**William Beaumont Hospital *and* Jeri Antilla.** Case 07–CA–093885

April 13, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On January 30, 2014, Administrative Law Judge Susan A. Flynn issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below, and to adopt the recommended Order as modified and set forth in full below.[3]

I.

The complaint alleges that the Respondent's "Code of Conduct for Surgical Services and Perianesthesia," as maintained and distributed to employees, was unlawful in its entirety. The Code reads in relevant part:

> It is the intention of Beaumont Hospitals to foster effective working relationships among all hospital employees and physicians in order to provide and maintain high quality and safe patient care. Such relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations.
>
> It is the expectation of hospital management that employees and physicians promote and maintain a professional environment in which all individuals are treated with dignity and respect.
>
> Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action.
>
> Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:[4]
>
> [1.] Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
>
> [2.] Profane and abusive language directed at employees, physicians, patients or visitors.
>
> [3.] Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
>
> [4.] Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
>
> . . . .
>
> [5.] Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent finding that "the union" was a labor organization within the meaning of Sec. 2(5) of the Act. There is no union involved here.

The Respondent has not excepted to the judge's finding that it violated Sec. 8(a)(1) of the Act by instructing employee Deanna Brandt not to discuss with other employees the Respondent's investigation into her alleged misconduct. Accordingly, we do not pass on the judge's rationale, which included discussion of *Banner Estrella Medical Center*, 358 NLRB 809 (2012), a case decided by a panel that included invalidly appointed Board Members. See *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014).

[2] We affirm the judge's finding that the Respondent lawfully discharged employees Jeri Antilla and Deanna Brandt. However, in agreeing with the judge that the General Counsel carried his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), we find that Antilla and Brandt engaged in protected concerted activity by complaining about staffing and safety, and we observe that their termination notices cite some of their protected activity. We nevertheless agree with the judge's finding that the Respondent established that it would have discharged Antilla and Brandt even in the absence of their protected activity.

In finding that the Respondent met its *Wright Line* rebuttal burden, we rely on evidence of the discharged employees' unprotected intimidating behavior, not on evidence that the Respondent maintained mechanisms for employees to report their safety concerns. Contrary to the Respondent, we do not rely on the evidence concerning discipline meted out to other employees after the alleged unfair labor practices. When assessing the consistency of an employer's disciplinary practices, discipline that preceded the incident is a more reliable indicator.

[3] We shall modify the judge's recommended Order to conform to the violations found and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] In the original document, the numbered items are presented as bullet points. We have added the numbers to facilitate our discussion. The ellipses indicate bullet points that we have omitted.

. . .

[6.] Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

Where, as here, a rule does not explicitly restrict activities protected by Section 7, the rule is nevertheless unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646–647 (2004). Only the first prong of this test is at issue here.

II.

For the reasons stated by the judge, we affirm her findings that paragraphs 1, 2, and 3, as well as part 1 of paragraph 6 ("Behavior that is disruptive to maintaining a safe and healing environment"), of the Code are lawful.[5] And, in the absence of exceptions, we adopt the judge's finding that paragraph 4 and part 2 of paragraph 6 ("behavior that is. . . counter to promoting teamwork") are unlawful. Unlike the judge, however, we find two additional portions of the Code to be unlawful.

First, in agreement with the General Counsel, we find the language in the introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" to be unlawfully overbroad. In *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011), we found unlawful an employer rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees." Like the rule there, the Respondent's prohibition is "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and [] employees would reasonably construe the rule to prohibit such activity." Id. (citation omitted).[6]

Second, we find paragraph 5 unlawful insofar as it prohibits "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." This rule is unlawful because it would reasonably be construed to prohibit expressions of concerns over working conditions similar to those that we have found protected in this case.[7]

These conclusions are firmly grounded in the well-established principles that were articulated more than a decade ago in *Lutheran Heritage Village* and that (as we will explain) have been applied without question by Federal courts of appeals. The practical impact of our decision today is modest--an order requiring modification of a few provisions of an extensive employer handbook, the vast majority of which was either unchallenged or upheld. In short, this case is (or at least should be) a relatively unremarkable application of well-established law to uncontroverted fact.

III.

Our dissenting colleague argues, in passing, that we have reached the wrong result under *Lutheran Heritage Village*.[8] The dissent's primary argument, however, is that the Board should break with its current approach, although no party in this case has asked us to do so. Our colleague finds the decision today to be "a tragic example of the problems fostered by the *Lutheran Heritage [Village]* standard"—which, he suggests, has left employers afraid of articulating work rules (to the detriment of employees, patient safety, and a wide range of legitimate employer interests). He then proposes a new stand-

[5] Although the General Counsel contends generally that all of the provisions in the Code are unlawful, he does not specifically except to the judge's finding regarding part 1 of par. 6.

[6] The same unlawfully overbroad language in the Code's introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" was used in both Antilla's and Brandt's termination forms. The General Counsel, however, does not contend that the discharges were unlawful because of the reference to the invalid rules. Accordingly, we do not analyze the discharges under *Continental Group*, 357 NLRB 409 (2011).

[7] See, e.g., *Claremont Resort & Spa,* 344 NLRB 832, 832 fn. 4 (2005) (finding unlawful a rule prohibiting "[n]egative conversations about [employees] and/or managers").

We do not, however, find par. 5's prohibition on impugning employees' or physicians' "moral character" to be unlawful, as it would not reasonably be interpreted as prohibiting protected conversations.

[8] In our colleague's view, the rules are lawful under *Lutheran Heritage Village* because the Respondent's employees necessarily would understand that the rules were intended to promote patient care "without regard to any employee's potential exercise or non-exercise of NLRA protected rights." But, for the reasons we have suggested, the rules have a reasonable tendency to chill the exercise of Sec. 7 rights.

That a rule is intended to promote patient care does not mean that it is not overbroad, or that it cannot be applied—perhaps in the name of patient care—to punish employees' protected concerted activity. The Supreme Court has made clear that a hospital rule adopted and defended in the interest of patient care may nevertheless violate the Act. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 496–497 (1978). See also *Presbyterian St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1474 (10th Cir. 1983) (invalidating, as overbroad, hospital's rule that included statement that "any activity which is disruptive to the care of the patient or atmosphere of patient care will not be tolerated"). Although he minimizes the significance of the possibility, our colleague acknowledges that "[a]t some future time, an employee might engage in protected activity that could violate one of the rules in dispute here." Employees contemplating such activity—for example, pursuing a workplace issue even though it "precipitated some interpersonal conflict" (in our colleague's words) or "criticizing the 'professional capabilities'" of a physician or coworker" who affected working conditions—might well be discouraged from doing so. The real possibility of such a chilling effect suffices to make the rule overbroad.

ard that would shift the focus of the Board's inquiry away from NLRA-protected rights and toward employer interests. With respect, our colleague's critique is misplaced—it misconstrues the underlying facts of this case and the actual impact of our decision today. Moreover, his suggested new approach would provide no greater clarity in the law, and would potentially undermine the essential protections of the Act. Accordingly, we have no difficulty in deciding today to adhere to the Board's established standard for assessing facial challenges to employer rules.

*A.*

We begin by rejecting the dissent's opening premise that there is a link between Board doctrine and the death of a baby. Nothing we hold today, and nothing in the *Lutheran Heritage Village* standard, has any connection to the tragedy in the background of this case or to the risk of similar incidents in the future. Indeed, our dissenting colleague has chosen a particularly dubious case in which to expound upon the supposedly paralyzing limitations that *Lutheran Heritage Village* can impose on employers seeking to promulgate work rules targeting offensive or unsafe workplace behavior. If anything, the lesson of our decision today is just the opposite.

The Respondent's "Code of Conduct for Surgical Services and Perianesthesia" was adopted well before the incident our colleague seizes on, not in response to it. The Code, in other words, was firmly in place when the incident occurred (and did not prevent it). Today's decision, in turn, largely leaves the Code in place. The General Counsel did not challenge the Code's statement of "intention . . . to foster effective working relationships among all employee and physicians," its directive that "[s]uch relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations," or its prohibition of "[c]onduct . . . that is inappropriate or detrimental to patient care o[r] Hospital operations." The Board, in turn, is upholding most of the challenged provisions in the Code, including prohibitions against (1) "[w]illful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients or visitors;" (2) "[p]rofane and abusive language directed at employees, physicians, patients or visitors;" (3) "[b]ehavior that is rude, condescending or otherwise socially unacceptable;" (4) "[i]ntentional misrepresentation of information;" and (5) "[b]ehavior that is disruptive to a safe and healing environment."[9]

Moreover, the two hospital staff members whose discharges are at issue here were *not* fired for violations of the Code, and the Board is finding their discharges *lawful*. Nothing about today's decision will change the hospital's ability to fire employees in the future for the type of conduct in question. Indeed, even if the staff members had been fired for violations of Code provisions that were found unlawful, the discharges themselves might nevertheless have been lawful under the Board's 2011 decision in *Continental Group*, supra, which clarified the approach to employer liability for discipline based on unlawfully overbroad rules.[10]

In short, this case largely illustrates that *Lutheran Heritage Village* is no obstacle to a hospital employer seeking to promote safe patient care by legitimately regulating employees' on-the-job interactions.

*B.*

If this case is demonstrably *not* a "tragic example of the problems fostered by the *Lutheran Heritage [Village]* standard," then it is far from clear why the Board should revisit the standard here. As noted above, no party has asked us to do so, and no Federal court of appeals has rejected the standard in the 12 years during which the Board regularly has applied it. Indeed, the courts have applied *Lutheran Heritage Village* themselves, even striking down certain employer rules that had been upheld by the Board.[11] We are not persuaded that, for more

[9] The Respondent has not challenged the judge's finding that two other Code provisions were unlawful: (1) the prohibition against "[v]erbal comments or physical gestures directed at others that exceed the bounds of fair criticism; and (2) the prohibition against "[b]ehavior . . . that is counter to promoting teamwork." The legality of those Code provisions thus is not before us.

[10] *Continental Group* explained that the Board had "long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful," but that it was now "appropriate to set limits on its application." 357 NLRB 409, 410. Accordingly, the Board held that:

> [D]iscipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability . . . if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than violation of the rule, was the reason for the discipline.

357 NLRB 409, 412. Thus, "it is not unlawful for an employee to discipline an employee pursuant to an overbroad rule, in situations where the employee's conduct is not similar to conduct protected by the Act in the manner" explained in the decision. Id. See, e.g., *Flex Frac Logistics, LLC*, 360 NLRB No. 120 (2014) (upholding discharge pursuant to overbroad rule).

[11] See, e.g., *Flex Frac Logistics, LLC v. NLRB,* 746 F.3d 205, 209 (5th Cir. 2014) (enforcing Board's finding that rule was unlawful); *International Union, UAW v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008) (reversing Board's finding that rule was lawful); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007) (enforcing Board's finding that rule was unlawful); *Guardsmark, LLC v. NLRB*, 475 F.3d 369,

than a decade, the Board and the courts have been engaged in an analytical exercise that is somehow contrary to the Act and Supreme Court precedent. Nor do we think that our colleague has offered a compelling alternative to the current standard: the test he proposes has a weaker analytical foundation and would be more difficult to apply. In this sometimes difficult area of labor law, the Board should not take a step backward.

1.

The crux of the dissent is its claim—citing the Supreme Court's *Republic Aviation* decision[12]—that the Board must assess all employer rules by applying a balancing test that weighs employees' particular Section 7 interests against the employer's particular business justifications. The First Circuit, however, has explained that "[n]othing in *Republic Aviation* compel[s] the Board to apply a balancing test" in cases like this one and that "[w]hile the Board could have chosen to structure its rule differently and engage in a balancing analysis, [the courts] owe[] deference to its decision not to do so." [13] The District of Columbia Circuit, meanwhile, has endorsed the Board's "focus[] on the text of the challenged rule," explaining that the Board is entitled to judicial deference in its interpretation of Section 8(a)(1) when it "'faithfully applies [its] standard and adequately explains the basis for its conclusion.'"[14]

More broadly, our colleague insists that *Lutheran Heritage Village* takes no account of the "legitimate justifications of particular policies, rules and handbook provisions." This claim reflects a fundamental misunderstanding of the Board's task in evaluating rules that are alleged to be unlawfully *overbroad*. As the *Lutheran Heritage Village* Board explained, quoting the Board's 1998 decision in *Lafayette Park Hotel*, "to determine whether the mere maintenance of certain work rules violates Section 8(a)(1) of the Act, 'the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.'"[15] The courts, as explained, have endorsed that proposition.[16]

That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights. (The courts have recognized this fact[17]—which surely explains why no court has viewed *Lutheran Heritage Village* as our dissenting colleague does.) When, in contrast, the Board finds that a rule is *not* overbroad—that employees would not "reasonably construe the language to prohibit Section 7 activity" (in the *Lutheran Heritage Village* formulation)– it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee.[18] Here, too, the *Lutheran Heritage Village* standard demonstrably does take into account employer interests.

It is odd, meanwhile, that our colleague invokes a District of Columbia Circuit decision (*Adtranz*, supra) to criticize the *Lutheran Heritage Village* standard even though the *Lutheran Heritage Village* Board itself explicitly and repeatedly relied upon the court's decision to

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378–380 (D.C. Cir. 2007) (reversing Board's finding that rule was lawful).

[12] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (upholding Board's finding that employer rules prohibiting solicitation and distribution of literature were unlawful).

[13] *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011). In *Republic Aviation*, the Supreme Court emphasized the Board's broad discretion to interpret and administer the National Labor Relations Act:

> [T]hat Act left to the Board the work of applying the Act's generally prohibitory language in the light of the infinite combination of events which might be charged as violative of its terms. Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. . . . [T]hat purpose is the right of employees to organization for mutual aid without employer interference.

324 U.S. at 798. Our dissenting colleague argues that the First Circuit's decision is incorrect, but we find his arguments unpersuasive for the same reasons that we reject his general position here. As we have pointed out, meanwhile, no Circuit has rejected *Lutheran Heritage Village* since it was decided in 2004. Insofar as our colleague argues, in the alternative, that the Board should adopt his position even if not compelled to do so, we decline. Our colleague's approach is not demonstrably superior to that reflected in current Board law.

[14] *Guardsmark*, supra, 475 F.3d at 374. In *Guardsmark*, the District of Columbia Circuit rejected the argument that the absence of evidence of prior enforcement against Sec. 7 activity favored upholding an employer's challenged rule. The court explained that in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), and in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 10 (D.C. Cir. 2001), it had "discuss[ed] lack of enforcement," but "d[id] so only after first concluding that the challenged rules were not likely to chill section 7 activity and that their mere maintenance was thus not an unfair labor practice." 475 F.3d at 375–376.

[15] 343 NLRB at 646, quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[16] See, e.g., *Cintas Corp.*, supra, 482 F.3d at 467–468. See also *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258–1259 (8th Cir. 2005) (quoting *Lafayette Park Hotel*, supra, with approval and upholding principle that discharge pursuant to overbroad rule is unlawful).

[17] See, e.g., *Flex Frac*, supra, 746 F.3d at 210 fn. 4; *Northeastern Land Services*, 645 F.3d at 483; *Cintas Corp.*, 482 F.3d at 378. Accord: *Beth Israel Hospital*, supra, 437 U.S. at 502 (observing that in invalidating a hospital's work rule, the "Board ha[d] not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided").

[18] See, e.g., *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2–3 (2014).

find that a rule prohibiting "abusive language" was not unlawful on its face.[19] This paradox illustrates another striking aspect of our colleague's position here. He presents the *Lutheran Heritage Village* standard as overly–indeed, impermissibly–protective of employees' Section 7 rights when the Board's decision actually gave greater weight than prior decisions to employers' interests. *Lutheran Heritage Village*, of course, was decided by a divided Board in 2004, with the dissenting Board members (Members Liebman and Walsh) arguing that the majority had "[i]gnored the employees' side of the balance" and had retreated from a broad application of the principle announced in *Lafayette Park Hotel*.[20] Academic commentators, too, saw *Lutheran Heritage Village* as a retrenchment, not an expansion of Section 7 rights.[21] Even so, one commentator argued that the decision reflected a permissible policy judgment by the Board, given its "discretion to set the level of appropriate protection [of Section 7 rights] to weigh . . . legitimate employer interests."[22] Our colleague takes the diametrically opposite view of *Lutheran Heritage Village*—that it subordinates employer interests to Section 7 rights and that it is not a permissible policy choice by the Board. We reject that view, for the reasons we have explained.

