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

PRIME COMMUNICATIONS, LP

and Case 16–CA–309916

SPENCER D. SMITH, an INDIVIDUAL

Rachel R. Jackson, Esq.
for the General Counsel.
Austin J. Brayley, Esq. and
Pierce Lambson, Esq.
for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Houston, Texas, on March 18, 2024. Spencer Smith (Smith or Charging Party) filed the charge on January 3, 2023, and the General Counsel issued the complaint on November 6, 2023. Prime Communications (Prime or the Respondent) filed a timely answer and an amended answer denying all material allegations. The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by issuing and since maintaining severance agreements with overly broad nondisparagement and confidentiality provisions.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited partnership with a place of business in Sugar Land, Texas, provides retail telecommunications products and services, and annually derives gross revenues in excess of $500,000, and purchases and receives at its Sugar Land Facility products, goods, and materials valued in excess of $5,000 directly from points outside the State of Texas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Statement of Facts

Spencer Smith began his employment with Prime on April 6, 2017, working as a retail sales consultant in The Woodlands, Texas. In June 2019, he took a position as a financial operations analyst at Prime's Sugar Land location, reporting to Jack Norris, the director of workforce management.

Smith received a corrective action form (CAF) on October 8, 2018, while he was still working as a sales consultant in The Woodlands. The CAF stated Smith sent an inappropriate message in GroupMe to a manager, and instructed him to refrain from inappropriate conversations. Smith signed the CAF, and in the comments stated, "I understand."[1] (R Exh. 1.)

In late October or early November 2019, Smith approached Mavluda Mavlonazaroza, his department director, and inquired about working closer to home. Smith testified first that he inquired about working at a nearby store, but also testified he requested to work remotely. Smith perceived that Mavlonazaroza was not happy with the request, and she told him she had to go. Smith became frustrated when, hours later, Mavlonazaroza was still in her office.[2]

On November 14, 2019, Megan Conway, a human resources representative, approached Smith and told him he needed to quit or he would be fired. According to Smith, Conway told him he was not fit for the position because he did not go to team events and he was sometimes dismissive. Upon prompting by counsel, Smith recalled a reference to the individual from the CAF during this conversation.[3] Smith denied that Conway mentioned other women complaining about feeling uneasy, uncomfortable, and scared around him, and added he could not control how others felt. Later that day, Smith emailed Conway saying he appreciated the opportunity to speak with her in detail earlier, and stating, "I will resign however, I would like to know if it is possible to have in writing the specifics about my PTO and bonus." (GC Exh. 2.) Smith's resignation was effective on November 14.

---

[1] The CAF was based on a complaint by a female employee. Smith heard this employee had said he was a nice looking, so he sent her a message saying she had a "nice picture or something like that," because he had never seen her in person. (Tr. 36.) Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "GC Exh." for the General Counsel's exhibit; and "R Exh." for the Respondent's exhibit. Although I have included some citations to the record, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

[2] The Respondent, in its closing brief, characterizes Smith's behavior as sitting in Mavlonazarova's office and refusing to leave until she addressed his complaint to is satisfaction. There is no testimony or other record evidence, however, to substantiate this. The Respondent further asserts that several female coworkers reported feeling uncomfortable, uneasy, and fearful around Smith. The CAF, along with Smith's testimony, shows that one employee complained about Smith's communications with her. While others may have also complained, the only evidence of this is double hearsay, and cannot be relied upon to substantiate this assertion. See *Auto Workers Local 651 (General Motors)*, 331 NLRB 479, 481 (2000). The Respondent's position statement (R Exh. 2) does not constitute competent evidence to establish any of the behavior attributed to Smith set forth therein.

[3] Conway did not testify.

Following Smith's resignation email, he contacted Prime's president, owner, and a couple of vice presidents, including the vice president of human resources, Gabrielle Moses, to question whether the circumstances around his resignation were ethical. The email Spencer sent to Moses dated November 17, stated, "As you can probably conclude from the email I forwarded to you, I was basically forced to resign . . .. Can you confirm that I am fully resigned?" Moses responded on November 18 that Smith's resignation had been fully processed. (GC Exh. 5.)

On November 26, 2019, Conway emailed Smith a severance agreement.[4] (Jt. Exh. 1.) When they discussed the agreement on the phone, Smith stated, "It seems like based off this language I can't contact anybody at the company, even if I have friends." (Tr. 20.) Conway responded that he could contact people, but they could not discuss Prime. Smith signed the agreement and returned it to Conway via email that same day, November 26. (GC Exhs. 3, 4.)

