JD–11–18
Dallas, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BAYLOR UNIVERSITY MEDICAL CENTER

and **Case 16–CA–195335**

DORIS S. CAMACHO, an Individual

Megan McCormick and ***David Foley, Esqs.,***
for the General Counsel.
Amber M. Rogers, Esq. (Hunton & Williams, LLP),
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Fort Worth, Texas on November 28, 2017. The complaint alleged that the Baylor University Medical Center (Baylor or the Respondent) violated the National Labor Relations Act (the Act) by tendering unlawful separation agreements to its employees. On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Baylor has operated a health care system in Texas. Annually, it derives revenues in excess of $250,000, and purchases and receives goods and materials valued in excess of $5,000 directly from out-of-state points. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Doris Camacho's Termination[2]

Baylor fired Camacho on September 30, 2016.[3] On October 4, it offered her over $10,000 in exchange for signing a *Confidential Settlement Agreement and General Release* (the

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1 Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

2 Her firing was not alleged to be unlawful. This Decision, thus, does not take a stance on the validity of this action.

3 All dates are in 2016, unless otherwise stated.

Separation Agreement). She refused to sign the Separation Agreement and, instead, brought the instant charge challenging the legality of the agreement.

B. Challenged Separation Agreement Provisions

The Settlement Agreement contained, inter alia, these provisions:

> **6. No Participation in Claims:**
> CAMACHO agrees that, unless compelled to do so by law, CAMACHO will not pursue, assist or participate in any Claim brought by any third party against … [Baylor] or any Released Party….
>
> **7. Confidentiality:**
> CAMACHO agrees that …. she must … keep secret and confidential and not … utilize in any manner all … confidential information of … [Baylor] or any of the Released Parties made available to her during her … employment … , including … information concerning operations, finances, …, employees, … personnel lists; financial and other personal information regarding … employees; ….
>
> **8. Non-Disparagement:**
> CAMACHO agrees that she shall not … make, repeat or publish any false, disparaging, negative, … or derogatory remarks … concerning … [Baylor] and the Released Parties … or otherwise take any action which might reasonably be expected to cause damage … to … [Baylor] and the Released Parties ….

(GC Exh. 2).

C. Analogous Separation Agreements

Between November 30, and October 23, 2017, Baylor entered into 26 equivalent Separation Agreements with other workers. (GC Exh. 3). These agreements contained analogous *No Participation in Claims*, *Confidentiality* and *Non-Disparagement* clauses.[4]

III. ANALYSIS

The *No Participation in Claims* and *Confidentiality* provisions are unlawful; the *Non-Disparagement* provision is, however, valid. The Board has held that the following analytic framework should be applied:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential

[4] Although these agreements were entitled *Workforce Realignment Agreement and General Release*, they were essentially equivalent to Camacho's Separation Agreement. As a result, the term Separation Agreement shall globally describe these *Workforce Realignment Agreements and General Releases* as well as Camacho's agreement.

> impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between … asserted business justifications and the invasion of employee rights in light of the Act and its policy," … focusing on the perspective of employees, which is consistent with Section 8(a)(1).… As the result of this balancing, … the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):
>
> - *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are … the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility….
>
> - *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> - *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The Boeing Company, 365 NLRB No. 164, slip op. at 3–4 (2017).[5]

1. *No Participation in Claims* Clause

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]." This litigation ban encompasses individuals, who might provide voluntary information to Board agents in furtherance of ULP charges filed against Baylor (i.e., NLRA-protected conduct). Given that the Board's "ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and

[5] On December 19, 2017, the parties were ordered to show cause whether this new precedent warranted reopening the record in this case for the taking of additional evidence. On December 29, 2017, the parties each declined to reopen the record in this case. The Order to Show Cause and the parties' responses are hereby admitted as ALJ Exhs. 2–4 respectively.

supporting statements from individuals,"[6] this ban strikes at the very core of NLRA-protected conduct. Baylor effectively failed to offer a legitimate rationale regarding why former employees cannot provide information to NLRB agents that is unrelated to their termination or might vindicate other valid NLRA interests. The balancing test, as a result, tips heavily in favor of finding that the severe impact of barring former workers from providing testimony to Board agents about alleged labor relations violations heavily outweighs Baylor's mostly unsubstantiated justification for the rule. This rule is, thus, invalid.