2.

Even if the dissent's argument were simply that the Board, while permitted to adopt the *Lutheran Heritage Village* standard, should abandon it for a better approach, our colleague has failed to articulate one. Whatever the flaws in current law might be, the shortcomings in the dissent's standard are glaringly apparent.

Certainly, cases involving allegedly overbroad employer rules and implicating the *Lutheran Heritage Village* standard may raise difficult issues, complicated, too, by the need to harmonize the Board's decisions over time. But this challenge is not a function of the Board's legal standard. Rather, it is inherent in the remarkable number, variety, and detail of employer work rules (and the larger documents in which they appear), drafted with differing degrees of skill and levels of legal sophistication.[23] Already 30 years ago, one legal scholar described the "bureaucratization of work" as having "enmeshe[d] the worker in a 'web of rules.'"[24] This phenomenon, whatever drives it, is largely out of the Board's hands. As the dissent acknowledges, "[n]othing in the [National Labor Relations Act] requires employers to adopt policies, rules and handbook provisions." Our colleague insists, rather, that the "broader premise of *Lutheran Heritage* . . . is the notion that employees are better served by *not* having employment policies, rules and handbooks [emphasis in original]." There is no basis in *Lutheran Heritage Village* or its progeny for that claim. What the decisions demonstrate is that employers who adopt policies, rules and handbooks should take into account employees' rights under the Act—as many employers surely do.[25] This need is hardly new. Decades before *Lutheran Heritage Village*, the Board had found that particular employer rules violated the Act (as *Republic Aviation*, decided in 1945, indicates). Nor has the Board's jurisprudence, before or after *Lutheran Heritage Village*, had any apparent effect on the adoption and maintenance of employer rules as a general matter.

In place of the current standard, the dissent offers a novel balancing test that would be harder to apply, while

[19] *Lutheran Heritage Village*, supra, 343 NLRB at 647.

[20] Id., at 650 (dissent).

[21] See, e.g., Michael C. Harper, Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X, 89 Boston U. L. Rev. 189, 229–233 (2009); William R. Corbett, The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability, 27 Berkeley J. Emp. & Lab. L. 23, 41–45 (2006). Professor Harper writes that *Lutheran Heritage* Village "limited . . . the Board's previous pronouncement in Lafayette Park Hotel that an employer may commit a section 8(a)(1) violation by maintaining a work rule that, although not explicitly directed at protected activity, might chill employees' exercise of their section 7 rights." 89 Boston U. L. Rev. at 230 (fn. omitted). In Professor Corbett's view, "[b]y accepting the D.C. Circuit's Adtranz analysis, the Board majority clearly diverged from its recent precedent analyzing employer rules prohibiting workplace conduct and communications." 27 Berkeley J. Emp. & Lab. L. at 43.

[22] Harper, supra, 89 Boston U. L. Rev. at 232.

[23] Our dissenting colleague compares and contrasts the Board's decisions in various rules cases, arguing that the *Lutheran Heritage Village* standard "has led to arbitrary results." But each challenged rule must be analyzed based on its own language and context, not by "reading particular phrases in isolation," *Lutheran Heritage Village*, supra, 343 NLRB at 646, or by purporting to see clear distinctions where none exist. As the Supreme Court observed in a different context under the Act, "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 674 (1961). The dissent seems to imagine a "quick, definitive formula as a comprehensive answer" to the problem of analyzing employer rules, but none is apparent to us. Id. Here, as in other areas of labor law, the Board is obligated to bring its experience to bear "on the complexities of the subject which is entrusted to [its] administration," *Republic Aviation*, supra, 324 U.S. at 800, and to deal with "an infinite variety of specific situations." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[24] Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 Wis. L. Rev. 733, 742 (1986).

[25] See generally Robert A. Gorman & Matthew W. Finkin, *Labor Law: Analysis and Advocacy* §8.2 (2013) (offering "practice points" to employers for drafting rules). To be sure, the Board does not affirmatively police employer rules. The Board's procedures are set in motion only if an unfair labor practice charge is filed by a private person and is determined to have merit by the independent General Counsel. See generally *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 118–122 (1987) (describing Board procedures). It may be that some employers doubt that their rules will ever be scrutinized by the Board--and their judgment may be correct.

tilted against Section 7 rights in a way that departs from traditional jurisprudence under Section 8(a)(1) of the Act. The Supreme Court's decisions illustrate that where employees' Section 7 rights are implicated, and the Board applies a balancing test, the issue is whether there is a "countervailing [employer] interest that outweighs the exercise of [Section] 7 rights."[26] Indeed, the District of Columbia Circuit has squarely placed on the employer the "obligation to demonstrate its inability to achieve [its] goal with a more narrowly tailored rule that would not interfere with protected activity."[27] Our colleague's proposed test, in contrast, puts a clear thumb on the scale to tilt the balance against Section 7 rights: "[A] facially neutral work requirement should be declared unlawful *only if the justifications are outweighed by the adverse impact* [emphasis added] on Section 7 activity." We have already explained why the authority cited by our colleague for this proposition (the District of Columbia Circuit's decision in *Aroostook County Regional Ophthalmology Center*, supra) does not support his view at all.

It seems highly unlikely, meanwhile, that application of the dissent's test would, in its words, "promote certainty, predictability and stability" in any desirable way. Our colleague would have the Board "engage in a more refined evaluation of [the] significant variables," which includes (1) "differentiat[ing] among different types of NLRB-protected activity" and assessing the weight of each; (2) "mak[ing] reasonable distinctions among the justifications associated" with a challenged rule and giving them varying weight; (3) "mak[ing] reasonable distinctions between different industries and work settings;" and (4) "tak[ing] into consideration any specific events that might be relevant." This "refined evaluation of the significant variables" must be conducted, according to our colleague, "[i]n the complex assortment of work settings throughout the United States" which feature "a near-endless variety of work requirements [that] exist for important reasons."

As a practical matter, the only way that certainty, predictability and stability might result from such a complex exercise would be if adoption of the dissent's test meant that facial challenges to employer rules would rarely succeed. But to effectively limit the Act's reach to the unlawful *application* of facially neutral rules would leave the potential chilling effect of such rules on protected, concerted activity unaddressed. That result is unacceptable if the Act is to be properly enforced.

For all of these reasons, we choose instead the option of adhering to current law, consistent with the judicial decisions applying and endorsing the *Lutheran Heritage Village* standard.

ORDER

The National Labor Relations Board orders that the Respondent, William Beaumont Hospital, Royal Oak, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules which employees would reasonably construe to discourage engaging in union or other protected concerted activities, and specifically the following provisions of the Respondent's Code of Conduct for Surgical Services and Perianesthesia:

> (i) The portion of the introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" (both as maintained in the Code and as applied on Performance Improvement Plan forms);
>
> (ii) the paragraph prohibiting "[v]erbal comments or physical gestures directed at others that exceed the bounds of fair criticism";
>
> (iii) the paragraph prohibiting "[n]egative or disparaging comments about the professional capabilities of an employee or physician made to employees, physicians, patients, or visitors"; and
>
> (iv) the prohibition on "[b]ehavior that is . . . counter to promoting teamwork."

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

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

(a) Rescind the prohibitions set forth in paragraph 1(a), above, or revise them to remove any language that prohibits or may reasonably be read to prohibit conduct protected by Section 7 of the Act.

(b) Notify all current employees that those prohibitions have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(c) Within 14 days after service by the Region, post at its facility in Royal Oak, Michigan, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized

[26] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563 (1978).

[27] *Guardsmark*, supra, 475 F.3d at 380.

[28] 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."

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 by the Respondent 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, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 13, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

With few exceptions, people go to the hospital because they need to, not because they want to. Whatever an individual patient's condition might be, it is often serious, sometimes critical—even a matter of life or death. Hospitals and those who work there bear a heavy obligation to make patient care their paramount concern.

I believe the Board majority disregards these important considerations in finding that the Respondent, William Beaumont Hospital (the Hospital), violated Federal law by maintaining two rules in its Code of Conduct. These rules (a) prohibit conduct that "impedes harmonious interactions and relationships," and (b) prohibit "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors."

I respectfully dissent from my colleagues' finding that these rules constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act). In my view, the rules are supported by substantial justifications unrelated to the NLRA. They predictably would have a minimal impact, if any, on the exercise of rights afforded by NLRA Section 7, which protects (among other things) "concerted" activities that employees engage in for the "purpose" of "mutual aid or protection."[1] Most importantly, as the Board and the courts have recognized, the justifications underlying these rules are especially important in a hospital. When the NLRA was adopted and amended to cover hospital work settings, Congress was not seeking to end "harmonious interactions" in hospitals. Nor was it the intent of Congress to require hospital patients and family members to hear "negative" and "disparaging comments" about the "professional capabilities" of doctors and nurses.

More generally, I believe the time has come for the Board to abandon *Lutheran Heritage Village-Livonia (Lutheran Heritage)*,[2] which renders unlawful all employment policies, work rules and handbook provisions whenever any employee "would reasonably construe the language to prohibit Section 7 activity." This aspect of the *Lutheran Heritage* standard applies to policies, rules and handbook provisions that do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict such activity.[3]

[1] For a detailed discussion of the elements of protected Sec. 7 activity, see *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB No. 12, slip op. at 11–23 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[2] 343 NLRB 646 (2004).

[3] This aspect of *Lutheran Heritage* is sometimes called "prong one" because the Board in *Lutheran Heritage* stated:

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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.

343 NLRB at 647 (emphasis added). For ease of reference, I refer to *Lutheran Heritage* prong one as "*Lutheran Heritage*." Similarly, I use the term "facially neutral" to describe policies, rules and handbook provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.

I have previously expressed my disagreement with the first prong of the *Lutheran Heritage* standard. See, e.g., *Lily Transportation Corp.*,

This case presents a tragic example of the problems fostered by the *Lutheran Heritage* standard. When a hospital obstetrics team is caring for a mother giving birth, people would naturally want to have "harmonious interactions and relationships" among the responsible physicians and nurses. In this case, a full-term newborn baby unexpectedly died, and the ensuing investigation showed the infant's death resulted in part from inadequate communication among Hospital personnel. Separately, when a highly regarded labor and delivery nurse resigned, the Hospital learned that two delivery nurses, Jeri Antilla and DeAnna Brandt, had been "mean," "nasty," "intimidating," "negative" and "bullying." Antilla and Brandt were fired, and my colleagues and I agree these discharges were lawful.

Despite this context, my colleagues find that the Hospital violated Federal law by maintaining a rule against conduct that impedes "harmonious interactions and relationships." My colleagues apply the rudimentary analysis required under *Lutheran Heritage* and conclude that the mere existence of this rule violates Section 8(a)(1) because (i) a Hospital employee would reasonably construe it as prohibiting angry workplace confrontations, (ii) the employee might be engaged in an angry workplace confrontation at some unspecified future time, and (iii) the angry confrontation, depending on its subject matter and the involvement of other employees, may constitute NLRA-protected concerted activity. True, the NLRA sometimes protects conduct that may not be "harmonious."[4] However, it defies common sense to find that a hospital violates Federal law merely by stating that physicians and nurses must promote "harmonious interactions and relationships."

Under *Lutheran Heritage*, reasonable work requirements have become like Lord Voldemort in *Harry Potter*: they are ever-present but must not be identified by name.[5] Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.

I will resist the temptation to launch immediately into an exhaustive recitation of the problems associated with the *Lutheran Heritage* "reasonably construe" standard. However, I believe *Lutheran Heritage* should be overruled by the Board and, if not, repudiated by the courts. In my view, multiple defects are inherent in the *Lutheran Heritage* test:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.
- The *Lutheran Heritage* standard stems from several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. One can hardly suggest that it benefits employees to deny them general guidance regarding what is required of them and what standards of conduct they can expect or demand from coworkers. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.
- In many cases, *Lutheran Heritage* invalidates facially neutral work rules *solely* because they are ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself. See fns. 29, 30 and 31, infra.

362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), affd. sub nom. *Three D, LLC v. NLRB*, -- F.3d --, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). In this opinion, I only address *Lutheran Heritage* prong one; I do not reach or pass on other aspects of that decision.

[4] An employee's disagreeable or confrontational behavior in the course of Sec. 7 activity loses the Act's protection if it rises to the level of "opprobrious conduct." *Atlantic Steel Co*., 245 NLRB 814, 816 (1979). However, "labor relations often involve heated disputes 'likely to engender ill feelings and strong responses,'" which means "an employee's right to engage in concerted activity 'permit[s] some leeway for impulsive behavior.'" *Inova Health System v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (quoting *Kiewit Power Constructors*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011)); see *NLRB v. Ben Pekin Corp*., 452 F.2d 205, 207 (7th Cir. 1971) (per curiam).

[5] In the *Harry Potter* series, authored by J. K. Rowling, Lord Voldemort (whose name, at birth, was Tom Marvolo Riddle) was the archenemy of Harry Potter and was so feared that almost no witch or wizard dared speak his name, referring to him instead as "You-Know-Who" or "He-Who-Must-Not-Be-Named." See Wikipedia, Lord Voldemort (https://en.wikipedia.org/wiki/Lord_Voldemort).

- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's own discretion. It renders unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It does not permit the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor does *Lutheran Heritage* permit the Board to afford *greater* protection to Section 7 activities that are deemed central to the Act.
- *Lutheran Heritage* does not permit the Board to differentiate between and among different industries and work settings, nor does it permit the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
- Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

This case presents an opportunity for the Board to take a step in the direction of conducting a more even-handed evaluation of employment policies, work rules and handbook provisions. By declining to take this step, the Board is disadvantaging all parties that have struggled mightily in this difficult area. This includes employees who, increasingly, may find themselves without guidance about what is expected of them in the workplace and what types of conduct may result in discipline or discharge.

What standard should replace *Lutheran Heritage* to evaluate facially neutral rules? The Board must carry out what the Supreme Court has repeatedly described as the Board's duty when determining whether particular work requirements unlawfully interfere with NLRA-protected rights. The Board has the "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[6] Therefore, when evaluating a facially neutral policy, rule or handbook provision, I believe the Board must evaluate at least two things: (i) the potential adverse impact of the rule on NLRA-protected activity, *and* (ii) the legitimate justifications an employer may have for maintaining the rule. The Board must engage in a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity. When engaging in this analysis, the Board should differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight."[7] Similarly, the Board should distinguish between substantial justifications—those that have direct, immediate relevancy to employees or the business—and others that might be regarded as having more peripheral importance. The Board should make reasonable distinctions between or among different industries and work settings, and it should take into consideration particular events that might be associated with a specific rule. Finally, the Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, but conclude that the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct.[8]

Paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply. Its single-minded focus precludes reasonable distinctions that the Board should be making in this important area. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life."[9] Though well-intended, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world "complexities" associated with many employment policies, work rules and handbook provisions.

Based on these considerations, the Board should overrule *Lutheran Heritage* and find that the Hospital did not violate our statute merely by maintaining the disputed

[6] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967) (emphasis added). See also *Republic Aviation v. NLRB,* 324 U.S. 793, 797–798 (1945) (referring to "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). See also *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (2015) (Member Miscimarra, dissenting in part).

[7] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 34.

[8] See, e.g., *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996); *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

[9] *NLRB v. Erie Resistor Corp*., 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

Code of Conduct provisions. I support the aggressive enforcement of our statute, and I do not contend that every policy, rule and handbook provision should be deemed lawful whenever there is some type of justification. Indeed, by balancing the interests described above, the Board would have greater latitude when evaluating the legality of facially neutral policies, rules and handbook provisions.

Accordingly, as explained more fully below, I respectfully dissent in relevant part from the majority's decision.[10]

## Background

This case arises in a somber context. In December 2011, a full-term newborn baby died at the Hospital. An investigation concluded that the reasons for the infant's death included a lack of communication among nurses and failures to provide requested assistance. Subsequently, after a highly regarded labor and delivery nurse resigned, the Hospital learned that unnamed "senior nurses" were engaging in "bullying and intimidation." This prompted another investigation, which led to the termination of nurses Antilla and Brandt. Antilla was discharged for "mean, nasty, intimidating, and bullying behavior," and Brandt for "negative, intimidating, and bullying behavior." My colleagues and I agree that both discharges were lawful.