The agreement states, in relevant part:

> 6. Employee agrees to refrain from making disparaging, defamatory, negative or other similar remarks concerning Prime, Prime's business, Prime's partners, owners, principals, managers, directors, officers, employees, agents, or services, to any third party, except to the extent that Employee (a) is required to make such remarks by applicable law or regulation or judicial or regulatory process, or (b) makes such remarks in or in connection with any then pending litigation or other legal proceeding. This non-disparagement provision is intended to be as broad as possible and to include the written publication of any information related to Prime, Prime's business, Prime's partners, owners, employees, agents, or services, whether true or untrue. Specifically, Spencer Smith understands and agrees he is prohibited from calling, making personal contact with or, emailing any employee of Prime Communications at any location including Prime retail stores.
>
> . . .
>
> 8. Employee promises that he will maintain in confidence the terms and existence of this Agreement and will not disclose the existence of this Agreement or its terms to anyone else, except to his spouse, tax advisor and/or attorney.

(Jt. Exh. 1.) The severance agreement provided that Smith would receive $5,000 in severance pay in exchange for signing it and agreeing to its terms, which Smith received. Smith has not been informed by anyone from Prime that the nondisparagement language and/or confidentiality provision in his severance agreement are no longer in effect.[5] The severance agreement has no expiration date.

[4] Dani Hill, an assistant general counsel for Prime, testified on Prime's behalf. She assists with drafting severance agreements, among other duties. She spoke with Conway about Smith's agreement but did not have a hand in drafting it.

[5] Smith was served with the answer to the instant complaint, the first of which was dated November 21, 2023, which stated, "The Complaint should be dismissed because Respondent already provided written assurance to the Region, before the Complaint was issued, that the confidentiality and nondisparagement provisions in Charging Party's severance agreement were 'no longer in effect.'" This does not constitute individualized notice to Smith.

Prime entered into severance agreements with at least three other employees, two in 2019 and the third in 2022. These agreements also contained similar nondisparagement provisions, except they did not include the final sentence of paragraph 6 of Smith's agreement, prohibiting all contact with any Prime employees. (GC Exhs. 6–8.) Two of the agreements included, however, the following provision: "Employee agrees that [s/he] will not voluntarily assist any agency or 3rd party with respect to any action adverse to the interests of Prime, its agents, principals or affiliates." These agreements further provided that the employees would contact the Respondent if they were:

> contacted by a 3rd party requesting information including, but not limited to, documents, email correspondence, texts, data, internal policies, procedures or practices related to or regarding a pending or future action involving, against or adverse to Prime Communications, its agents, principals, or affiliates.

(GC Exhs. 7–8.)

The confidentiality provisions in the other employees' agreements contained language similar to Smith's. These agreements also contained a provision agreeing that Prime was entitled to remedies in the event of a threatened or actual breach, including injunctive relief, $5,000 for each breach, and attorney fees and costs. In addition, if these employees disclosed the agreements' terms to a tax advisor and/or attorney, they were required to advise the tax advisor or attorney in writing beforehand that they too were bound by the agreements' terms. (GC Exhs. 6–8.)

B. Decision and Analysis

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 7 rights are not limited to discussions with coworkers. The Act's "broad definition covers, in addition to employees of a particular employer, also employees of another employer, or former employees of a particular employer, or even applicants for employment." *Briggs Mfg. Co*., 75 NLRB 569, 571 (1947); See also *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 779 (8th Cir. 2016). The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by Section 7. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147 (1959). It is well-settled that the test of interference, restraint, and coercion under section 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed. *American Freightways Co*., above, at 147.

An employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights. *McLaren Macomb*, 372 NLRB No. 58 (2023). It is the "high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights that dictates the Board's traditional approach of

viewing severance agreements requiring the forfeiture of Section 7 rights—whether accepted or merely proffered—as unlawful unless narrowly tailored." Id. slip op. at 9. *McLaren* overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020), which in turn had overruled *Clark Distribution Systems*, 336 NLRB 747 (2001), and limited the application of *Metro Networks*, 336 NLRB 63 (2001), and *Shamrock Foods Co*., 366 NLRB No. 117 (2018). In returning to the pre-*Baylor* standard, the Board made clear the agreement's language itself and its tendency to coerce should be the primary consideration, not the circumstances under which the agreement was proffered. Citing with approval its pre-*Baylor* caselaw, the Board stated:

> In none of these cases was the presence of additional unlawful conduct by the employer necessary to find that the plain language of the agreement violated the Act. Rather, the Board treated the legality of a severance agreement provision as an entirely independent issue. What mattered was whether the agreement, on its face, restricted the exercise of statutory rights.

