United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 31, 2012

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: SWH Corporation d/b/a Mimi's Café
Case 28-CA-084365

512-5012-0125
530-6067-2080-1200

This case was submitted for advice as to whether the portion of the Employer's employment at-will policy stating that "[n]o representative of the Company has authority to enter into any agreement contrary to the ... 'employment at will' relationship" violates Section 8(a)(1). We conclude that, given its context in the employee handbook, employees would not reasonably construe this provision to restrict Section 7 activity. Accordingly, the Employer's maintenance of this provision does not violate Section 8(a)(1), and the Region should dismiss the allegation, absent withdrawal.

The Employer, Mimi's Café, is a restaurant operator with locations in 24 states, including a restaurant in Casa Grande, Arizona, where the Charging Party was employed. All of the Employer's new employees sign for and receive a copy of a Teammate Handbook, which provides details about the applicable terms and conditions of employment. The Handbook applies to all Employer facilities and contains the following language regarding employees' "at-will" status:

> **AT-WILL EMPLOYMENT**
> The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. **No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship.** Nothing contained in this handbook creates an express or implied contract of employment.

(Emphasis supplied.) The Charging Party alleges that the bolded language violates Section 8(a)(1) because it is overbroad and would reasonably chill employees in the

exercise of their Section 7 rights to select union representation and engage in collective bargaining.

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule or policy if the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."[1] The Board has developed a two-step inquiry to determine if a work rule would have such an effect.[2] First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[3]

The Board has cautioned against "reading particular phrases in isolation,"[4] and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.[5] Instead, the potentially violative phrases must be considered in the proper context.[6] Rules that are ambiguous as to their application

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[1] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

[2] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–47 (2004).

[3] *Id.* at 647.

[4] *Id.* at 646.

[5] *Id.* at 647 ("[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). *See also Palms Hotel and Casino*, 344 NLRB 351, 355–56 (2005) ("We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it").

[6] *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (September 11, 2012) (finding context of confidentiality rule did not remove employees' reasonable impression that they would face termination if they discussed their wages with anyone outside the company), *and The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 16-17 (December 20, 2011) (finding employees would reasonably interpret the employer's "negativity" rule as applying to Section 7 activity in context of prior employer warnings linking "negativity" to the employees' protected discussions concerning their terms and conditions of employment), *with Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting

to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. [7] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[8]

Here, the Employer's at-will policy does not explicitly restrict Section 7 activity. Moreover, there is no indication that the Employer promulgated its policy in response to union or other protected activity or that the policy has been applied to restrict protected activity. Thus, under the *Lutheran Heritage*[9] standard, the Employer's maintenance of the contested handbook provision is only unlawful if employees would reasonably construe it in context to restrict Section 7 activity.

We conclude that the contested handbook provision would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his or her employment at-will status. First, 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 simply highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status. Moreover, the clear meaning of the provision at issue is to reinforce the Employer's unambiguously-stated purpose of its at-will policy: it explicitly states "[n]othing contained in this handbook creates an express or implied contract of employment." It is commonplace for employers to

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employees from "abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator"; in context of direct patient care, employees "would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday"), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *revd. on other grounds sub nom., Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

[7] *See, e.g., Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

[8] *See, e.g., Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

[9] 343 NLRB at 646–47.

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.[10] 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 when considered in context.[11] The Region should therefore dismiss, absent withdrawal, the Charging Party's allegation that the Employer's employment at-will policy violates Section 8(a)(1).

We recognize that in *American Red Cross Arizona Blood Services Region* an Administrative Law Judge found that the employer had violated Section 8(a)(1) by maintaining the following language in a form that employees were required to sign acknowledging their at-will employment status: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."[12] Applying the *Lutheran Heritage*[13] standard, the ALJ found that the signing of the acknowledgement form, whereby the employee—through the use of the personal pronoun "I"—specifically agreed that the at-will agreement could not be changed in any way, was "essentially a waiver" of the employee's right "to advocate concertedly ... to change his/her at-will status."[14] Thus, the provision in *American Red Cross* more clearly involved an employee's waiver of his Section 7 rights than the handbook provision here. The parties settled that case before Board review of the

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[10] *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).

[11] We note that notwithstanding this provision, the Employer would have an obligation to bargain in good faith with a union selected by its employees, including an obligation to bargain over a just cause discipline proposal. *Cf. J.I. Case v. NLRB*, 321 U.S. 332, 337 (1944) (finding individual employment contracts predating the selection of a collective-bargaining representative cannot limit the scope of the employer's duty to bargain over terms and conditions of employment).

[12] 2012 WL 311334, Case 28-CA-23443, JD(SF)—04-12 (ALJD dated February 1, 2012).

[13] 343 NLRB at 646-47.

[14] JD(SF)—04-12 at 20-21.

ALJ's decision. Because the law in this area remains unsettled, the Regions should submit to the Division of Advice all cases involving employer handbook provisions that restrict the future modification of an employee's at-will status.

/s/
B.J.K.