The Hospital's Code of Conduct identifies important justifications relevant to the two rules at issue here. The Code of Conduct states:

> It is the intention of Beaumont Hospitals to foster effective working relationships among all hospital employees and physicians in order to provide and maintain high quality and safe patient care. Such relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations.
>
> It is the expectation of hospital management that employees and physicians *promote and maintain a professional environment* in which all individual[s] are treated with dignity and respect.[11]

After this introduction, the Code of Conduct sets forth the following rules, including two provisions (italicized below) that my colleagues find unlawful:

> Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or *that impedes harmonious interactions and relationships* will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action.
>
> Improper conduct or inappropriate behavior or defiance in the following example, which includes but [is] not limited to the following:
>
> [1] Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
>
> [2] Profane and abusive language directed at employees, physicians, patients or visitors.
>
> [3] Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
>
> [4] Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
>
> [–] Unsolicited physical contact or threats of physical contact.
>
> [–] Written comments or illustrations in medical records or other official documents (except incident reports or other established hospital mechanisms for documenting and resolving concerns) that impugn the character or quality of care provided by a hospital or medical staff member.
>
> [–] Sexual innuendo or improprieties.
>
> [–] Rudeness or refusal to respond to concerns, questions, or requests regarding patient care.
>
> [5] *Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors*.
>
> [–] Negative or disparaging comments regarding religious, ethnic or racial background, disability or sexual orientation made to employees, physicians, patients or visitors.

[10] My colleagues and I agree with the judge's conclusion that certain rules maintained by the Hospital were lawful. No exceptions were filed to the judge's findings that certain other rules violated Sec. 8(a)(1), which means those findings are not before the Board. See fn. 40, infra. Similarly, no exceptions were filed to the judge's finding that the Hospital violated Sec. 8(a)(1) by instructing employee Deanna Brandt not to discuss with other employees the Respondent's investigation into her alleged misconduct, and I do not reach or pass on this finding.

I concur with my colleagues' conclusion that the judge properly found that the Hospital lawfully discharged employees Brandt and Jeri Antilla. However, I do not reach or pass on whether the General Counsel sustained his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which is to prove that protected conduct was a motivating factor in the Hospital's discharge decision. I agree with the judge and my colleagues that, even if the General Counsel satisfied this burden, the Hospital met its burden under *Wright Line* to establish that it would have discharged Brandt and Antilla without regard to their potential involvement in protected activity.

[11] Code of Conduct (emphasis added).

> [6] Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.[12]

None of the above rules explicitly restricts activities protected by Section 7, nor is there any allegation that any rules were promulgated in response to union activity or have been applied to restrict the exercise of Section 7 rights.

## Discussion

### *A. It is Important to Minimize Conflict and Disruptions in Hospital Work Settings, and These Important Interests Must Be Balanced Against NLRA-Protected Rights*

The Board and the courts have long recognized the public interest in protecting patients and family members from needless conflict in hospital work settings. The Supreme Court expressed this point eloquently in *NLRB v. Baptist Hospital*,[13] where the Court stated:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.[14]

In this case, I disagree with my colleagues' finding that the Hospital violated Section 8(a)(1) of the Act by maintaining rules that (a) prohibit conduct that impedes "harmonious interactions and relationships," and (b) prohibit "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." In my view, there are two problems with my colleagues' analysis. It applies the *Lutheran Heritage* "reasonably construe" standard, which I believe should be overruled for the reasons set forth in Part B below. And it fails to give adequate consideration to the Hospital work setting here and fails to attach any weight to the compelling justifications associated with the disputed rules, as addressed in Part C below.

### *B. Lutheran Heritage Should Be Overruled by the Board or Repudiated by the Courts*

My colleagues support their findings of illegality based on prong one of *Lutheran Heritage*, under which facially neutral policies, work rules and handbook provisions—which do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity—are deemed unlawful whenever any employee "would reasonably construe the language to prohibit Section 7 activity."[15] For the following reasons, I believe the *Lutheran Heritage* "reasonably construe" test should be overruled.[16]

First, the *Lutheran Heritage* "reasonably construe" standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions. These justifications are often substantial, as illustrated by the instant case. More importantly, the Supreme Court has repeatedly required the Board to take these justifications into account. We recognized this in *Lafayette Park Hotel*,[17] where a five-

[12] For ease of reference, I use the same paragraph numbering utilized in the majority opinion. The unnumbered indented paragraphs appear in the Code of Conduct in the sequence set forth in the text, but they are not quoted by my colleagues.

My colleagues and I agree with the judge's finding that pars. 1, 2, and 3, and part 1 of par. 6 ("Behavior that is disruptive to maintaining a safe and healing environment") are lawful. Putting aside the two provisions at issue here (italicized in the text), the judge concluded that paragraph 4 and part 2 of paragraph 6 ("behavior that is . . . counter to promoting teamwork") were unlawful. No exceptions were filed regarding these two provisions, so their legality is not before the Board. Accordingly, I do not reach or pass on the judge's conclusions regarding these provisions.

[13] 442 U.S. 773 (1979).

[14] Id. at 783 fn. 12 (internal quotation marks omitted). The Board has similarly "recognized that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function." *St. John's Hospital*, 222 NLRB 1150, 1150 (1976).

[15] 343 NLRB at 647 (quoted more fully in fn. 31, supra).

[16] Even if one applies *Lutheran Heritage*, I believe the majority cannot reasonably conclude that Hospital employees would construe the two work rules at issue here as interfering with NLRA-protected activities. Of all people, the employees of the Hospital—where successive investigations revealed that dysfunctional work relationships directly interfered with patient care and employee retention—would understand that these rules are justified by the importance of providing high-quality and safe health care and avoiding potential liability, without regard to any employee's potential exercise or non-exercise of NLRA-protected rights. See *Lafayette Park Hotel*, 326 NLRB at 825; *St. John's Hospital*, 222 NLRB at 1150. The connection between patient care and the two challenged rules is reinforced by the Code of Conduct's introductory language, which explains (among other things) that the Hospital intended through the Code to "foster effective working relationships among all hospital employees and physicians *in order to provide and maintain high quality and safe patient care*," and that such relationships "must be based upon mutual respect *to avoid disruption of patient care* . . ." (emphasis added). Accordingly, the judge properly concluded that "a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities," and "a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules."

[17] 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

member Board quoted the Supreme Court's decision in *Republic Aviation v. NLRB*[18] and held:

> Resolution of the issue presented by . . . contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society."[19]

Nor does *Republic Aviation* stand alone. The Supreme Court elsewhere has similarly required the Board to weigh the interests potentially advanced by a particular work requirement or restriction before the Board concludes that its potential adverse impact on employee rights warrants a finding of unlawful interference with NLRA rights. See *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 33–34 (referring to 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"); *NLRB v. Erie Resistor Corp*., 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). See also *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (Member Miscimarra, dissenting in part). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.").

Second, *Lutheran Heritage* is contradicted by NLRB case law. For example, the Board has recognized it is lawful for an employer to adopt no-solicitation and no-distribution rules (prohibiting *all* employee solicitation—including union-related solicitation—during working time, and prohibiting *all* distribution of literature—including union-related literature—in work areas).[20] Employers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation.[21] Similarly, employers have adopted "just cause" provisions and attendance requirements that cause employees to be disciplined or discharged for failing to come to work, even though employees have a Section 7 right to engage in protected strikes.[22] Each of these rules fails the *Lutheran Heritage* "reasonably construe" test because each one clearly restricts potential Section 7 activity. Yet each requirement has been upheld by the Board.

Third, in many cases involving facially neutral policies, rules and handbook provisions, the Board has engaged in a balancing of competing interests rather than strictly applying the *Lutheran Heritage* "reasonably construe" test. Indeed, in the instant case, the judge correctly reasoned that evaluating whether facially neutral work rules violate Section 8(a)(1) "requires a balancing of competing interests: the right of employees to organize or otherwise engage in protected activity and the right of employers to maintain a level of discipline in the workplace." As noted above, in *Lafayette Park Hotel* the Board attached weight to the justifications underlying particular work rules in addition to their potential adverse

[18] 324 U.S. 793 (1945).

[19] 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797–798). The Board in *Lafayette Park Hotel* stated that "[i]n determining whether the mere maintenance of [disputed] rules violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." However, Member Hurtgen observed that a rule may reasonably chill the exercise of Sec. 7 rights but still be justified by significant employer interests. 326 NLRB at 825 fn. 5. Member Hurtgen noted that no-solicitation rules restrict the exercise of Sec. 7 rights (by subjecting employees to discipline or discharge if they engage in solicitation—including union solicitation—during working time), but these restrictions have been deemed lawful based on Board precedent dating back more than 70 years establishing that "[w]orking time is for work" and that the employer's interest in production outweighs the Sec. 7 right of employees to engage in solicitation during working time. *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). See also fn. 48, infra.

[20] See *Our Way, Inc*., 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 621 (1962); *Peyton Packing*, 49 NLRB at 843. See also discussion in fn. 46 supra.

[21] See *GTE Lenkurt, Inc.,* 204 NLRB 921, 921–922 (1973); *Tri-County Medical Center,* 222 NLRB 1089 (1976). In *GTE Lenkurt*, the Board upheld an employee handbook no-access provision limiting the right of off-duty employees to be on the premises. Stating that determining the legality of the no-access rule "requires a balancing of the employees' Section 7 rights against the employer's private property rights," the Board held that the rule was lawful. 204 NLRB at 921–922. In *Tri-County*, the Board reiterated that a no-access rule applicable to off-duty employees will be lawful, provided that the rule "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." 222 NLRB at 1089.

[22] See, e.g., *Health Management, Inc.*, 326 NLRB 801 (1998) (employee lawfully discharged for just cause for continuing attendance and tardiness problems); *Cambridge Chemical Corp.,* 259 NLRB 1374 (1981) (same); *South Carolina Industries*, 181 NLRB 1031 (1970) (same).

impact on Section 7 rights.[23] In *Caesar's Palace*,[24] the Board upheld a confidentiality rule pertaining to a workplace investigation, even though the rule limited the right of employees to engage in NLRA-protected discussions. The Board's analysis in *Caesar's Palace* has equal application here:

> We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. *It does not follow however that the Respondent's rule is unlawful and cannot be enforced*. The issue is *whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweigh[] the Respondent's asserted legitimate and substantial business justifications*.[25]

Again, although *Lutheran Heritage* dispensed with any consideration of business justifications, the Board upheld a no-photography rule in a subsequent case, *Flagstaff Medical Center*,[26] in part because the rule implicated "weighty" interests associated with patient confidentiality.[27] In all these decisions, the Board has deemed it necessary, when evaluating the legality of one or more work rules, to consider both Section 7 rights *and* the business justifications associated with a particular rule. As the judge properly recognized in the instant case, any different approach "would ignore the employer's rights in the *Lafayette* balancing test and consider only potential employee rights."

Fourth, *Lutheran Heritage* is predicated on false premises that are inconsistent with the Act and contrary to the Board's responsibility to promote certainty, predictability and stability.[28] Several considerations are relevant here:

- Because the Act protects so many potential concerted activities (including the right to refrain from such activities), a wide variety of facially neutral rules can be interpreted, under some hypothetical scenario, as a potential limitation on some type of Section 7 activity.
- *Lutheran Heritage* requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity, but this disregards the fact that generalized provisions related to employment—including those relating to discipline and discharge—have been deemed acceptable throughout the Act's history.[29]

[23] See, e.g., 326 NLRB at 825 (observing that disputed rule "addresses legitimate business concerns"), 826 (in finding confidentiality rule lawful, observing that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information"), 827 (noting "legitimate business reasons" for rule requiring employees to secure permission before using the hotel's restaurant or cocktail lounge to entertain friends or guests).

[24] 336 NLRB 271 (2001).

[25] 336 NLRB at 272 (emphasis added) (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)).

[26] 357 NLRB 659 (2011), petition for review granted in part and denied in part 715 F.3d 928 (D.C. Cir. 2013).

[27] Id. at 663. In *Flagstaff*, the Board majority upheld a rule prohibiting employees from taking photographs of patients or hospital property. The majority emphasized the "weighty" privacy interests of hospital patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography." Id. The majority reasoned that "[e]mployees would reasonably interpret [the hospital's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." Id. However, then-Member Pearce relevantly dissented because under *Lutheran Heritage* the analysis turns exclusively on how an employee would "reasonably construe" the no-photography rule in relation to NLRA-protected rights, and he reasoned that "employees would reasonably construe the rule's language to prohibit Section 7 activity." Id. at 670 (Member Pearce, dissenting in part).

[28] One of the Board's primary responsibilities under the Act is to promote labor relations stability. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (Board declines to exercise jurisdiction in relation to scholarship football student-athletes because doing so would not promote stability in labor relations). See also *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (describing "the Act's goal of achieving industrial peace by promoting stable collective-bargaining relationships"); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations.").

The Supreme Court has stressed the need to provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678–679, 684–686.

[29] Linguistic perfection has not been required in other types of employment provisions enforced by the Board and the courts. As I have stated elsewhere:

> It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may [result in discipline or discharge]. If it did, "just cause" provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid. However, "just cause" provisions have been called "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms." More generally, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are "a myriad of cases which the draftsmen cannot wholly anticipate," and "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties."

- Another false premise of *Lutheran Heritage* is the notion that employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities. This disregards the fact that statutory ambiguities pervade the NLRA.[30] Even if employment policies and rules reproduced the full text of the NLRA, they will never attain a level of clarity greater than what Congress incorporated into the statute itself. Therefore, it is likely that one can "reasonably construe" even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity.[31]

The broader premise of *Lutheran Heritage*, which is even more seriously flawed, is the notion that employees are better served by *not* having employment policies, rules and handbooks. Nothing in the NLRA requires employers to adopt policies, rules and handbook provisions.[32] Moreover, employees in the United States remain generally subject to the doctrine of employment-at-will, which means employees can be discharged for any reason or no reason at any time.[33] Therefore, it would be lawful for employers to make all decisions regarding the potential discipline and discharge of employees on a case-by-case basis, where no expectations or requirements are communicated in advance. This would impose substantial hardship on employers that strive for consistency and fairness when making such decisions, and employees would not know what standards of conduct they must satisfy to keep their jobs. Also, I believe this would be irreconcilable with the Act's emphasis on stability, certainty and predictability.[34] However, this is the logi-

*Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 11 (Member Miscimarra, dissenting in part) (quoting *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578–579 (1960); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959)) (other citations and internal quotation marks omitted).

Ironically, the Board itself in *Lutheran Heritage* stated: "Work rules are necessarily general in nature . . . . We will not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB at 648. As illustrated by the instant case, however, the Board has lost sight of this language in applying *Lutheran Heritage*.

[30] Nobody can reasonably suggest that employers can incorporate into policies, rules and handbooks the precise contours of Sec. 7 protection when these contours have produced so much disagreement between and among the General Counsel, administrative law judges, different Board members, and the courts. See, e.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014) (divided opinions regarding whether a single employee's complaint asserting statutory rights constituted protected concerted activity); *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) (divided opinions regarding whether employees have a statutory right to use employer email systems for Sec. 7 purposes); *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (court of appeals rejects Board majority's finding that arbitration agreements containing class-action waivers unlawfully interfere with Sec. 7 activity); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (same). As the Supreme Court stated in one case, some provisions of the Act "could not be literally construed," there was no "glaringly bright line" between permitted and prohibited activity, and "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 672–674 (1961).

[31] In cases involving important employee benefits documents such as summary plan descriptions that are required under the Employee Retirement Income Security Act (ERISA), substantial *deference* is usually afforded the plan administrator—often, the employer—whose determinations may be deemed final and binding whenever this is stated in relevant benefit documents. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (indicating that a court will not engage in de novo review of a plan administrator's decisions if the "benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan").

By comparison, in Board decisions applying *Lutheran Heritage*, ambiguity in generalized work rule language causes the rule to be held unlawful, in part because the Board also applies the principle that ambiguity must be construed against the drafter. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1 (2015); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1–2 fn. 4 (2015); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 870 (2011). Again, the (unattainable) requirement of linguistic perfection, which uniquely applies to facially neutral policies, rules and handbook provisions, stands in stark contrast to the wide latitude with which the Board and courts have always treated generalized language in collective-bargaining agreements. See fn. 57, supra.