McLaren, slip op. at 4. The Board concluded, "[W]e will examine, as pre-*Baylor* precedent did, the language of the agreement, including whether any relinquishment of Section 7 rights is narrowly tailored." Id. slip op. at 5. Accordingly, the focus here is on the plain language of the severance agreements at issue.[6]

The nondisparagement provision in *McLaren* stated, in relevant part:

> At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of

[6] The *McLaren* decision concerned agreement's proffer, but its rationale clearly applies to an agreement's maintenance— the tendency to coerce, if language-based, is the same regardless of point in time. I note that three of the four agreements in this record were proffered in 2019, pre-*Baylor*, and the other was proffered in 2022, post-*Baylor* but pre-*McLaren*. None of the agreements have end dates, and thus they all persisted post-*McLaren*. Because the remedy is the same regardless of the timing and caselaw in effect at the time of the proffer, this decision is not materially affected by the dates of the proffers.

The Board did not specify whether *McLaren* was to be retroactively applied. No party raised the issue here. The Board's usual practice is to apply new policies and standards retroactively "'to all pending cases in whatever stage"' unless to do so would cause manifest injustice. *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture* Co., 121 NLRB 995, 1006-1007 (1958)). The Board considers the following factors when determining whether retroactive application would cause manifest injustice: "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing party under the retroactive application of the change of law." *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993) (citing *NLRB v. Bufco Corp*., 899 F.2d 608, 609 (7th Cir. 1990)). Because the only remedy is an order to rescind the overly broad language in the agreement, "leaving the employer free to replace the rule with a more narrowly tailored substitute," applying it retroactively does not result in manifest injustice regardless of the state of the law when the agreement was signed. See *Stericycle*, 372 NLRB No. 113, slip op. at 13 (2023)(applying same principle to justify retroactivity in a case involving an overly broad work rule).

> Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Id. slip op. at 2. The Board found that this nondisparagement provision substantially interfered with employees' Section 7 rights on its face. Citing to *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)* 346 U.S. 464, 477 (1953), the Board reiterated that Section 7 protects "employees who engage in communications with a wide range of third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection." Id. slip op. at 7. Noting that public statements by employees about the workplace are central to the exercise of employee rights under the Act, the Board found the broad provision at issue in *McLaren* would preclude, for example, any statement that the employer had violated the Act. Because the agreement provided "no definition of disparagement that cabins that term to its well-established NLRA definition" under *Jefferson Broadcasting*, but rather encompassed "employee conduct regarding any labor issue, dispute, or term and condition of employment," the Board found it was unlawfully restrictive. Id. slip op at 9. Finally, noting the agreement applied not just to the employer but to "its parents and affiliated entities and their officers, directors, employees, agents and representatives," and it had no end date, the Board concluded, "The end result is a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee." Id.

Here, Smith and the other employees' nondisparagement provisions are similarly broad and even more proscriptive, and likewise have no end date. Smith's prohibition from contacting any Prime employee at any location would certainly preclude Smith from assisting former coworkers who may be interested in challenging similar agreements or involved in any other employment dispute. The other employees' agreements, by expressly precluding voluntary assistance to any agency with respect to any action adverse to Prime, quite obviously interfere with Section 7 protected communications, and provide a $5,000 penalty for each such communication. See *Metro Networks, Inc.*, 336 NLRB at 67. The nondisparagement provisions were not narrowly tailored, but instead were written to be "as broad as possible."[7] I find, therefore, the nondisparagement provisions of the severance agreements at issue would restrict employees' exercise of their Section 7 rights and are unlawfully overly broad.

Turning to the confidentiality provisions, the language in the agreement the Board found unlawful in *McLaren* stated:

> The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

[7] Though the Board in *McLaren* did not address what constitutes narrow tailoring, it noted that prior decisions had approved severance agreements where the releases "waived only the signing employees right to pursue employment claims and only as to claims arising as of the date of the agreement." Id. at fn. 38.

McLaren, slip op. at 2. The severance agreements at issue here prohibit disclosure of their terms as well as their mere existence, to "anyone else" or "any third party" except a tax advisor or attorney. Accordingly, the confidentiality provisions "would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent's use of the severance agreement, including the nondisparagement provision." Id. slip op. at 10. Moreover, the penalty provisions in some of the agreements would further chill employees' protected activity for fear of having to pay $5,000 for each covered disclosure as well as the Respondent's attorney fees and costs. I find the General Counsel has established the confidentiality provisions in the severance agreements are unlawfully overly broad as alleged.

