip op. at 1–2 (2020) (*San Rafael*). In *San Rafael*, the alternative dispute resolution policy required arbitration of all disputes between employees and the employer, and therefore, when reasonably interpreted, included claims arising under the Act within the scope of its arbitration mandate. *Id.*, slip op. at 3. However, the agreement also contained a savings clause providing that "[n]othing in this [a]lternative [d]ispute [p]olicy is intended to preclude any employee from filing a charge with . . . the National Labor Relations Board." *Id.* The Board found that the savings clause affirmatively and specifically stated that employees may file charges with the Board and was sufficiently prominent within the agreement. *Id.* The Board also found that a reasonable employee would not easily overlook or disregard the savings clause, even though it was at the end of the three-page arbitration agreement. *Id.* ("Indeed, the clause's placement at the end of the document enhances rather than detracts from its conspicuousness: it is literally the last word in the [p]olicy.")

Here, like the arbitration agreements in *Briad Wenco* and *San Rafael*, the Policy initially requires arbitration of all disputes between employees and the Respondent, which would include claims arising under the Act. However, at the end of the Policy is a savings clause stating

³ Under *Boeing*, supra, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. *Id.*, slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to

interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b), and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See *id.*, slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019) (*LA Specialty*).

⁴ A challenged rule may not be found unlawful merely because it could hypothetically be interpreted to potentially limit Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See *Boeing*, supra, slip op. at 9.

that “[n]othing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with . . . the National Labor Relations Board.” This savings clause, like the ones in *Briad Wenco* and *San Rafael*, specifically and affirmatively states that employees may file charges with the Board, and it is also sufficiently prominent.⁵ The Policy is only three pages long, and a reasonable employee would not easily overlook or disregard the savings clause, which is set apart from other provisions in a separate paragraph. See *San Rafael*, supra, slip op. at 3.

For these reasons, employees would not reasonably interpret the Policy to potentially interfere with their right of access to the Board and its processes. The Policy is therefore lawful under *Boeing* Category 1(a). See *Boeing*, supra, slip op. at 4 (describing how Category 1(a) consists of “rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights”) (footnote omitted).⁶ Thus, we will grant the Respondent’s motion for summary judgment and dismiss the complaint.

Accordingly, we deny the Charging Party’s motion for summary judgment. In view of the disposition of this case, we find it unnecessary to pass upon the General

Counsel’s motion for summary judgment and the other arguments raised in the Charging Party’s, the General Counsel’s, and the Respondent’s filings.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 30, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁵ We disagree with the Charging Party’s argument that the placement of the savings clause in a section headed “SEVERABILITY” would cause employees confusion. See *San Rafael*, supra, slip op. at 3 fn. 3. As we stated in *San Rafael*, the terms may be used interchangeably, and, regardless, we see no reason why the “SEVERABILITY” heading would lead employees to ignore the clause and its clear acknowledgment of their right to file Board charges. *Id.*

We note that a savings clause in an arbitration agreement may sufficiently preserve employees’ right to file charges with the Board even if it does not expressly refer to the National Labor Relations Board, the NLRB, or the Board. See *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees’ right of access to the Board savings-clause language stating that

employees who sign arbitration agreement “are not giving up . . . the right to file claims with federal . . . government agencies”). Necessarily, then, there can be no question of the legal sufficiency of a savings clause like the one at issue here, which expressly and prominently refers to employees’ right to file charges with the National Labor Relations Board.

⁶ As discussed in fn. 2, above, and contrary to the Charging Party’s arguments, a hearing is not necessary to determine the Respondent’s business justifications because employees would not interpret the Policy as potentially interfering with the exercise of any Sec. 7 right. Under *Boeing*, an employer’s business justifications for maintaining a rule should be considered only if the rule, when reasonably interpreted, would prohibit or interfere with the exercise of rights protected by the Act. See *LA Specialty*, supra, slip op. at 4 fn. 8.