[32] Employers are required to maintain certain documentation under state and federal statutes other than the NLRA. For example, employers are required to have procedures to investigate and remedy complaints of various types of workplace harassment to avoid liability under Title VII of the Civil Rights Act of 1964. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). ERISA requires employers to have certain plan documents and summary plan descriptions regarding employee benefits. See, e.g., 29 U.S.C. § 1022. The Workers Adjustment and Retraining Notification Act (WARN) requires employers to provide 60 days' written notice to various parties in advance of business changes that constitute a "plant closing" or "mass layoff." 29 U.S.C. § 2101 et seq. Ironically, under *Lutheran Heritage*, these types of documentation, where made available to employees—even though *required* by other legal obligations—would be deemed unlawful by the Board whenever they could be "reasonably construed" to adversely affect NLRA-protected activity.

Putting aside whether an employer's facially neutral rules violate Sec. 8(a)(1), employers must comply with the Act's other provisions. Therefore, if there is a certified or recognized union, for example, the employer's 8(a)(5) obligation to bargain may require negotiations over existing or potential policies, rules or handbook provisions.

[33] There are exceptions to the employment-at-will doctrine where a discharge would violate a statutory requirement or prohibition (for example, Title VII or the Age Discrimination in Employment Act), constitute wrongful discharge in violation of public policy in certain states (see, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978)), or violate a "just cause" provision in a collective-bargaining agreement or a similar provision in some other type of employment contract.

[34] See fn. 28, supra.

cal outgrowth of *Lutheran Heritage*, and it may very well be its legacy. Indeed, the remedy in this case, like all other cases that apply prong one of *Lutheran Heritage*, requires rescission of every offending provision contained in the Hospital's Code of Conduct.

Fifth, the *Lutheran Heritage* "reasonably construe" test imposes too many restrictions on the Board. By making legality turn exclusively on whether an employee would "reasonably construe" a rule to prohibit *any* type of Section 7 activity, *Lutheran Heritage* requires a "one-size-fits-all" analysis that gives the same treatment to every potential intrusion on Section 7 rights, however slight it might be and however remote the possibility that employees would actually engage in such protected activity. The "reasonably construe" test permits no consideration of the justifications for a particular rule, which in turn prevents the Board from treating some justifications as warranting greater weight than others. *Lutheran Heritage* prevents the Board from making important distinctions between different types of rules, different business justifications, and different Section 7 rights, and it disregards differences between rules with respect to their potential impact on protected rights. Abandoning *Lutheran Heritage* would permit the Board to engage in a more refined evaluation of these significant variables.[35]

Sixth, *Lutheran Heritage* prevents the Board from considering the unique characteristics of particular work settings and different industries, or specific events that might be associated with a particular policy, rule or handbook provision. The instant case illustrates the problems associated with this limitation. As noted above, the Board and the courts have long recognized the importance of avoiding needless conflict and disruptions in an acute-care hospital setting.[36] And in *Flagstaff*, the Board majority upheld a hospital's no-photography rule—notwithstanding its potential impact on Section 7 activity—after considering the "weighty" privacy interests of patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography."[37] Yet *Flagstaff* dealt merely with "privacy" and the "wrongful disclosure of . . . information," which pale in comparison to the interests implicated in the instant case, where inadequate coordination and dysfunctional interaction among Hospital personnel contributed to an unexpected death. Nonetheless, the majority attaches no weight to the hospital work setting or this event and its contributing causes because this is not permitted by the *Lutheran Heritage* "reasonably construe" standard.

Finally, *Lutheran Heritage* has caused extensive confusion and litigation for employers, unions, employees and the Board itself. The "reasonably construe" standard has defied all reasonable efforts to apply and explain it.[38] Indeed, even with the benefit of hindsight, it is still difficult to understand Board rulings that uphold some facial-

[35] I believe it is *the Board's* responsibility—not the responsibility of employers, unions or employees—to balance the legitimate interests served by a facially neutral policy, rule or handbook provision with the potential infringement on Sec. 7 rights. See *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (Member Miscimarra, dissenting in part) (expressing disagreement with the majority's placing on the employer the task of case-by-case "weighing" and "balancing" when attempting to determine whether it is lawful to request nondisclosure of what is discussed during a workplace investigation meeting). This more refined balancing, when conducted by the Board, would permit the Board to develop more detailed standards for specific types of rules, particular types of Sec. 7 activity, and whether or when certain justifications do or do not outweigh a risk of interference with employee rights.

[36] See *NLRB v. Baptist Hospital,* 442 U.S. at 773; *St. John's Hospital*, 222 NLRB at 1150.

[37] 357 NLRB at 663.

[38] See GC Memorandum 15-04 (March 18, 2015); GC Operations Memorandum 12–59 (May 30, 2012); GC Operations Memorandum 12-31 (Jan. 24, 2012); GC Operations Memorandum 11–74 (Aug. 18, 2011). See also U.S. Chamber of Commerce, *Theater of the Absurd: The NLRB Takes on the Employee Handbook* (available at http://www.workforcefreedom.com/sites/default/files/NLRB_Theater%20of%20the%20Absurd.pdf, last accessed December 14, 2015) (criticizing the Board's decisions regarding employee handbook policies as "seem[ing] to run counter to any balanced reading of the NLRA"); Brice, Fifer, and Naron, *Social Media in the Workplace: The NLRB Speaks,* 24 No. 10 Intell. Prop. & Tech. L.J. 13 (2012) (calling the Board's disapproval of some social media rules under the *Lutheran Heritage* test "far from intuitively obvious"); Liss, *Beware That Your Social Media Policies Do Not Draw the Ire of the National Labor Relations Board,* 70 J. Mo. B. 324 (2014) (discussing the difficulty of understanding and applying the Board's recent interpretations of the *Lutheran Heritage* "reasonable employee" standard to rules governing employees' use of social media); Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity,* 27 Berkley Tech. L.J. 837 (2012) (same); O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 Charleston L. Rev. 411 (2014) (same); Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?,* 38 J. Corp. L. 607 (2013) (citing inconsistencies in the Board's interpretation of social media policies); Link, *Employers Beware,* 284-OCT N.J. Law. 24 (2013) (calling the Board's guidance on social media policies "internally inconsistent at times, and frequently ambiguous"); Logan, *Social Media Policy Confusion: The NLRB's Dated Embrace of Concerted Activity Misconstrues the Realities of Twenty-First Century Collective Action,* 15 Nev. L.J. 754 (2014) ("The Board's inconsistent adaptation of the NLRA to social media policies is 'causing concern and confusion.'"); McNamara, *The Times are Changing: Protecting Employers in Today's Evolving Workplace,* 2011 WL 601173 (2011) (citing the Board's "confusing" application of *Lutheran Heritage* to employer work rules); Rojas, *The NLRB's Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA,* 51 Washburn L.J. 663 (2012) (asserting that application of the Board's current standards under *Lutheran Heritage* to social networking is "impractical, inefficient, and inconsistent with the purposes of the Act").

ly neutral rules while invalidating others.[39] For example, in the instant case, consider the hard-working judge's careful effort to parse a small number of Board and court decisions cited in her opinion:

- In *Lafayette Park Hotel*,[40] it was *lawful* to have a rule prohibiting "conduct that does not support the . . . Hotel's goals and objectives," even though this arguably encompassed conduct that did not support the Hotel's goal of remaining nonunion, which would prohibit union organizing by employees. However, it was deemed unreasonable to assume, without more, that remaining nonunion was one of the goals encompassed by the rule.
- In *Lafayette Park Hotel* as in a similar case,[41] it was *unlawful* to maintain a rule prohibiting "false, vicious, profane or malicious statements toward or concerning the . . . [employer] or any of its employees" because such statements could occur in the context of activities protected under Section 7.
- In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, the court found it was *lawful* to have a rule prohibiting "abusive or threatening language to anyone on company premises," which the court found required employees to "comply with generally accepted notions of civility."[42] The court deemed this "quite different" from *Lafayette Park Hotel* and a similar Board case,[43] in which the Board found that it was *unlawful* to maintain rules "threatening to punish 'false' statements without evidence of malicious intent."[44]
- In *Lutheran Heritage*,[45] it was *lawful* to maintain rules prohibiting "verbal abuse," "abusive or profane language," and "harassment." Although *Lutheran Heritage* renders unlawful every rule that an employee would "reasonably construe" to prohibit Section 7 activity, the Board stated that a rule would not be unlawful merely because it "*could* be interpreted that way."[46]
- In *Palms Hotel & Casino*,[47] it was *lawful* to have a rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees because the rule was not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace."[48]
- In *Flamingo Hilton-Laughlin*,[49] it was *unlawful* to have a rule prohibiting "loud, abusive or foul language" because this was so broad that it "could reasonably be interpreted as barring lawful union organizing propaganda."[50]
- In *2 Sisters Food Group,*[51] it was *unlawful* to maintain a rule subjecting employees to discipline for "inability or unwillingness to work harmoniously with other employees" because the employer did not "define what it means to 'work harmoniously' (or to fail to do so)," and the rule was "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7."[52]
- In *The Roomstore*, it was *unlawful* to maintain a rule prohibiting "[a]ny type of negative energy or attitudes."[53] Similarly, in *Claremont Resort & Spa*, it was *unlawful* to maintain a rule prohibiting "[n]egative conversations about associates and/or managers" because the employer did

[39] Since *Lutheran Heritage* was decided in 2004, the Board has evaluated a variety of facially neutral policies, work rules and handbook provisions. See, e.g., *Quicken Loans,* 359 NLRB No. 141 (2013); *Knauz BMW*, 358 NLRB 1754 (2012); *Costco Wholesale Corp*., 358 NLRB 1100 (2012); *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Roomstore*, 357 NLRB 1690 (2011); *Hyundai America Shipping Agency*, supra, 357 NLRB at 860 (2011); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007); *Inter-Disciplinary Advantage*, 349 NLRB 480 (2007); *Palms Hotel & Casino*, 344 NLRB 1363 (2005); *Claremont Resort & Spa*, 344 NLRB 832 (2005); *Triple Play Sports Bar & Grille*, supra, 361 NLRB No. 31; *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014); *Arkema, Inc.,* 357 NLRB 1248 (2011), enf. denied 710 F.3d 308 (5th Cir. 2013); *Tenneco Automotive, Inc.,* 357 NLRB 953 (2011), enfd. in pert. part 716 F.3d 640 (D.C. Cir. 2013); *NLS Group*, 352 NLRB 744 (2008), affd. 355 NLRB 1154, enfd. 645 F.3d 475 (1st Cir. 2011); *Guardsmark, LLC*, 344 NLRB 809 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007); *Cintas Corp*., 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007). As explained in the text, the conflicting outcomes of these cases are sometimes virtually impossible to rationalize.

[40] 326 NLRB at 824.

[41] *Cincinnati Suburban Press, Inc.*, 289 NLRB 966, 975 (1988).

[42] 253 F.3d at 27.

[43] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

[44] 253 F.3d at 26–27.

[45] 343 NLRB at 646.

[46] 343 NLRB at 647 (emphasis in original).

[47] 344 NLRB 1363 (2005).

[48] Id. at 1368.

[49] 330 NLRB at 287.

[50] Id. at 295.

[51] 357 NLRB at 1816.

[52] Id. at 1817.

[53] 357 NLRB at 1690 fn. 3.

not "clarif[y] any potential ambiguities in its rule by providing examples."[54]

[54] 344 NLRB at 836.

The above cases comprise an extremely small sampling of Board and court cases addressing a single, narrow category of policies, rules and handbook provisions. The disputed rules also occupy a very narrow space that involves promoting civility and respect. Do these cases permit one to understand what the "lawful" rules do correctly and what the "unlawful" rules do incorrectly? I believe the rather obvious answer is no. The above cases yield the following results:

**Lawful Rule**

- no "abusive or threatening language to anyone on Company premises"
- no "verbal abuse," "abusive or profane language," or "harassment"
- no "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees
- prohibiting "conduct that does not support the . . . Hotel's goals and objectives"

**Unlawful Rule**

- no "loud, abusive, or foul language"
- no "false, vicious, profane or malicious statements toward or concerning the . . . Hotel or any of its employees"
- no "inability or unwillingness to work harmoniously with other employees"
- no "negative energy or attitudes"
- no "[n]egative conversations about associates and/or managers"

These examples reveal that the *Lutheran Heritage* "reasonably construe" standard, to a substantial degree, has led to arbitrary results. Would an employee "reasonably construe" a difference between prohibiting "abusive or threatening language to anyone on Company premises" (held lawful in *Adtranz*) and prohibiting "loud, abusive, or foul language" (deemed unlawful in *Flamingo Hilton*)? Would employees be unlawfully discouraged from engaging in NLRA-protected activity by a rule prohibiting "false, vicious, profane or malicious statements" (deemed unlawful in *Lafayette Park Hotel*) while perceiving they may freely engage in protected activity when a handbook prohibits conduct that is "injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees (deemed lawful in *Palms Hotel & Casino*)? Here as well, I believe the rather obvious answer is no.

It bears emphasis that the above questions relate to the outcome of cases *that have already been decided*, regarding a *single, narrow category* of rules aimed at fostering workplace civility. The challenges become orders of magnitude greater if one attempts to address, in advance, the entire spectrum of issues that warrant treatment in policies, work rules or handbook provisions. The Board can and should do better in this area, and I believe employees, unions and employers deserve better.

I do not fault my predecessors on the Board who, with good intentions, articulated the "reasonably construe" standard in *Lutheran Heritage*. Section 7 rights deserve protection, and Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of those rights. Additionally, *Lutheran Heritage* contained numerous qualifications that more recent decisions have disregarded.[55] Finally, more than a decade has passed since the Board articulated the *Lutheran Heritage* "reasonably construe" standard. Our experience with this standard has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions. For all of these reasons, *Lutheran Heritage* should be overruled, and the Board should strive to remedy the confusion that this standard has produced.

### *C. The Board Should Conduct a "Proper Balance" by Considering Justifications Associated with a Facially Neutral Work Rule as well as Any Potential Impact on NLRA-Protected Rights*

In this case and all others in which one or more facially neutral policies, rules and handbook provisions are at issue, the Board should resume doing what the Supreme Court has repeatedly required, which is to carry out its "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[56] When discharging this duty, the following considerations would have particular relevance:

- Contrary to the analysis required under the *Lutheran Heritage* "reasonably construe" standard,

[55] For example, the Board majority in *Lutheran Heritage* stated: "Where, as here, the rule does not refer to Section 7 activity, we 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. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach." 343 NLRB at 647 (emphasis in original). Thus, the Board majority rejected the view expressed by dissenting Members Liebman and Walsh, who contended that a facially neutral work rule should be deemed unlawful whenever it could be interpreted to encompass Sec. 7 activity. Nonetheless, the latter view has been effectively adopted in many subsequent decisions through application of the principle that ambiguity is construed against the employer as the drafter of the rule. See fn. 31, supra.

[56] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 33-34 (emphasis added). See also *NLRB v. Erie Resistor Corp*., 373 U.S. at 229; *Republic Aviation v. NLRB*, 324 U.S. at 797–798; *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (Member Miscimarra, dissenting in part); see fn. 34, supra.

the Board must consider at least two things when evaluating a particular policy, rule or handbook provision: (i) its potential adverse impact on NLRA-protected activity, *and* (ii) the legitimate justifications that may be associated with it.[57] The Board must engage in a meaningful balancing of these competing interests, and a facially neutral work requirement should be declared unlawful only if the justifications are outweighed by an adverse impact on Section 7 activities.

- When conducting this balancing, the Board should differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others regarded as more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight."[58]
- The Board should make reasonable distinctions among the justifications associated with a challenged policy, rule or handbook provision. The justifications for rules dealing with discrimination, harassment, safety or security, for example, might be afforded greater weight than those for rules aimed at increasing sales or productivity. The Board should also make reasonable distinctions between and among different industries and work settings, and it should take into consideration any specific events that might be relevant to a particular policy, rule or handbook provision.
- Even if the Board held an employer could lawfully maintain a particular policy, rule or handbook provision, the Board may still find it unlawful to *apply* the rule in a situation involving NLRA-protected activity. Therefore, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, the Board may still find that the employer violated Section 8(a)(1) of the Act by invoking the rule to discipline employees involved in an angry workplace confrontation that was protected by Section 7.[59]

Regarding this last point, the Court of Appeals for the D.C. Circuit has criticized the Board's failure to distinguish between the mere maintenance of a facially neutral rule, on the one hand, and circumstances where a rule has been applied to restrict Section 7 activity on the other.[60] In the complex assortment of work settings throughout the United States, a near-endless variety of work requirements exist for important reasons. Many of these requirements are imposed by statutes other than the NLRA. Some address legitimate concerns about workplace violence. Others address the need to ensure employee safety, or they express an understandable desire to foster courtesy among employees in work forces that are increasingly diverse.

