From: (b) (6), (b) (7)(C)
To: Watson, Timothy; Foley, David A.; Reeder, Linda M.; Gonzalez, Ofelia
Cc: Bock, Richard; Szapiro, Miriam; Dodds, Amy L.; Shorter, LaDonna
Subject: Modernize, Inc., 16-CA-252557
Date: Sunday, August 9, 2020 8:46:55 PM

The Region submitted this case for advice as to whether non-disparagement, confidentiality, and non-participation clauses in a separation agreement are unlawful and whether the Region should defer to that agreement as resolving the discharge allegation in this case. We conclude that the separation agreement is lawful, and that deferral is appropriate.

Briefly, the Charging Party was a computer programmer until (b) (6), discharge from the Employer in (b) (6), (b) (7)(C) 2019. In July of that year, the Charging Party was discussing salary with another computer engineer and encouraged that employee to seek an individual raise. Shortly thereafter, the Charging Party was (b) (6), (b) (7)(C) denied a raise because (b) (6) had discussed wages with a coworker. Over the course of the summer and fall, the Employer repeatedly warned the Charging Party, orally and in writing, not to discuss salary with (b) (6), peers. On (b) (6), (b) (7)(C), the Employer downgraded the Charging Party's performance rating because (b) (6) had created a "toxic environment" by discussing salary with coworkers and by reporting to another manager that (b) (6), supervisor had instructed (b) (6), (b not to discuss wages. The Charging Party contacted human resources to find out how to contest (b) (6), performance rating and complained that (b) (6), supervisor had been targeting (b) (6), (b. The next day, (b) (6), (b) (7)(C), (b) (6) was terminated for continuing to disclose private discussions with (b) (6), supervisor with other managers. After (b) (6), termination, the Charging Party and Employer entered into a separation agreement that generally released the Employer from all legal claims, including those arising out of (b) (6), employment and termination, in exchange for three weeks' pay totaling (b) (6), (b) (7)(C).

The Confidentiality and Non-Participation Clauses Do Not Tend to Infringe on Section 7 Rights

The instant case is governed by the Board's recent decision in *Baylor University Medical Center*, 369 NLRB No. 43 (Mar. 16, 2020). There, the Board found similar provisions in a separation agreement lawful, where there was no allegation that the individuals to whom it was offered were unlawfully discharged or that the proffered agreements were made under circumstances that would tend to infringe on Section 7 rights. *Id.* at 2. Specifically, the Board found the non-disparagement, confidentiality, and non-participation in claims provisions all lawful in *Baylor*, observing that the separation agreement was not mandatory, it pertained only to post-employment activities, it had no impact on terms and conditions of employment, and its mere proffer was lawful. *Id.* at 1-2.

However, separate and apart from *Baylor* and even without consideration of whether the discharge in the instant case was unlawful, we would find the confidentiality and non-participation provisions, alone, to be lawful. The clause requiring the Charging Party to keep the terms of the separation agreement confidential, except for consultations with an attorney or family member, is clearly not violative. *See Shamrock*, 366 NLRB No. 117, slip op. at 3 n.12, 29 (June 22, 2018) (finding similar confidentiality restrictions to be lawful). Similarly, the non-participation provision in no way restricts the Charging Party's ability to participate in Board investigations or proceedings. The relevant paragraph reads:

> 8. Scope of Release. The release to which you are agreeing in the preceding Paragraph 7 includes, without limitation, any claims related in any way to the termination of your employment, except for any action necessary to enforce this agreement or any lawful claim alleging that this agreement is not knowing and voluntary under the ADEA. Except as otherwise provided in this Paragraph 8, [the Charging Party] will not voluntarily participate in any judicial or other adversarial proceeding of any nature or description against any member of the Company Group related to your employment with the [Employer] or the termination of your employment.

The Board considers non-participation clauses in separation agreements unlawful when they prevent the employee from assisting in the investigation of a ULP charge filed by another individual. *See, e.g.*, *Clark Distribution Systems*, 336 NLRB 747, 748-49 (2001). On its face, the second sentence does not mention claims brought by other employees. Nonetheless, read in isolation, this clause could be construed as prohibiting the Charging Party from merely participating in an NLRB investigation or proceeding that relates to (b) (6), employment but concerns the claims of others, for example, by corroborating the Employer's practice of discouraging salary discussions. However, given that the preceding sentence focuses on (b) (6), *own* claims related to the termination of (b) (6), employment, a reasonable employee would not construe the second sentence as extending to claims beyond (b) (6), own. Accordingly, the clause is lawful when read in context.

Baylor and *Independent Stave* Dictate Dismissal of the Instant Charge

Although the Region seeks to issue complaint on the Charging Party's discharge, we would not do so for the reasons set forth below and, accordingly, the Board's decision in *Baylor* compels a finding that the separation agreement is lawful. The Charging Party did not engage in concerted activity within the traditional definition set forth in the *Meyers Industries* cases. *See Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1, n.2 (Jan. 11, 2019). Rather, the Region would have to rely on asserting that Charging Party's activities were inherently concerted, a doctrine questioned by the Board in *Alstate*, and arguably inconsistent with its conclusions in that case.

When analyzing whether to give effect to a severance agreement containing language waiving or releasing claims against an employer, the Board applies the four factor test from *Independent Stave Co.*, 287 NLRB 740 (1987). *See Hughes Christensen Co.*, 317 NLRB 633, 634 (1995), *enforcement denied on other grounds*, 101 F.3d 28 (5th Cir. 1996); *see also A.S.V., Inc.*, 366 NLRB No. 162, slip op. at 2 & n.5 (Aug. 21, 2018); *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 615 (2007). This standard examines all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound, and the position taken by the General Counsel regarding settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements. *Independent Stave*, 287 NLRB at 743.

Here, we conclude that the Region should give effect to the release of claims contained in the

separation agreement. There is no union present and nothing to suggest that the Charging Party did not intend to enter into the agreement, so all relevant parties have agreed to be bound. Because the Charging Party secured a new job relatively quickly, by January 2020, the payment (b) (6), received 17 days before filing this ULP charge represents 21 percent of (b) (6), estimated backpay award. While this amount is lower than might ordinarily be acceptable for the resolution of an unlawful discharge allegation, as referenced above, there are serious weaknesses in the Region's theory of the case. *See BP Amoco*, 351 NLRB at 615-16 (finding enhanced severance benefits were reasonable given that no charge had been filed at the time and there was significant risk that the discrimination charge would not be found meritorious). Where, as here, the Board has called into question the continued viability of the inherently concerted doctrine as being inconsistent with bedrock statutory principles, *see Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1 n.2, and this doctrine is the keystone for proving a violation in this case, its uncertain future makes the payment amount significantly more reasonable. In addition, there is no evidence of undue pressure on the Charging Party to execute the agreement. In fact, (b) (6), is a highly compensated employee who was given ten days to consider the separation agreement and was encouraged to consult an attorney before signing. Finally, while the Board has sometimes relied upon violations in the same case as probative under the fourth criterion, here the concurrent Section 8(a)(1) violations (creating the impression of surveillance and instructing the Charging Party not to discuss salary) were closely connected to the discharge itself, did not impact other employees, and were not inextricably intertwined with an unlawful scheme. *Cf. A.S.V.*, 366 NLRB No. 162, slip op. at 2-3 (finding that plantwide threats and anti-union layoff scheme that was intertwined with the severance agreements weighed against deferral). Based on all of these factors, we conclude that the separation agreement bars complaint over the Charging Party's discharge.

This email closes this case in Advice. Please feel free to contact us with any questions or concerns.

(b) (6), (b) (7)(C)