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

Advice Memorandum

DATE: February 4, 2013

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: Windsor Care Centers 512-5012-0125
Cases 32-CA-087540 and 21-CA-087575

The Region submitted these cases for advice on whether the Employer violated Section 8(a)(1) by maintaining an employment at-will policy that states that the policy may only be modified through a written agreement signed by the Employer's President and the affected employee. We conclude that employees would not reasonably construe this provision to restrict Section 7 activity and that, accordingly, the maintenance of the policy is not unlawful and the Region should dismiss the instant charges, absent withdrawal.

The Employer, Windsor Care Centers, operates over thirty nursing and rehabilitation facilities throughout California. The Charging Parties, SEIU-United Long Term Care Workers and SEIU-United Healthcare Workers West, have filed charges respectively in Regions 21 and 32, based upon the Employer's employment at-will policy, contained in its Employee Handbook in effect at all of its locations. The Handbook provision at issue states as follows:

> STATEMENT OF AT-WILL EMPLOYMENT STATUS
> Employment with the Company is at-will which means the employment relationship may be terminated with or without cause and with or without notice at any time by you or the Company. In addition, the Company may alter an employee's position, duties, title or compensation at any time, with or without notice and with or without cause. Nothing in this Handbook or in any document or statement and nothing implied from any course of conduct shall limit the Company's or employee's right to terminate employment at-will. *Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employee and the President.*

(emphasis added). Specifically, the Charging Parties allege that the italicized language violates Section 8(a)(1) because it forecloses protected activity to change the employees' at-will status through union organizing and 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]

Here, the Employer's employment at-will policy does not explicitly restrict Section 7 activity. Moreover, there is no evidence 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, maintenance of the contested handbook provision is only unlawful if employees would reasonably construe it in context to restrict Section 7 activity.[4]

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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] The Board repeatedly has said that potentially violative phrases must be read in context and that it will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity. *See, e.g., Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting employees from "abandoning [their] job by walking off the shift without permission of [their] [s]upervisor or [a]dministrator" in context of direct patient care because 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), *rev'd on other grounds sub nom.*, *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007); *Lutheran Heritage Village-Livonia*, 343 NLRB 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").

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. The "Statement of At-Will Employment Status" describes the employees' current status, which is that they are subject to termination with or without cause or notice and that their terms and conditions of employment may be changed unilaterally by the Employer. The language that the Charging Party points to simply describes the method by which employees can, at present, create an enforceable employment contract with the Employer modifying their at-will status.[5] As in *Rocha Transportation*[6] and *Mimi's Café,*[7] the Employer's at-will employment policy does not require employees to refrain from seeking to change their at-will status collectively or to agree that their at-will status cannot be changed in any way.[8] Indeed, the provision is not directed at

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[5] 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. *Cf. 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).

[6] *See Rocha Transportation,* Case 32-CA-086799, Advice Memorandum dated Oct. 31, 2012 (dismissing Section 8(a)(1) charge based upon the following provision: "No manager, supervisor, or employee … has any authority … to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.").

[7] *See Mimi's Café,* Case 28-CA-084365, Advice Memorandum dated Oct. 31, 2012 (dismissing Section 8(a)(1) charge based upon the following provision: "No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship.").

[8] In this regard, the clause at issue here is distinguishable from that found violative by an Administrative Law Judge in *American Red Cross Arizona Blood Services,* Case 28-CA-23443, JD(SF)-04-12 at 20-21, 2012 WL 311334, *18-20 (NLRB Div. of Judges Feb. 1, 2012) (finding the following language unlawful: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."). The Judge held that by specifically agreeing that the at-will agreement could not be changed in any way, the employee "essentially" waived the right "to advocate concertedly … to change his/her at-will status."

employee conduct at all. Nor does the provision foreclose the possibility of modifying the at-will employment relationship in the future through a collective-bargaining agreement that is ratified by the Employer and a bargaining representative acting as the employees' agent.

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 that would change that status.[9] Thus, the Region should dismiss the instant charges, absent withdrawal.

/s/
B.J.K.

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[9] 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).