The Board needs to refrain from assuming that facially neutral policies, work rules and handbook provisions operate, first and foremost, to extinguish NLRA-protected activity. Such an assumption is especially unwarranted without evidence that a particular rule has been applied to restrict Section 7 activity. In this regard, the Board should take to heart criticism levied by the D.C. Circuit nearly 15 years ago:

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at is-

[57] The business justifications associated with a particular policy, rule, or handbook provision may include, for example, non-NLRA legal obligations such as the prevention of discrimination or harassment on the basis of sex, race, age, disability, or other protected factors; the avoidance of workplace violence; efforts to foster occupational safety and health; the protection of trade secrets, intellectual property and customer or client information; and a desire to foster respect, cooperation and courtesy between and among employees (who work in increasingly diverse work forces) or to promote these same qualities in dealings with customers, clients, vendors, and the general public.

The Board's balancing can appropriately consider factors such as the immediacy and relative importance of particular Sec. 7 rights or a particular work requirement's justification. For example, the Board might reasonably invalidate a confidentiality requirement prohibiting disclosure of employee wages (because the employer might lack any reasonable justification for such a requirement, and concerted activity regarding wages is central to the Act's protection). Conversely, the Board might uphold a requirement that employees treat one another with courtesy and respect to the extent the Board concluded, for example, that (i) substantial concerns existed about workplace harassment or violence, and (ii) angry confrontations in the workplace, though sometimes protected by the Act, are not central to the Act's protection.

[58] *NLRB v. Great Dane Trailers*, 388 U.S. at 34.

[59] The appropriate remedy for such a violation would be an order to cease and desist from *applying* the rule to restrict protected activity, not to rescind the rule altogether. See *Marina Del Rey Hospital*, 363 NLRB No. 22, slip op. at 2 (2015).

[60] Thus, in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d at 213, the D.C. Circuit stated:

> In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified. If an occasion arises where [the employer] is *attempting to use the rule* as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, *the rule on its face is not unlawful*.

(Emphasis added.) See also *Adtranz ABB Daimler-Benz Transportation v. NLRB,* 253 F.3d at 28 (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees").

> sue here [prohibiting "abusive or threatening language"]. Under both Federal and State law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under State or Federal law. Given this legal environment, any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the Adtranz employee handbook. . . . Under current law, the only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment. . . . To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a "catch 22."[61]

The court continued:

> We also recognize that the uneven or partial application of a rule against abusive and threatening language could constitute an unfair labor practice if directed against employees seeking to exercise their statutory rights. *Yet the Board's position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous*. It defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace.[62]

As a final matter, I respectfully disagree with my colleagues' contention that I am advocating a "novel balancing test" that supposedly "puts a clear thumb on the scale to tilt the balance against Section 7 rights." Here, my colleagues emphasize that the Board has applied *Lutheran Heritage* "for more than a decade," and they are "not persuaded" that, throughout that period, "the Board and the courts have been engaged in an analytical exercise that is somehow contrary to the Act and Supreme Court precedent." My colleagues concede that cases implicating *Lutheran Heritage* may raise "difficult" and "complicated" issues, but the majority insists these problems are "inherent in the remarkable number, variety, and detail of employer work rules . . . drafted with differing degrees of skill and levels of legal sophistication."

Most of my colleagues' criticisms deal with matters that have already been addressed, but I believe their observations are especially misplaced in three respects.

First, while arguing that I advocate a standard that "puts a clear thumb on the scale to tilt the balance against Section 7 rights," my colleagues disregard the fact that the *Lutheran Heritage* "reasonably construe" standard does not permit the use of any "scale," and it does not involve any "balance." Under *Lutheran Heritage*, the Board exclusively considers only the potential, hypothetical impact of a particular rule on NLRA-protected activity, even though such activity may never occur, it may lie at the periphery of the protection afforded by our statute, and any adverse impact on Section 7 activity may be substantially outweighed by compelling justifications. Merely requiring the Board to "balance" these considerations does not place a "thumb on the scale" in any direction.[63]

Second, the balancing standard described in this opinion is not "novel." Rather, the balancing of competing interests—specifically, considering the potential impact on NLRA-protected rights along with relevant justifications for particular requirements or restrictions—is mandated by the Supreme Court decisions in *Republic Avia-*

[61] *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d at 27 (internal quotations and citations omitted; emphasis added).

[62] Id. at 27–28 (emphasis added).

[63] Nothing would prevent the Board, after engaging in an appropriate balancing of justifications and NLRA rights, from concluding that a facially neutral rule violates Sec. 8(a)(1), and such a finding would be entitled to reasonable deference on appeal. See, e.g., *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 375–377 (D.C. Cir. 2007) (rejecting employer's argument that facially neutral rule is lawful because it was never applied against protected activity). Indeed, the "balancing" required by the Supreme Court's decisions in *Republic Aviation*, *Erie Resistor* and *Great Dane* mandates only that the Board *consider* business justifications (in addition to the impact of particular rules or requirements on NLRA-protected activity). Moreover, even if the Board concluded that a facially neutral rule could lawfully be *maintained*, the Board could find that the same rule was subsequently unlawfully *applied* to restrict or interfere with NLRA-protected activity. See text accompanying fns 87, supra; see also *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d at 213; *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d at 28. In these respects, it would not unduly restrict the Board or compel a particular outcome for the Board to engage in the "balancing" that is required under Sec. 8(a)(1). The Board would have greater flexibility and could undertake a more refined evaluation of facially neutral work rules, policies and handbook provisions than is permitted by the current *Lutheran Heritage* standard.

Likewise, there is no merit in the majority's suggestion that the "balancing" of competing interests would result in greater certainty and stability only if "facial challenges to employer rules would rarely succeed," and it is not true that such a balancing "would leave the potential chilling effect of such rules on protected, concerted activity unaddressed." Again, an appropriate balancing of justifications and NLRA rights would preserve the Board's ability to conclude that various facially neutral rules, policies or handbook provisions violate Sec. 8(a)(1). Although mere maintenance of various rules would still be unlawful, greater certainty and stability would result from the Board's ability to consider relevant justifications and the impact on NLRA-protected rights, and the Board could draw more understandable distinctions between different types of rules, justifications, work settings and NLRA-protected rights. None of these distinctions is permitted under the single-minded *Lutheran Heritage* "reasonably construe" standard, which makes it predictable that divergent outcomes in multiple cases would defy rational explanation and appear to be arbitrary. See text accompanying fns.66–83, supra.

*tion*,[64] *Erie Resistor*[65] and *Great Dane*[66] and was conducted by the Board itself in cases such as *Peyton Packing Co.* (decided in 1943),[67] *Stoddard-Quirk Manufacturing Co*. (decided in 1962),[68] *GTE Lenkurt, Inc.* (decided in 1973),[69] *Essex International* (decided in 1974),[70] *Tri-County Medical Center* (decided in 1976),[71] *Our Way, Inc*. (decided in 1983),[72] *Lafayette Park Hotel* (decided in 1998),[73] *Caesar's Palace* (decided in 2001),[74] and *Flagstaff Medical Center* (decided in 2011),[75] among others. My colleagues get one thing right: *Lutheran Heritage* has been in effect "for more than a decade." But this does not preclude a conclusion that *Lutheran Heritage* is contrary to the Act and Supreme Court precedent. In fact, as described at length above, *Lutheran Heritage* constitutes an obvious and completely unexplained departure from the consideration of competing interests that has been deemed necessary in numerous cases decided by the Supreme Court, other courts and the Board.[76]

Third, the above considerations, especially when combined with the Board's practical experience applying *Lutheran Heritage*, compel a conclusion that the *Lutheran Heritage* "reasonably construe" standard has caused enormous problems and needless uncertainty in this important area. It is no surprise that the Board, applying *Lutheran Heritage*, has found that so many legitimate work requirements violate Federal law: the *Lutheran Heritage* "reasonably construe" standard does not permit *any* consideration of the important reasons these work requirements exist. In any event, even if my colleagues disbelieve that *Lutheran Heritage* has created difficulties in this area, this does not resolve the inconsistencies between *Lutheran Heritage* and the Supreme Court's decisions in *Republic Aviation*, *Erie Resistor*, and *Great Dane* as well as numerous other Board and court decisions, nor does it adequately address the other considerations that warrant overruling the *Lutheran Heritage* "reasonably construe" standard.

### *D. The Hospital's Code of Conduct Provisions At Issue Here Are Lawful Under Section 8(a)(1) of the Act*

Applying the analysis outlined above, it remains to determine whether the Hospital violated Section 8(a)(1) by maintaining language in its Code of Conduct that (i) prohibits conduct that impedes "harmonious interactions and relationships" and (ii) prohibits "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." This requires engaging in a meaningful balancing of the competing interests associated with these rules, taking into account their justifications and any potential impact on NLRA-protected activities. For several reasons, I believe this analysis warrants a conclusion that the Hospital did not violate the Act based on the mere maintenance of the two rules at issue here.

First, the unique characteristic of hospitals referenced above—the integral connection between patient care and

[64] 324 U.S. at 797–798.
[65] 373 U.S. at 229.
[66] 388 U.S. at 33–34; see supra fn. 34.
[67] 49 NLRB at 843; see supra fn. 47.
[68] 138 NLRB at 621; see supra fn. 48.
[69] 204 NLRB at 921–922; see supra fn. 49.
[70] 211 NLRB at 749; see supra fn. 48.
[71] 222 NLRB at 1089; see supra fn. 49.
[72] 268 NLRB at 394; see supra fn. 48.
[73] 326 NLRB at 824; see supra fns. 45, 51 and accompanying text.
[74] 336 NLRB at 272; see supra fn. 52.
[75] 357 NLRB at 663; see supra fn. 54.
[76] To support its view that the Board may continue to adhere to *Lutheran Heritage* and freely disregard the justifications underlying challenged work rules, the majority cites a single court case, *NLRB v. Northeastern Land Services*, 645 F.3d 475 (1st Cir. 2011), where the court upheld a Board order invalidating a confidentiality rule. The court commented on the *Lutheran Heritage* "reasonably construe" standard and stated that the Board "could have chosen to structure its rule differently and engage in a balancing analysis." Id. at 483. However, the court deferred to the Board's failure to engage in "balancing," and it rejected the employer's argument that "the Board failed to consider the legitimate justification it had for the confidentiality provision." Id. at 482–483. The court asserted that the employer's argument was "at odds with current Board precedent," citing *Lutheran Heritage* and *Lafayette Park Hotel*, and it stated that "[n]othing in *Republic Aviation* compelled the Board to apply a balancing test here." Id.

For several reasons, the decision in *Northeastern Land Services* does not support the Board majority's continued adherence to the *Lutheran Heritage* "reasonably construe" standard. First, the court's deference to *Lutheran Heritage*—specifically, to the failure of that decision to permit any "balancing" or consideration of the "legitimate justification" underlying the rule at issue—is contrary to multiple Supreme Court decisions, including *Republic Aviation*, *Erie Resistor* and *Great Dane*. Second, the court engaged in no analysis of *Republic Aviation* and provided no support for the erroneous statement that "[n]othing in *Republic Aviation* compelled the Board to apply a balancing test." 645 F.3d at 483. Third, although the court deferred to the Board's failure to permit "balancing" in *Lutheran Heritage*, the court misconstrued other "current Board precedent" by failing to recognize that the Board *engaged* in balancing in *Lafayette Park Hotel* (cited in the court's decision) and *Caeser's Palace* (cited in the court's decision and relied upon in the administrative law judge's decision reviewed by the Board and court in *Northeastern Land Services*). Id. at 480, 482. Fourth, *Lutheran Heritage* was a relatively recent case, issued after the judge's decision and before the Board addressed the confidentiality rule in *Northeastern Land Services*, and neither the Board nor the court had the opportunity to consider the extensive confusion that has resulted from *Lutheran Heritage*. Moreover, as noted above, the court in *Northeastern Land Services* acknowledged that the Board "could have chosen to . . . engage in a balancing analysis." Id. at 483. Contrary to *Northeastern Land Services*, I believe the Board is compelled to balance the justifications for specific rules with the potential impact on NLRA-protected rights. However, even if not required, I believe the Board should engage in such an analysis for the reasons explained in this opinion.

the hospital environment—strongly supports a conclusion that substantial justifications warranted these rules.[77]

Second, the record establishes that this particular Hospital had critical needs associated with the two work rules. The Hospital experienced an unexpected death; an investigation attributed the death, in part, to the lack of coordination among Hospital staff and a failure to provide requested assistance; the Hospital received a separate complaint that two nurses in the labor and delivery unit (Antilla and Brandt) had engaged in "bullying and intimidation"; the two nurses were fired for being "mean," "nasty," "negative," "intimidating" and/or "bullying"; and my colleagues and I agree these discharges were lawful. If ever there were a case where substantial, immediate justifications existed for a rule seeking to promote "harmonious interactions and relationships," this is it.[78] And in view of these same facts—particularly issues of liability in relation to an unexpected death—one cannot reasonably doubt that legitimate purposes unrelated to NLRA-protected activity were served by the rule against "negative or disparaging comments about the . . . professional capabilities" of Hospital physicians and employees. It is also significant that the Code of Conduct expressly sets forth the rationale underlying the Hospital's rules by stating: "It is the intention of Beaumont Hospitals to foster effective working relationships among all hospital employees and physicians in order *to provide and maintain high quality and safe patient care*" (emphasis added).

Third, the record establishes that the justifications associated with the two rules at issue here were substantial. The justifications directly affected patients and employees alike, and breakdowns in the labor and delivery unit had severe consequences. As noted previously, in *Flagstaff Medical Center*, which also arose in a health care work setting, the Board upheld a no-photography rule based on the "weighty" privacy interests of patients and the "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography."[79] The instant case—involving an unexpected death, two investigations, the resignation and discharges described above—implicates even greater concerns than the "weighty" interests the Board deemed controlling in *Flagstaff*.

Fourth, it is also important to consider the potential adverse impact of the Hospital's Code of Conduct on NLRA-protected activities. At some future time, an employee might engage in protected activity that could violate one of the rules in dispute here. This could occur if two employees engaged in concerted activities for mutual aid or protection regarding an employment issue, where the activities involved or precipitated some interpersonal conflict in the workplace (contravening the rule promoting "harmonious" interactions). Two or more employees might similarly engage in protected concerted activities in which the employees criticize the "professional capabilities" of a physician or coworker (contravening the rule prohibiting such comments). However, weighed against the significant justifications described above, I believe there is a "comparatively slight" risk that such incidents would occur, especially in comparision to the substantial benefits that the disputed rules would produce for everyone in the hospital, including patients and employees.[80] A broad range of protected Section 7 activities at the Hospital would not necessarily involve *any* conflict with the two disputed rules. Most importantly, in the event of such a conflict, if the Hospital were to *apply* either or both of the disputed work rules to restrict Section 7 activity, the Board could still find that the Hospital violated Section 8(a)(1), even if the two rules at issue here were declared lawful on their face. Finally, I do not believe a high risk exists that the two disputed rules would be interpreted by employees to discourage their exercise of NLRA-protected rights. Rather,

[77] See *NLRB v. Baptist Hospital*, 442 U.S. at 783 fn. 12; *St. John's Hospital*, 222 NLRB at 1150.

[78] See also *Quality Patient Care in Labor and Delivery: A Call to Action*, which states: "Optimal maternal health outcomes can best be achieved in an atmosphere of effective communication, shared decision-making, and teamwork," and "[i]mproving safety . . . requires teamwork and effective communication at multiple levels within the organization." Indeed, in this three-page statement, the phrase "effective communication" appears six times, and the words "team," "teams," or "teamwork" appear a total of *28 times*. See http://www.acog.org//media/Departments/Patient-Safety-and-Quality-Improvement/Call-to-Action-Paper.pdf?la=en.