The Respondent contends that I should disregard *McLaren* because it was wrongly decided, and the Board acted beyond its power by issuing it. I am bound to follow extant Board law, and any argument that a Board decision should be overturned is properly addressed by the Board. The Respondent further argues that Smith's rights were not limited, as evidenced by his post-agreement contact with Prime employees. No showing of actual coercion is required to prove a violation of Section 8(a)(1), however. Id. slip op. at 9.

CONCLUSIONS OF LAW

1. By issuing and since maintaining severance agreements with language that would chill employees in the exercise of their rights under Section 7 of the Act, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

2. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found the Respondent has issued and since maintained severance agreements with language that would reasonably chill employees in the exercise of their rights under Section 7 of the Act, the Respondent will be ordered to cease and desist therefrom. The Respondent will be ordered to rescind the overly broad language in the confidentiality and nondisparagement sections of the severance agreements, and to notify the employees subject to the severance agreements in writing that these provisions will not be enforced. The Respondent shall also be required to post a notice, as detailed in the order below.

The General Counsel urges the Board to adopt a remedial procedure for enforcement actions instituted by an employer in reliance on unlawful contract terms so that eligible employees may have the legal action withdrawn and recover legal fees and costs. Any change in the Board's remedial structure must come from the Board, not an administrative law judge.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Prime Communications, LP, Sugar Land, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) issuing and maintaining severance agreements with nondisparagement provisions that broadly require employees to "refrain from making disparaging, defamatory, negative or other similar remarks concerning Prime, Prime's business, Prime's partners, owners, principals, managers, directors, officers, employees, agents, or services, to any third party except to the extent that Employee (a) is required to make such remarks by applicable law or regulation or judicial or regulatory process, or (b) makes such remarks in or in connection with any then pending litigation or other legal proceeding," and prohibit them from contacting any employee of Prime Communications at any time.

(b) issuing and maintaining severance agreements with confidentiality provisions that state, "Employee promises that he will maintain in confidence the terms and existence of this Agreement and will not disclose the existence of this Agreement or its terms to anyone else, except to his spouse, tax advisor and/or attorney," and /or that provide penalties, including injunctive relief, monetary damages, and attorney fees and costs for each breach.

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

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

(a) Within 14 days of the Board's order, rescind the overly broad language in the confidentiality and nondisparagement sections of the severance agreements and notify in writing all former employees who signed the separation agreements that it has done so and that the unlawfully overbroad nondisparagement and confidentiality provisions will not be given effect.

(b) Within 14 days after service by the Region, post at its facility in Sugar Land, Texas copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms

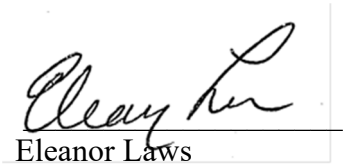
[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] 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

provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the 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. 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 November 26, 2019.

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

Dated, Washington, D.C. June 26, 2024



Eleanor Laws
Administrative Law Judge

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT issue and/or maintain severance agreements with nondisparagement provisions that broadly require employees to "refrain from making disparaging, defamatory, negative or other similar remarks concerning Prime, Prime's business, Prime's partners, owners, principals, managers, directors, officers, employees, agents, or services, to any third party except to the extent that Employee (a) is required to make such remarks by applicable law or regulation or judicial or regulatory process, or (b) makes such remarks in or in connection with any then pending litigation or other legal proceeding," or that prohibit former employees from contacting any employee of Prime Communications at any time.

WE WILL NOT issue and/or maintain severance agreements with confidentiality provisions that state, "Employee promises that he will maintain in confidence the terms and existence of this Agreement and will not disclose the existence of this Agreement or its terms to anyone else, except to his spouse, tax advisor and/or attorney" and /or that impose penalties, including injunctive relief, monetary damages, and attorney fees and costs for each breach.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of the Board's order, rescind the overly broad language in the confidentiality and nondisparagement sections of the severance agreements and notify in writing all former employees who signed the separation agreements that it has done so and that the unlawfully overbroad nondisparagement and confidentiality provisions will not be given effect.

PRIME COMMUNICATIONS, LP

(Employer)

Dated _____ By _____

(Representative) (Title)

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

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178

(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/0 -CA- or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2925.