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

DATE: February 4, 2013

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: Fresh & Easy Neighborhood Market 512-5012-0125-0000
Case 21-CA-085615

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by maintaining an at-will employment policy stating that employees' at-will employment status may only be altered through an agreement executed by the individual employee and an Employer executive. We conclude that the Employer's policy is lawful as employees would not reasonably construe this provision to restrict Section 7 activity.

FACTS

Fresh & Easy Neighborhood Market (the "Employer") operates grocery stores in Arizona, Nevada, and California. The Employer provides each new employee with a CD-ROM containing its employee handbook, which a supervisor explains in detail during the employee's orientation. A provision in the employee handbook (the "Handbook Clause") describes the employment relationship as "at-will" and states, in relevant part:

> Nothing in this [Handbook] changes this at-will relationship, guarantees you a benefit, creates a contract of continued employment or employment for a specified term, or any contractual obligation that conflicts with the [Employer's] policy that the employment relationship with its employees is at-will.
>
> No representative of the [Employer] other than a[n Employer] executive has the authority to enter into any agreement for employment for a specified duration or to make any agreement for employment other than at will. *Any such agreement that changes your*

> *at-will employment status must be explicit, in writing, and signed by both a*[*n Employer*] *executive and you.*[1]

As a condition of employment, employees must sign and date an acknowledgement agreement indicating that they have received a copy of the employee handbook and have "familiarize[d]" themselves with its contents. The acknowledgement agreement contains, inter alia, a clause (the "Acknowledgement Clause") which reiterates the Handbook Clause in slightly different language:

> I understand that my employment is at-will, meaning that my employment is for no definite term and . . . the [Employer] has the right to discipline me or terminate my employment or change the terms of my employment . . . at its discretion, at any time, with or without cause or advance notice. *I further understand that the foregoing provision regarding my status as an at-will employee may only be changed by a written agreement signed by a*[*n Employer*] *executive and me that refers specifically to this provision.*[2]

Additionally, the acknowledgement agreement provides that all of the Employer's "current policies, regulations, and benefits . . . may be changed from time to time at the discretion of the [Employer]," except for the at-will employment and arbitration policies.

ACTION

We conclude that the Employer's policy is lawful as employees would not reasonably construe it to restrict Section 7 activity. The policy does not foreclose the possibility of employees modifying their employment relationship or require employees to waive their right to future modification of their at-will status by a bargaining representative.

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."[3] The Board has developed a two-step inquiry to

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[1] Emphasis added.

[2] Emphasis added.

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

determine if a work rule would have such an effect.[4] First, a rule is unlawful if it explicitly restricts Section 7 activities.[5] 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.[6]

The Board has cautioned against "reading particular phrases in isolation,"[7] and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.[8] Instead, the potentially violative phrases must be considered in the proper context.[9] Rules that are ambiguous as to their application to Section 7

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[4] *Id.* at 646–47.

[5] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 & n.5 (2004).

[6] *Id.* at 647.

[7] *Id.* at 646.

[8] *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").

[9] *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (Sept. 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 (Dec. 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 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), *rev'd on other grounds sub nom. Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. [10] 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.[11]

Here, the Employer's at-will employment 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*[12] standard, 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. The Acknowledgement and Handbook Clauses describe 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 Clauses simply describe the method by which employees can, at present, create an enforceable employment contract with the Employer modifying their employment relationship.[13]

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[10] *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).

[11] *See*, *e.g.*, *Tradesmen International.*, 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).

[12] 343 NLRB at 646–47.

[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 in both *Rocha Transportation*[14] and *Mimi's Café*,[15] the provision here 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.[16] Indeed, the provision is not directed at 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 an Employer executive and a bargaining representative acting as the employees' agent.[17] 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

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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).

[14] *See Rocha Transportation*, Case 32-CA-086799, Advice Mem. at 3–4 (Oct. 31, 2012) (finding handbook provision stating "No manager, supervisor, or employee . . . has authority to enter into . . . an agreement for employment other than at-will [except] the president of the Company . . ." was a lawful explanation of employees' employment relation with the employer, in the absence of a clear requirement that employees refrain from seeking to concertedly change their at-will status).

[15] *See SWH Corporation d/b/a Mimi's Café* (*Mimi's Café*), Case 28-CA-084365, Advice Mem. at 3–4 (Oct. 31, 2012) (finding handbook provision stating "No representative of the Company has authority to enter into any agreement contrary to the . . . 'employment at will' relationship" would not reasonably be construed as restricting Section 7 activity).

[16] 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 Region*, Case 28-CA-23443, JD(SF)-04-12, 2012 WL 311334, at *18–21 (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." *Id.* at 20–21.

[17] *See Rocha Transportation*, Case 32-CA-086799, Advice Mem. at 4 (discussing how employer's requirement that only the company president could enter into agreements modifying the employment relationship specifically did not foreclose the ability of employees to collectively bargain over their at-will status).

contract.[18] 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).

/s/
B.J.K.

[18] 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).