In large part, my colleagues declare unlawful the Hospital's rule regarding "harmonious" relationships based on *2 Sisters Food Group*, 357 NLRB at 1816. For several reasons, I believe *2 Sisters* does not warrant a finding that the disputed work rules were unlawful. First, the Board in *2 Sisters* relied on *Lutheran Heritage*, and I believe *Lutheran Heritage* should be overruled for the reasons discussed at length in the text. Second, *2 Sisters* involved a retail food store, not an acute care hospital, which means the unique considerations associated with hospitals, as recognized by the Board and the courts, were not present in *2 Sisters*. Third, the rule invalidated in *2 Sisters* subjected employees to potential discipline for an "inability or unwillingness to work harmoniously with other employees." However, no facts in *2 Sisters* remotely resemble those in this case, including an unexpected death that was revealed, in the ensuing investigation, to have resulted in part from the lack of effective communication among hospital employees. It borders on the absurd to suggest that these two situations are equivalent.

As explained in the text, the *Lutheran Heritage* standard prevents the Board from taking into account the significant factual distinctions between *2 Sisters* and the instant case, which is among the reasons that I believe the *Lutheran Heritage* "reasonably construe" test should be abandoned.

[79] 357 NLRB at 663.

[80] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 34.

I agree with the judge's conclusion that "a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities," and "a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules."

Fifth, striking a "proper balance"[81] between the justifications associated with the rules and the risk that they might discourage Section 7 activity supports a finding that maintenance of these rules is lawful. The justifications are substantial, and they are reinforced by the work setting here (an acute care hospital) and by significant events that directly implicated the rules. On the other hand, the rules do not expressly prohibit Section 7 activity, and there is no evidence that they were adopted in response to Section 7 activity or have been applied to restrict such activity. The judge found it is unlikely that employees would associate the rules with NLRA-protected activity. It is also significant that the Board unanimously finds lawful the discharges of employees Antilla and Brandt based on misconduct that, like the misconduct the rules seek to prevent, undermined patient care. As the judge explained:

> The hospital had experienced an unexpected infant death, and this was found to be due, at least in part, to nurses not cooperating with each other, not communicating effectively with each other. If new or inexperienced staff does not feel comfortable asking for assistance or asking questions for fear of being mocked, or humiliated, or yelled at, then there is indeed increased risk to patients.

Conclusion

My colleagues indicate that no "link" exists between "Board doctrine and the death of a baby." It is true that the Hospital promulgated the requirements at issue here, notwithstanding *Lutheran Heritage* and its progeny, and these requirements failed to prevent the tragic events described above. However, the Board compounds this failure by finding it violates Federal law for the Hospital even to maintain a rule fostering "harmonious interactions and relationships" or prohibiting "negative or disparaging comments" about the "professional capabilities" of doctors and coworkers. And *Lutheran Heritage* prevents the Board from attaching *any* weight to justifications that—as illustrated by this case—can mean the difference between life and death.

Unquestionably, Board doctrine has consequences affecting far more than NLRA rights. Yet *Lutheran Heritage* imposes a form of blindness on the Board, requiring that we ignore every important consequence associated with our decisions in this area, and with employment policies, work rules and handbook provisions, *except* their potential impact on the NLRA. This is contrary to the balancing required by the Supreme Court in *Republic Aviation*, *Erie Resistor* and *Great Dane*,[82] and it disregards the Supreme Court's statement that "the Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[83] In other words, when Congress gave the Board responsibility to apply our statute to the "complexities of industrial life,"[84] it did not expect the Board to treat "complexities" as if they do not exist.

In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, the D.C. Circuit stated that "America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them."[85] The court sharply criticized the Board's treatment of rules promoting civility in the workplace, and stated:

> Under the Board's reasoning, every employer in the United States that has a rule or handbook barring abusive and threatening language from one employee to another is now in violation of the NLRA, irrespective of whether there has ever been any union organizing activity at the company. This position is not "reasonably defensible." It is not even close. In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language.[86]

As the instant case illustrates, not much has changed since this criticism was levied against the Board.

I believe the *Lutheran Heritage* "reasonably construe" standard should be overruled, and the Board must conduct a more refined examination of facially neutral work requirements, taking into account the justifications associated with particular rules in addition to any potential impact on NLRA-protected conduct. The Board should also develop more understandable guidelines based on reasonable distinctions that are not permitted under *Lutheran Heritage*. In the instant case, this warrants a finding that the Hospital did not violate Section 8(a)(1) by maintaining rules promoting "harmonious interactions

[81] Id. at 3334.

[82] Supra fn. 34. See also the text accompanying fns. 46–47supra.

[83] *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942).

[84] *NLRB v. Erie Resistor Corp*., 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc*., 420 U.S. at 266–267.

[85] 253 F.3d at 26.

[86] Id. at 25–26 (emphasis added).

and relationships" and prohibiting "negative or disparaging comments about the . . . professional capabilities of an employee or physician . . . ."

Accordingly, as to these issues, I respectfully dissent.

Dated, Washington, D.C. April 13, 2016

Philip A. Miscimarra, Member

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 rules which employees would reasonably construe to prohibit engaging in union or other protected concerted activities for purposes of collective bargaining or other mutual aid or protection, specifically the following portions of our Code of Conduct for Surgical Services and Perianesthesia:

- The portion of the introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" (both as maintained in the Code and as applied on Performance Improvement Plan forms);
- The paragraph prohibiting "[v]erbal comments or physical gestures directed at others that exceed the bounds of fair criticism";
- The paragraph prohibiting "[n]egative or disparaging comments about the professional capabilities of an employee or physician made to employees, physicians, patients, or visitors";
- The prohibition on "[b]ehavior that is . . . counter to promoting teamwork."

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

WE WILL rescind the portions of the Code of Conduct for Surgical Services and Perianesthesia listed above, or revise them to remove any language that prohibits or may reasonably be read to prohibit you from engaging in union or other protected concerted activities for purposes of collective bargaining or other mutual aid or protection.

WE WILL notify you that those rules have been rescinded or, if they have been revised, provide you a copy of the revised rules.

WILLIAM BEAUMONT HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/07–CA–093885 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.

*Darlene Haas Awada, Esq.,* for the General Counsel.
*John P. Hancock, Jr., Esq.* and *Rebecca S. Davies, Esq. (Butzel Long),* for the Respondent.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 14–16, 2013. The Charging Party filed the charge on November 28, 2012, and the General Counsel issued the complaint on March 28, 2013.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging employees Jeri Antilla and DeAnna Brandt due to their alleged protected concerted activities. The Respondent filed an answer denying the essential allegations of the complaint and raising affirmative defenses.

The General Counsel orally amended the complaint at the beginning of the trial alleging that the Respondent, through its agent, Anne Ronk, orally promulgated an overly broad rule prohibiting employees from talking with other employees regarding an investigation into alleged misconduct. The General

Counsel again orally amended the complaint during the second day of trial alleging that the Respondent promulgated and maintained the Code of Conduct for Surgical Services and Perianesthesia that includes rules that are overly broad and which employees would reasonably construe as discouraging Section 7 activities. The General Counsel asserts these actions also violate Section 8(a)(1) of the Act. The Respondent denies that the allegations constitute violations of the Act and further contends that the allegation pertaining to the Code of Conduct was untimely raised.

After the trial, the parties filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following

## FINDINGS OF FACT

### JURISDICTION

The Respondent operates a hospital in Royal Oak, Michigan. During a representative 1-year period, the Respondent derived gross annual revenue in excess of $100,000, and purchased and received goods and materials valued in excess of $5000 directly from suppliers located outside the State of Michigan. Accordingly, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

The Respondent operates several hospitals including one in Royal Oak, Michigan, that includes a Family Birth Center (FBC). The hospital CEO is Shane Cerone; the hospital administrator is Maureen Bowman; the human resources representative is Amy Giannosa. In the Family Birth Center, the director of Women, Children and Psychiatric Services (Maternal Child Health) is Anne Ronk. She supervises the Nurse Manager, Patricia Knudsen, who has 24/7 responsibility for operations. Knudsen supervises the two associate nurse managers: Alissa Amlin (afternoon shift) and Tonyie Andrews-Johnson (midnight shift).

The Family Birth Center includes 20–21 labor/delivery beds, 9 triage beds, and 4 operating rooms (ORs). In the event of a problem, the newborn would be sent to the newborn intensive care unit (NICU). The Charging Party, Jeri Antilla, is a Registered Nurse (RN); DeAnna Brandt is a certified surgical technician. Both worked in the FBC although Brandt also worked at times in the Children's Surgery Center.

The employees of the Respondent's hospitals, including William Beaumont Hospital in Royal Oak, are not unionized.

#### *B. Code of Conduct*

Since at least October 9, 2009, the Respondent has maintained a Code of Conduct for Surgical Services and Perianesthesia, which has been distributed to employees. (R. Exh. 6.)

The Code reads as follows, in pertinent part:

> Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action. Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:
>
> Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
> Profane and abusive language directed at employees, physicians, patients or visitors.
> Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
> Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
> . . . Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.
> . . . . Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

#### *C. Working Conditions*

The nursing staff works on two shifts: days and nights. The weekend night shift (referred to as midnights) generally works from 7 p.m. to 7 a.m., on Friday, Saturday, and Sunday nights. There is a charge nurse[1] on duty on midnights but there is rarely any manager on duty on midnights, although occasionally Andrews-Johnson works Sunday nights. On an average night, there may be 9 to 12 nurses on duty, with a total of approximately 30 nurses assigned to the night shift. (Tr. 603, 604, 653.)

Nurses may transfer between shifts when a position becomes vacant. In such instances, management calls and offers the position to the most senior nurse on the other shift, who could accept or decline. Most nurses prefer the day shift, so experienced nurses are pulled from the night shift to the day shift, and their slots filled by newer, less experienced nurses. New nurses would only be assigned one patient, while the more experienced nurses may be responsible for two or three. Thus, experienced nurses are expected to handle their own patients, as well as assist the less experienced nurses in performing their duties, which causes stress among the nursing staff. In addition, the midnight shift was chronically understaffed at the relevant time period, although the reasons for that are unclear. (Tr. 510, 515–516, 517.)

It is the hospital's practice to assign preceptors (experienced nurses) to mentor new nurses. The new nurse shadows the preceptor and gradually begins performing tasks herself, as she becomes more confident. The period of orientation lasts a minimum of 12 weeks.

#### *D. Response to a Sentinel Event*

In December 2011, a "sentinel event" occurred. A sentinel

[1] Charge nurses are not supervisors.

event is defined as a serious incident; in this case, a newborn died unexpectedly. An investigation was conducted and it was determined there were numerous reasons for the child's death. Among those reasons were lack of communication between nursing staff especially during handoffs (when nurses changed shifts) and failure to provide assistance when requested by a nurse. A 4-hour mandatory training session was then presented on four dates in January and February 2012, attempting to address the problems identified in order to ensure there was no recurrence, with a focus on communication.

On March 5, 2012, the hospital CEO, Shane Cerone, went to the midnight shift and met individually with several nurses, seeking feedback and input about the work environment. (R. Exh. 16.) Neither Antilla nor Brandt spoke to Cerone.

The following week, one nurse was added 7 nights a week (the equivalent of three nurses) despite no budgeting for such positions, based on the nurses' complaints about inadequate staffing. (Tr. 535.) Later that year, in the summer, additional nurses were hired, approximately 16 in total. Most were graduate nurses, with no experience; a few had some experience but not in labor and delivery. Two new nurses, Dusta Dukic and Nadia Futalo, began on the midnight shift and did their orientation on that shift; the others received orientation on the day shift, then transitioned to the midnight shift by September 2012. Thus, at the relevant time period, on an average midnight shift, most of the RNs had little experience.

*E. Protected Concerted Activity*

Many nurses complained to each other about the problems on the midnight shift, especially understaffing and the effects of having a large number of inexperienced or less experienced nurses on that shift, causing a heavier burden to fall on the more experienced nurses. They also felt the situation was unsafe for the patients, and some had concerns about the possibility of losing their nursing licenses if they were held responsible for an error committed by a new nurse on one of their patients.

The Charging Party, Antilla, was one of the nurses who would discuss these issues and complain about problems on the midnight shift. (Tr. 191.) Those discussions often occurred at the nursing station, but sometimes also occurred in the patients' rooms. Antilla testified that she also talked to Amlin about one of the new nurses, Dusta Kukic, after she had precepted her. That feedback was in response to an email from Amlin asking about a particular incident. (GC Exh. 9.) Antilla also said that she had commented to Andrews-Johnson that Andrews-Johnson had scheduled a new nurse for triage when an experienced nurse was needed. Neither of those instances involved concerted activity.

DeAnna Brandt was a surgical technician, and therefore was usually in the OR. However, she, too, discussed the problems of understaffing and inexperienced nurses with nurses. (Tr. 246–247.) In addition, she raised concerns about performance deficiencies with the charge nurses. Brandt testified that she brought such concerns to the charge nurses almost nightly, that she did not characterize as complaints but rather as areas she noted where the nurses needed improvement or extra guidance. She said she also reported back to preceptors about new nurses' performance.

Brandt testified that she did not have the opportunity to talk to Andrews-Johnson about her concerns because Andrews-Johnson was rarely on duty on midnights (Tr. 297–298, 325–326). However, she did testify to a meeting they had on April 16, 2012, when she was issued her performance evaluation. Brandt added written comments regarding a nurse named Maggie and her being unfamiliar with Surgiflo or how to do sponge counts; that newer nurses were unfamiliar with surgical instruments; and that charge nurses sometimes did not call her to open an OR before the patient was brought in. (GC Exh. 18.) Brandt said that Andrews-Johnson did not read those written comments. (Tr. 242.) Brandt testified that she had raised similar concerns with Ronk when Ronk had come to the floor to discuss renovations, although Ronk had told her she was not there to discuss such issues, just the renovations. (Tr. 241–242.)

Lori Post, an RN, testified that she engaged in discussions about short staffing and the inexperienced nurses. (Tr. 74–75, 88–89.) She was unaware whether anyone raised these concerns with management; she did not, other than talking to Cerone earlier, in March 2012. She had told him the unit was unsafe due to short staffing, and that she believed "something" was going to happen. Post felt that, since Diane Glinski had been fired (ostensibly for bullying)[2] approximately 2 weeks after she had spoken to Cerone, most nurses then "clammed up" around management for fear of retaliation.

*F. Management Awareness of Protected Concerted Activity*

Ronk was unaware of these discussions amongst staff about new nurses and safety concerns. (Tr. 514–515, 536.)

Andrews-Johnson was aware that Antilla and Brandt talked to other nurses about staffing and safety issues working with the new nurses. (Tr. 587–589.) Some of the nurses came to her with their concerns, which she encouraged, so the matters could be addressed. (Tr. 588.)

*G. New Nurse's Resignation*

One of the new nurses, Tina Wadie, failed to report for duty on October 22, 2012. She called out sick that day, then sent an email on October 23, 2012, to Amlin, Andrews-Johnson, and Lindsay Decker, clinical nurse specialist. In it, she stated that she would not be returning to work although this was her "dream job," since she seemed not to be well-suited for the job and due to bullying and intimidation by unnamed senior nurses. (R. Exh. 9.) Andrews-Johnson forwarded the email to HR and the clinical nurse specialist. (Tr. 573–574.)

This situation concerned management. Ronk felt that Wadie was considered the best qualified of the new hires, and she expected the more experienced nurses to help, not intimidate and drive away, the newer nurses. (Tr. 539.) Andrews-Johnson was concerned that Wadie quit her dream job, without notice, and that Wadie said it made her ill to think about coming to work. (Tr. 574.) The allegations Wadie made in her email, such as the statement about the "right way" and the "night way"

[2] The record shows that Glinski was not in fact fired. She resigned after being confronted about misbehavior (including showing photos of a deceased infant). There were no allegations of bullying against her. (Tr. 520, 567; GC Exh. 25 (g).

of doing things and the need to move patients on within 1 hour, suggested that proper procedures were not being followed on midnights or were being rushed. (Tr. 575–576.)

On October 24, Giannosa was asked by her boss, Mike Dixon, director of human resources, to conduct an exit interview with Wadie. She was directed to ask whether Wadie would be willing to talk to hospital recruiters about taking a position in another unit. Wadie agreed and returned to work.

Giannosa talked to Wadie on at least one other occasion, and Wadie named four employees as problems: Antilla, Brandt, Post, and Michele Wonch. (R. Exh.10; GC Exh. 27.) Wadie told Giannosa that Brandt was nasty, huffy, not nice at all, belittling about everything, sarcastic, condescending, rolling eyes, and made negative comments no matter what you do. Wadie reported that Antilla said there is a "night way" of doing things, sat around a lot and complained about the unit, other new nurses say she is a bully. Tiffany (last name not reported), Antilla, and Post made comments about new nurses and about their nursing licenses.