2. *Confidentiality* Provision

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. The Board has held that comparable rules have the predictive effect of limiting §7 discussions of wages, hours and working conditions.[7] See *Boeing*, 365 NLRB No. 164, slip op. at 4 (stating that an "example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another."). Although Baylor attempted to justify its rule as a protection against former employees divulging private health-care related information, its current provision also broadly encompasses wages and benefits, and is not expressly limited to health-care communications. The *Confidentiality* provision, therefore, fits within Category 3, and is unlawful because its limitation on NLRA-protected conduct (e.g., wage and benefit discussions) is not outweighed by Baylor's reported justification.

3. *Non-disparagement* Provision

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.

CONCLUSIONS OF LAW

1. Baylor is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

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[6] See *Metro Networks*, 336 NLRB 63, 67 (2001).

[7] See also *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n. 1 (2015) (employer's confidentiality agreement provided that "information about physicians, other employees, and the internal affairs of [the company] are considered confidential"); *DirectTV U.S.*, 359 NLRB 545, 547 (2013), reaffd. 362 NLRB No. 48, slip op. at 1 fn. 1 (2015) ("confidentiality" provision warned employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and to "[n]ever give out information about . . . employees," and expressly included "employee records" as one category of "company information" that must be held confidential); *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007) (rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" could be reasonably construed by employees to restrict discussions of wages and other terms and conditions of employment with other employees and with the union).

2. Baylor violated §8(a)(1) by:[8]

a. Maintaining a *No Participation in Claims* clause in its Separation Agreements, which bars employees from pursuing, assisting or participating in claims brought against Baylor.

b. Maintaining a *Confidentiality* clause in its Separation Agreements, which bans discussion of wages, hours, and working conditions with employees, unions or other parties.

3. The unfair labor practices set forth above affect commerce within the meaning of §2(6) and (7) of the Act.

REMEDY

Baylor is ordered to cease, desist and take certain affirmative action designed to effectuate the Act. Having found that its Separation Agreements contained unlawful *No Participation in Claims* and *Confidentiality* clauses, it shall be required to rescind those provisions and notify the employees who signed the releases, in writing, that it has done so. It shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[9]

ORDER

Baylor, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Maintaining *No Participation in Claims* clauses in its Separation Agreements, which bar former employees from pursuing, assisting or participating in any claim brought by any third party against Baylor.

[8] Baylor offered two equally unpersuasive defenses. First, it contended that its actions were lawful because Camacho, who had been fired, was not a statutory employee covered by the Act when offered the Separation Agreement. This argument ignores Board precedent that fired employees remain statutory employees covered by the Act. See, e.g., *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977). Second, Baylor averred that its actions were lawful because Camacho never signed the Separation Agreement. This contention ignores precedent holding that violations flow from offering invalid severance agreements, irrespective of whether they are signed. See *Metro Networks*, *Inc.,* 336 NLRB 63 (2001). It also ignores the fact that 26 *Workforce Realignment Agreement and General Releases,* with analogous language, had been signed.

[9] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Maintaining *Confidentiality* clauses in its Separation Agreements, which ban discussion of wages, hours and working conditions with employees, unions or other parties.

c. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

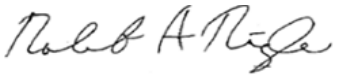
2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days of this Order, rescind the unlawful portions of the Separation Agreements described above and notify the employees who signed the releases, in writing, that this has been done.

b. Within 14 days after service by Region 16, post at all of its offices copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since October 4, 2016.

c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. February 12, 2018



Robert A. Ringler
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain *No Participation in Claims* clauses in our Separation Agreements, which prohibit former employees from pursuing, assisting or participating in any claims brought against us by any third party.

WE WILL NOT maintain *Confidentiality* clauses in our Separation Agreements, which ban discussion of wages, hours and working conditions with our employees, unions or other parties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind the unlawful *No Participation in Claims* and *Confidentiality* clauses in our Separation Agreements, and **WE WILL** notify each employee who signed agreements containing these clauses, in writing, that we have done so.

BAYLOR UNIVERSITY MEDICAL CENTER
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-195335 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.