After speaking with Wadie, Giannosa sent an email to Alonzo Lewis, VP of Maternal Child Health and Women's Health, Bowman, Ronk, Amlin, and Andrews-Johnson, as well as Dixon, Jennifer Mattucci, employment manager, and three recruiters: Marilyn Koski, Laura Velzy, and April Hornyak, advising them of certain issues raised by Wadie and that the concerns would be addressed. (GC Exh. 26.)

*H. Investigation*

Based on Wadie's statements to her, Giannosa decided to proceed with an investigation.

Then, on October 26, the situation was discussed at a meeting attended by Giannosa, Ronk, Andrews-Johnson, and Amlin; Knudsen was present by telephone (as she was out on extended sick leave). A plan of action was agreed to, that is, that an investigation would be conducted. (Tr. 578–580.) Giannosa assigned that responsibility to Andrews-Johnson, as the first-line supervisor. She was to talk to the newer nurses about their experience on the midnight shift, without mentioning any individuals' names. These were to be open-ended conversations to see if the nurses raised any concerns. (Tr. 538, 540–541.) Giannosa testified that Andrews-Johnson was to interview a random selection from among the nurses hired in the past couple of years.

Andrews-Johnson took notes of each interview and then sent emails to the management group, summarizing the discussion following each one. (R. Exh. 13; Tr. 580.)

At their October 31 meeting, the group reviewed the interview notes that Andrews-Johnson had gathered to date. A preliminary consensus was reached based on the feedback received to date that two employees (Antilla and Brandt) should be terminated and two (Post and Wonch) counseled. (R. Exh. 11; Tr. 541–542, 566.) Andrews-Johnson continued to conduct interviews thereafter.

*I. Initial Meeting with Brandt and Nondiscussion Order Given*

Initial meetings were held with Antilla and Brandt, to advise them of the nature of the charges against them and provide them the opportunity to reply or to resign before disciplinary action was taken. Ronk met with Brandt, and Andrews-Johnson and Amlin met with Antilla.

On November 2, Amlin told Brandt to see Ronk. Brandt testified that Ronk told her that a nurse had quit and said that Brandt had been mean, nasty, and rude to her, and that an investigation would be conducted. She said Wadie as well as other new nurses had named her as nasty and rude. Ronk inquired whether she had taken any communication classes, and Brandt said she had not. Ronk encouraged her to take some, and said the hospital would pay her for her time in the classes. Ronk further told Brandt to think about her actions and the situation, and that they would talk again after the investigation. Brandt said she was concerned that she might be fired and felt she needed to consult an attorney; Ronk replied that she was not allowed to discuss this with anyone, not even an attorney, as this was hospital business. (Tr. 257, 550; GC Exh. 34.) Ronk, however, testified that she instructed Brandt not to discuss the matter with anyone on the unit. (Tr. 550.) I find Ronk more credible than Brandt regarding their conversation, and specifically regarding the nondiscussion instruction. First, Ronk made contemporaneous notes of the conversation. Second, from those notes it is clear that Ronk made the remark in response to Brandt's statement that she would be approaching the new nurses that weekend to introduce herself and offer any assistance they might want.

Brandt did not discuss the matter with anyone. Ronk admitted in her testimony that she did advise Brandt not to discuss the matter with anyone on staff, as the matter was still under investigation and she was concerned (given the nature of the complaints against Brandt) that such discussions may result in additional allegations of intimidation. Ronk's notes of the meeting confirm that she instructed Brandt not to discuss the meeting with anyone else in the unit (GC Exh. 34).

Brandt later sent Ronk emails indicating that she had registered for classes and that she had applied for other positions at the hospital, outside the FBC. (GC Exhs. 19, 20.)

*J. Initial Meeting with Antilla*

On November 5, Antilla was asked to meet with Andrews-Johnson and Amlin. She was told that her name had been brought up by a few nurses as being negative, about making comments about her nursing license being on the line and other remarks about new staff, and how she felt new nurses shouldn't be working in labor and delivery. Andrews-Johnson asked Antilla for her side, and Antilla agreed that she had made the three remarks. She said she had expressed concerns about not just her license, but other nurses' nursing licenses. She noted that previously, nurses had been required to have 1–2 years' experience before being assigned to labor and delivery, which was a specialty area, and that longer training periods (orientation) or a nurse residency program would be advisable. She was told that her negativity could be construed as intimidating and bullying, that she had been negative in early 2012 but had improved, and now was being negative again. She was told the reports of her negativity came from new nurses, but no names were revealed. Ultimately, Antilla was encouraged to prepare a reply, and that HR would call her after the investigation was conducted. (R. Exh. 25.)

After meeting with Antilla, Andrews-Johnson reported to

Giannosa, Ronk, and Amlin what had transpired. (Tr. 585.)

*K. Decisions to Discipline*

Ronk testified that decisions to discipline were made by management and HR. In this instance, the final decisions were made at a meeting on November 8, by Ronk, Knudsen, and Giannosa, with any input from Andrews-Johnson and Amlin. The decision to terminate Antilla and Brandt was based on the statements provided by a number of staff nurses in the course of Andrews-Johnson's investigation, as well as the statements by Wadie. Those statements were accepted as true.

Hospital policy provided that progressive discipline was not required when the infraction was serious, including improper conduct. (R. Exh. 14.) Giannosa testified that Antilla and Brandt's behavior was severe enough to warrant termination because it was a safety concern, as bullying affected the nurses' interactions with each other, discouraged nurses from requesting assistance, and had contributed to the sentinel event of December 2011. (Tr. 453–454, 465–466.) Ronk testified that bullying and intimidating behavior has no place in a labor and delivery setting where teamwork is critical. Such behavior "impedes communication, open communication, staff feeling free to ask questions, ask for help, and that can put a patient's safety at risk." (Tr. 544.)

Although there was no specific testimony as to which manager drafted the basic termination language, it would appear that it was Andrews-Johnson, as the first-line supervisor and the individual who conducted the investigations. She did review the termination documents with Giannosa. (Tr. 39–40, 472.) Giannosa edited and added to them, specifically adding language under the form's future expectations section, as per hospital policy, then returned them to management for review. (GC Exhs. 4, 5; Tr. 41–42, 48, 472, 475.) The documents were signed by all necessary parties and issued to Antilla and Brandt.

Brandt was fired for exhibiting mean, nasty, intimidating, and bullying behavior. (Tr. 472; GC Exh. 5.)

Antilla was fired for exhibiting negative, intimidating, and bullying behavior. (Tr. 475; GC Exh. 4.)

Two nurses, Lori Post and Michele Wonch, were counseled. Neither was terminated because their conduct was not as severe as Antilla and Brandt's. Andrews-Johnson counseled Post; Knudsen was supposed to counsel Wonch. (Tr. 583, 605.) There is a memo in Post's file documenting that counseling but there is none in Wonch's file. (GC Exh. 25 j.) That counseling should have been conducted by Knudsen, as determined by the management group.[3]

*L. Issuance of the Discipline*

1. Termination of Brandt

On November 8, Brandt was called to a meeting with Ronk, Andrews-Johnson, and Amlin. She was advised that her employment was being terminated and she was given the papers to read. (GC Exh. 5.) At the bottom, under background and related information, counselings from August 2006 and June 2011[4] were noted. Brandt refused to sign the termination but received a copy. She testified that Ronk explained the Respondent's internal grievance process to her, but said that Bowman, who had signed off on the termination, would be the step 1 deciding official. She also said that Ronk said, "Good luck with that." Ronk denied making such remarks about Bowman or step 1. (Tr. 546.) Ronk testified that the meeting lasted approximately 5 minutes as Brandt asked no questions. (Tr. 546, 552.) Andrews-Johnson testified that Brandt said nothing, that Ronk did all the talking, reviewing the termination papers with Brandt. Andrews-Johnson corroborated Ronk's testimony that she did not make such reference to Bowman and the grievance procedure. (Tr. 582.) She agreed that the meeting was very short.

Brandt testified that she was not asked for her side of events. She never submitted a written reply to the charges.

Brandt did not file a grievance. She testified that she was not familiar with the grievance process, so she looked it up online but did not ask HR or anyone else any questions about it. She noted that there was a right of appeal to a panel after the first step. Nonetheless, she did not pursue her grievance rights.

I accept and credit the testimony of Ronk and Andrews-Johnson over that of Brandt. Brandt's testimony regarding looking up the grievance process online supports Ronk and Andrews-Johnson. Brandt may have felt that pursuing a grievance was pointless under the circumstances, but that was her perception, and not based on any attempts by management to discourage her.

2. Termination of Antilla

On November 9, Ronk asked to see Antilla before she began her shift. Antilla met with Ronk and Andrews-Johnson. Ronk told her that, in light of the investigation findings, she was being fired as the ringleader of negativity on the unit. Ronk said her name had been brought up, in a letter from a nurse who recently quit and in discussions with nursing staff, as being intimidating and bullying.

Antilla then explained the stepstool incident to Ronk, that there had not been a stepstool in the room when it appeared it would be needed for a particular delivery, and that afterward, she told the new nurse that she needed to ensure that each delivery room had a stepstool, bag, and mask in case of emergency. She had then gone to the nurses' station and repeated this.

Antilla denied making any statement about the "right way" and the "night way." She also denied saying she hated to work weekends with so many new nurses, since that was her pre-

[3] While it is possible that either the counseling did not occur or that the documentation was not completed due to Knudsen being out on extended medical leave, such is pure speculation as there was no testimony on this point and there is no documentation that it ever occurred. (GC Exh. 25.)

[4] Brandt testified that she had no knowledge of an August 2006 counseling. However, in June 2011, she was written up for a Facebook posting. (GC Exhs. 16, 17.) Brandt had complained on Facebook about working nine shifts, plus covering for other surgical technicians. Ronk told her that she appreciated her hard work but that if she had a problem with someone, she should confront that person rather than post negative comments about the hospital on the internet. At that meeting, Brandt noted some safety concerns in the OR, such as when a nurse did not understand that she had contaminated the sterile field, as well as complaining about the lack of bathroom breaks during a 12-hour shift. Ronk had said she would address those concerns, and apparently did so. Brandt later sent Ronk an email saying she had gotten her breaks and indicating that all was well. (R. Exhs. 7, 8.)

ferred shift, for family reasons.[5]

Ronk then told her the hospital had a zero tolerance for bullying and intimidation, and that, therefore, she was being fired. Antilla then presented the reply letter that Amlin had encouraged her to write. (GC Exh. 12.) Ronk collected her badge, gave her Giannosa's phone number, and reviewed the grievance process with her.

Antilla filed a grievance. In her grievance, Antilla had indicated that she felt the problem was a personality conflict, that her statements were taken out of context, and that she had a good relationship with Wadie, as reflected in Wadie's Facebook posting. (GC Exh. 10.) She met with Ronk, Bowman, and Giannosa for step 1. She lost at the first step, so she filed an appeal to the panel, but lost that as well. She then filed the instant unfair labor practice charge.

## III. LEGAL STANDARDS AND ANALYSIS

### *A. Terminations*

The discipline or discharge of an employee violates Section 8(a)(1) of the Act if the employee was engaged in activity that is "concerted" within the meaning of Section 7 of the Act, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir 1981), cert denied 455 U.S. 989 (1982); *Correctional Medical Services*, 356 NLRB 277, 278 (2010); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfd. 314 NLRB 1169 (1994). If the General Counsel makes such an initial showing of discrimination, then the Respondent may overcome that inference by presenting evidence demonstrating that it would have taken the same action even in the absence of the employee's protected activity. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997); *Williamette Industries*, 341 NLRB 560, 563 (2004).

Both Antilla and Brandt did routinely and frequently complain to peers about working conditions, such as understaffing on the midnight shift, and the problems associated with working with inexperienced nurses—additional burdens on the senior staff, risks to the patients, and the potential for losing nursing licenses. It is arguable whether these discussions in themselves initially constituted protected concerted activity, as there was no evidence whatsoever presented that any employee planned to take any action based upon those complaints and there was no concerted purpose, it was mere complaining. While Antilla testified that she "found her passion" in advocating for new nurses and obtaining longer orientation periods for them, it was established that she did not take any action in that direction with management, except in one conversation when she stated that she felt orientation periods should be longer.

Ronk was initially not aware that staff, and specifically Antilla and Brandt, engaged in such discussions or other protected concerted activity until it was revealed in the course of the investigation into the bullying allegations.[6] However, Andrews-Johnson had been aware of those discussions, and that Antilla and Brandt engaged in them. Some nurses brought their concerns directly to Andrews-Johnson and she encouraged them to do so. However, Andrews-Johnson noted in her investigation interview notes the complaints raised by Antilla and Brandt and others, as reported by the interviewees. The other members of the management team, including Giannosa, learned of the complaints through Andrews-Johnson's interview notes. Subsequent to their gaining knowledge of the protected activity, management decided to terminate both Antilla and Brandt. Thus, the General Counsel has met her burden.

However, I find that the Respondent has established that both Antilla and Brandt would have been terminated absent their protected activity.

First, while not determinative, it has been established that other nurses who likewise engaged in similar discussions complaining about working conditions, were not terminated. Most nurses engaged in those conversations and several names were raised in Andrews-Johnson's investigation. Of the four who were deemed the primary offenders, only Antilla and Brandt were terminated. Post was only counseled. While there is no evidence that Wonch was in fact counseled as the management team agreed, that is immaterial, since the decision had clearly been made by the team to counsel her, and not to terminate her.

Second, management witnesses credibly testified, and both Antilla and Brandt agreed, that management did not discourage such conversations among the staff.

Third, the reasons that management has given for the terminations are significant and credible, and were sufficient to justify the terminations. The alleged misconduct must be viewed in context. The General Counsel chooses to interpret the allegations of negativity as directed toward protected concerted activity. I disagree. The hospital had experienced an unexpected infant death, and this was found to be due, at least in part, to nurses not cooperating with each other, not communicating effectively with each other. If new or inexperienced staff does not feel comfortable asking for assistance or asking questions for fear of being mocked, or humiliated, or yelled at, then there is indeed increased risk to patients. Whether one characterizes the conduct as bullying or negative or demeaning is immaterial; it is the underlying conduct that is at issue, not the characterization.

Knudsen testified to being advised of bullying problems within her first month in her current job, in October 2011. (R. Exhs. 26, 27, 28.) An environmental survey (culture of safety survey) was then conducted. (Tr. 611, 615–618; R. Exh. 29.) Knudsen characterized negative behavior as intimidation, mocking, excessive criticism, hoarding knowledge; and behaviors that are not conducive to a safe environment. (Tr. 618.) Because of her concern about the staff comments in response to the survey, Knudsen felt that teambuilding and other training

[5] She did not address the statement that she hated working with the new nurses, just that part of the statement pertaining to working weekends.

[6] Brandt emailed Ronk a document (comments) that Brandt had wanted attached to her performance appraisal the prior year. Ronk testified that she never read those comments, as the decision to terminate her employment was made at approximately the same time, so she had no reason to read the document. (Tr. 552–553.)

was in order. (Tr. 619.) However, the sentinel event occurred while the initial planning was taking place, that altered the strategy. (Tr. 61; R. Exh. 31.) The ensuing investigation into the sentinal event showed that communication, handoffs, and interpretation of fetal tracing, were significant contributing factors. (Tr. 621.) Therefore, a 4-hour mandatory training, or safety symposium, was presented for the nurses, to address those issues. (Tr. 622; R. Exhs. 30, 32, 33, 34, 36, 37, 38.) It was offered four times in January and February 2012.

Four culture of safety surveys were conducted in 2012, to see whether any progress had been made. (Tr. 634.) Several methods were available for staff to report concerns to management. (Tr. 639, 642.)

Then, despite these efforts, in October 2012, Wadie quit her job and gave, as one of the reasons, the treatment of her by other staff.

The management team accepted as true the statements made by the nurses to Andrews-Johnson. Those nurses had no reason to fabricate their reports, and their reports were consistent.

Brandt was fired for exhibiting mean, nasty, intimidating, and bullying behavior. (Tr. 472; GC Exh. 5.) Antilla was fired for exhibiting negative, intimidating, and bullying behavior. (Tr. 475; GC Exh. 4.) Giannosa credibly explained that negative behavior meant the negative attitude exhibited toward the new nurses, belittling, condescending, and demeaning behavior. (Tr. 475.) That is entirely distinct from complaining about working conditions.

Both Antilla and Brandt were terminated due to inappropriate conduct toward other employees, having nothing whatever to do with workplace grievances. They failed to interact with other staff in a professional manner, that was part of the cause for Wadie's resignation, and were uncooperative with other staff, worsening the situation about which they were purportedly so concerned. Neither Antilla nor Brandt acknowledged any awareness of the effect of their behavior and comments on the new nurses.

I accept and credit Ronk's testimony. Ronk testified that when she became aware in October/ November 2012 that Antilla was discussing concerns about staffing with other staff, the fact that she was engaging in such discussions was not of concern to her. (Tr. 514, 536–537.) In fact, the hospital encouraged such discussions. Ronk testified that she would not consider it a problem for staff to discuss these concerns, but that it would be a concern to her as a manager if staff had concerns, because she would want to know about and address or remedy those concerns. (Tr. 515, 536.) Rather, Ronk testified that Antilla and Brandt were terminated because there is no place for bullying and intimidating behavior in a setting such as labor and delivery where teamwork is critical. (Tr. 544.) It impedes open communication, the freedom to ask questions, or to ask for help that can put a patient's safety at risk. (Tr. 544.) This had been made evident in the investigation into the December 2011 sentinel event.

I accept and credit Andrews-Johnson's testimony that the only things that were considered when making her decision to terminate the two were Wadie's feedback and the input from other new nurses from her investigation. (Tr. 586.) The fact that Antilla and Brandt had discussed their concerns with each other, with her, or with other nurses was not a factor in the decision to termination their employment (Tr. 588–589).

Most of the concerns raised by the nurses were well known to management.[7] Management agreed that there were problems with understaffing, and hired more nurses. They were aware that new nurses needed training, and expected the senior staff to assist them during and after their orientation periods. The only area where management was not in agreement with the nurses' concerns was about the risk of losing their nursing licenses due to a mistake by another nurse. However, I find that expressing that misplaced fear was not a factor in the decisions to terminate Antilla and Brandt, and that they would have been terminated even in the absence of making such statements.

The General Counsel notes that at least one employee who complained about the conduct at issue felt that "it wasn't really bullying." That is of no consequence. As I stated above, the characterization of the conduct is not important; it is the conduct itself that is important.

The General Counsel asserts that the allegations were too vague and that neither Antilla nor Brandt could fairly respond without further details. However, they were given descriptions of the conduct and statements at issue, and were given the opportunity to ask questions. Brandt asked no questions and did not file a grievance, electing not to present a defense. Antilla did respond in writing to the charges, and did file a grievance, although her efforts were unsuccessful.

The General Counsel makes much of Antilla's good performance and of the positive Facebook comments, and of Brandt's good performance as well, all of which are immaterial since the terminations were not based on performance, but on conduct. The management team looked at their performance but it did not outweigh the misconduct. It appears that Antilla exhibited a very different attitude toward the new nurses when they were coworkers than when she was acting as charge nurse or preceptor. And, as the record establishes, other senior nurses were more hostile to the new nurses when Antilla was around than they were otherwise. Therefore, she was characterized as the ringleader. It had nothing to do with her complaints about working conditions. There is no dispute that Antilla was an excellent nurse; that fact was recognized by management who used her as a preceptor and as a charge nurse. That good performance does not outweigh the bad judgment she exercised in her conduct toward the new nurses.

The General Counsel is troubled by the conduct of the investigation. Specifically, she argues that it was suspect because only some, and not all, of the new nurses were interviewed, and some of the interviewees were not new nurses. That is irrelevant, since positive or neutral reports would not cancel out the negative ones already received, and there was not a scintilla of evidence presented that Andrews-Johnson improperly selected interviewees or that any interviewee's report was improperly influenced. The General Counsel also expresses concern that

[7] Not only is there no policy prohibiting staff from discussing with each other any issues or concerns, but the hospital encouraged submission to management of such concerns, via several different methods, so such concerns could be addressed. (Tr. 521–533; R. Exhs. 17, 18, 19, 20, 21, 22, 23, 24.)

Ronk had made her own decision that Antilla and Brandt should be terminated by October 29, before all interviews had been conducted. (GC Exh. 34; Tr. 566.) This is of no consequence; three negative reports had been received by that point. There is no magic number of negative reports that would support termination; one may be adequate. It was not necessary to interview all new nurses and certainly it was not necessary that all new nurses reported misconduct by Antilla and Brandt in order to support the terminations.

The General Counsel asserts that the Respondent departed from past practice in terminating Antilla and Brandt, since progressive discipline was not applied. However, no comparable situation had arisen in the past, and the hospital's personnel policy provided for termination without progressive discipline, in appropriate circumstances.

The General Counsel argues that Respondent had tolerated similar behavior in the past, in particular by Wonch. However, this hardly supports the General Counsel's allegation of retaliatory discharge, since Wonch engaged in the same discussions as Antilla and Brandt, and made the same complaints. If the Respondent were engaging in retaliation, then it would be expected that Wonch would have been fired as well. In any event, the allegations made in the past (as well as the current allegations) regarding Wonch were similar but were not of the same level of severity as those raised against Antilla and Brandt.

Finally, the General Counsel contends that Respondent relied upon shifting reasons for the terminations. She finds it significant that the Respondent's Position Statement referenced the Surgical Code of Conduct. That was counsel's opinion and, in any event, it is not a reason for the terminations; the reason was the misconduct. She also finds it compelling that matters such as Antilla's tongue ring were mentioned in the termination notice and that Brandt's conduct during her orientation period was noted. However, these are not different or shifting reasons; they are simply other instances of past problems that were noted. If they were not included in the termination notices, the result would be the same. The investigation was initiated due to complaints about mistreatment of new nurses and that was the reason for both terminations.

Therefore I recommend that these charges be dismissed as to both Antilla and Brandt.

### *B. Code of Conduct*[8]

Determination of the legality of work rules requires a balancing of competing interests: the right of employees to organize or otherwise engage in protected activity and the right of employers to maintain a level of discipline in the workplace.

In determining whether an employer's work rules violate Section 8(a)(1), the Board has held that:

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonablytends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7…. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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.

*Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); see *Lafayette Park Hotel*, NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

Thus, where the rules are likely to have a chilling effect on Section 7 rights, their maintenance may be an unfair labor practice even absent evidence of enforcement.

The Respondent's Code of Conduct does not explicitly restrict Section 7 activities, nor was it promulgated in response to union activity, nor has it been applied to restrict Section 7 activities. Thus, the issue at hand is whether employees would reasonably construe the Code of Conduct to prohibit Section 7 activity.

In *Lafayette*, supra, the court found a rule prohibiting conduct that does not support the Respondent hotel's goals and objectives to be lawful, as it is unreasonable to assume, without more, that remaining nonunion is one of those goals. The rules address other legitimate business concerns and the court found unreasonable the position that the rule was ambiguous as to "goals." However, the rule prohibiting making false, vicious, profane, or malicious statements toward or concerning the hotel or any employee was found to be a violation. There were similar results in *Cincinnati Suburban Press, Inc.,* 289 NLRB 966, 975 (1988) (statements are protected absent a showing of reckless disregard for the truth or maliciousness), and *American Cast Iron Pipe Co.,* 234 NLRB 1126, 1131 (1978) (false and inaccurate statements that are not malicious are protected). In the instant case, there is no general prohibition against making false statements. Rather, the Code prohibits intentional misrepresentation of information (which implies malice) and negative or disparaging comments about the moral character or professional capabilities of an employee or physician. The Code's introductory paragraph makes it clear that the hospital's concern is patient care, so, when read in context, the rule has nothing to do with protected activity.

The D.C. Circuit Court distinguished the work rules found unlawful in *Lafayette* and *Flamingo,*[9] restricting speech that is arguably related to protected activities (and merely false), from

[8] The Respondent alleges that this amendment was untimely raised, since the General Counsel became aware of the Code during the investigation some 5 months earlier yet failed to charge any violation until late in the trial. While the charge certainly was raised late in the game and no good reason for the delay was given, I find that the Respondent was not prejudiced by the delay. This is a legal argument only, no witnesses were relevant to the issue and none were called, and this charge would not affect the potential relief if retaliatory discharge were found. I therefore decline to reverse my ruling permitting the amendment.

[9] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

a rule prohibiting "abusive or threatening language" that seeks to maintain basic civility. *Adtranz ABB Daimler-Benz Transportation*, 331 NLRB 291 (2000), vacated in part 253 F.3d 19 (2001). The court noted that an employer's effort to squelch criticism from employees, and threatening to punish "false" statements without evidence of malicious intent is quite different from demanding that employees comply with generally accepted notions of civility that does not, in itself, constitute an unfair labor practice. The court reiterated that it must be considered whether there was enforcement of the rule where the language may be protected, or mere maintenance of the rule. Significantly, the court also observed that threatening and abusive language is not inherent aspects of union organizing or other Section 7 activities. It specifically rejected the argument that the mere "unrealized potential" that "the rule could reasonably be interpreted as barring lawful union organizing propaganda" rendered it facially invalid. Id. at 25–26. Ultimately, it determined that "the Board's position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous." Id. at 25. The Board subsequently agreed with and adopted the court's rationale when it decided *Lutheran Heritage* and *Palms Hotel*. In *Lutheran Heritage,* supra, the Board found prohibitions against verbal abuse, abusive, or profane language, or harassment to be lawful. The mere fact that the rule could be read to address Section 7 activity does not make it illegal. See *Lutheran Heritage,* supra at 647 ("we 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"). Similarly, in *Palms Hotel & Casino*,[10] the Board found lawful a rule that prohibits employees from engaging in conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees. "Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." Id. at 1368. "We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it." Id at 1368.

However, the Board found unlawful a rule that prohibited loud, abusive, or foul language, as it was so broad that it could be interpreted as barring lawful union organizing propaganda. *Flamingo Hilton-Laughlin*, 330 NLRB at 295. The Board found unlawful a work rule that subjected employees to discipline for the "inability or unwillingness to work harmoniously with other employees." *2 Sisters Food Group,* 357 NLRB 1816, 1816 (2011). In that instance, the employer neglected to define those terms; the prohibition was merely one of a laundry list of rules and "was sufficiently imprecise that it could encompass any disagreement or conflict among employees including those related to Section 7." Id, slip op. at 2. Similarly, a rule prohibiting "any type of negative energy or attitudes" was deemed unlawful. *Roomstore*, 357 NLRB 1690 fn. 3 (2011). A rule prohibiting "negative conversations" about managers was found unlawful, as it had no clarifying language. *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005). In all of those instances, the rules were ambiguous, and those ambiguities must be resolved against the employer.

In the instant case, a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities. To find otherwise would ignore the employer's rights in the *Lafayette* balancing test and consider only potential employee rights.

The Beaumont Code at issue reads as follows:

> Conduct on the part of a Beaumont employee or physician that is inappropriate or
> detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action. Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:
> Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
> Profane and abusive language directed at employees, physicians, patients or visitors.
> Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
> Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
> . . . Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.
> . . . Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

(R. Exh. 6.)

Although the introductory paragraph references harmonious relationships, the Code goes on to define in the six bullets the specific types of conduct that are prohibited. The rules are put in context via reference to legitimate business concerns (i.e., patient care, hospital operations, and a safe healing environment), that would tend to restrict their application.

I find that a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules.

I find that two of the six work rules (rule 4—"Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and rule 6 part 2—"Behavior . . . that is counter to promoting teamwork") challenged by the General Counsel violate Section 8(a)(1). Although neither Antilla nor Brandt nor any other employee was disciplined for violation of the Code, and no employee actually limited their activities based on the Code, those portions of the Code do violate the Board's standards and may reasonably chill the exercise of Section 7 rights. The two terms are ambiguous and undefined in the Code, even when read in context: "comments or gestures that exceed the bounds of fair criticism," and "behavior that is counter to promoting teamwork." Those terms may reasonably be interpreted as prohibiting lawful discussions or complaints that are protected by Section 7 of the Act. Although the Re-

[10] *Palms Hotel & Casino,* 344 NLRB 1363 (2005).

spondent has legitimate concerns regarding appropriate staff behavior, and has a legitimate interest in promulgating work rules to try to maintain a safe atmosphere in the workplace, those portions of the Code are overbroad and ambiguous. "Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it." See *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

However, I find that the other four challenged work rules (1, 2, 3, and 5) as well as the first portion of rule 6 in the Code of Conduct are clear and legitimate when read in context, and could not reasonably be interpreted as prohibiting lawful discussions or complaints. The first prohibits willful and intentional conduct; the second profane and abusive language; the third rude, condescending and otherwise socially unacceptable behavior, as well as intentional misrepresentations (not merely false, and the intent requirement implies a showing of malice); the fifth pertains to statements regarding moral character or professional capabilities; and part 1 of rule 6 behavior disruptive to a safe and healing environment (a hospital), all of which are clear and legitimate, and cannot reasonably be read in context to prohibit protected activities.

Therefore, I find that two of the challenged work rules (rule 4—"Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and rule 6 part 2—"Behavior . . . that is counter to promoting teamwork") violate Section 8(a)(1) as alleged but recommend that the charges as to work rules 1, 2, 3, 5, and 6 part 1 be dismissed.

### *C Nondiscussion Instruction to Brandt*

As discussed above, an employer may not impose work rules that reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park,* supra at 825. The Board has held that to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation).

While in *Caesar's Palace*, 336 NLRB 271, 272 (2001), the confidentiality rule imposed during a drug investigation was held lawful where the rule was necessary to ensure the safety of witnesses and to preserve the integrity of the investigation, no similar rationale was asserted as the reason for the instruction given to Brandt. In *Banner Estrella Medical Center*, 358 NLRB 809 (2012), the Board found the employer's generalized concern with, rather than a determination of a necessity for, protecting the integrity of its investigations was insufficient to outweigh employees' Section 7 rights. In order to minimize the impact on Section 7 rights, it is the employer's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." *Hyundai,* supra at 874.

In the instant case, the Respondent had no blanket confidentiality rule, and no such rule was routinely issued during investigations. (Tr. 551.) Indeed, even in this investigation where multiple individuals were named, the instruction was only issued to one employee, Brandt. It seems clear that the instruction was not preplanned, but was given in response to Brandt's statement to Ronk that she intended to talk to new nurses and offer to help them. Ronk testified that Andrews-Johnson had advised her that she had learned in the investigative interviews that staff was fearful of retaliation. (Tr. 550–551.) Ronk stated that she told Brandt not to discuss the investigation with others on the unit since she feared the possibility of additional charges of bullying or intimidation.[11] However, while it may have been wise for Brandt to refrain from conversing with the new nurses as she planned, since she now knew that some of them had made negative reports about her, the instruction given to Brandt not to discuss the investigation was overbroad, and did prevent her from discussing the investigation with colleagues as she had the right to do.

Therefore, I find that the nondiscussion instruction issued by Ronk to Brandt violated Section 8(a)(1) of the Act as alleged.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By issuing and maintaining portions of the Code of Conduct for Surgical Services and Perianesthesia, specifically "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork," the Respondent has violated Section 8(a)(1) of the Act.
3. By issuing a nondiscussion directive to an employee, the Respondent has violated Section 8(a)(1) of the Act.
4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent has not otherwise violated the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

## ORDER

The Respondent, William Beaumont Hospital, located in Royal Oak, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing or maintaining rules which employees would rea-

[11] Protecting the integrity of the investigation was not given as a rationale. In any event, Andrews-Johnson's investigation was well underway by November 2, the date the nondiscussion instruction was given to Brandt, so there could potentially have been only minimal effects on the investigation.

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

sonably construe to discourage engaging in protected concerted activities, specifically issuing or maintaining two portions of the Code of Conduct for Surgical Services and Perianesthesia: "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork" and issuing nondiscussion directives to employees.

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

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

(a) Rescind portions of the Code of Conduct for Surgical Services and Perianesthesia, specifically "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork."

(b) Within 14 days after service by the Region, post at its facility in Royal Oak, Michigan, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about October 1, 2012.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. January 30, 2014

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 do anything to prevent you from exercising the above rights.

WE WILL NOT issue or maintain rules which employees would reasonably construe to discourage engaging in protected concerted activities, specifically, two portions of the Code of Conduct for Surgical Services and Perianesthesia: "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork" nor will we issue nondiscussion directives to employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind portions of the Code of Conduct for Surgical Services and Perianesthesia, specifically "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork."

WILLIAM BEAUMONT HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07–CA–093885 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.

[13] 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."