NATIONAL LABOR RELATIONS BOARD

Newsletter for Regions 20, 32, and Subregion 37

R20 - San Francisco ▪ R32 - Oakland ▪ SR37 - Honolulu

March 2018

Board Finds Casino Discriminatorily Banned Former Employee from Accessing Public Areas of Its Facility Because She Filed Class Action Lawsuit

Washington, D.C. – On May 16, 2017, the Board affirmed the findings of an Administrative Law Judge and held that MEI-GSR Holdings, LLC d/b/a Gran Sierra Resort & Casino/HG Staffing, LLC (the Employer), a hotel in Reno, Nevada, that also operates a casino, restaurant, spa, and other entertainment amenities, violated Section 8(a)(1) of the Act by discriminatorily denying a former employee access to the public areas of its facility. The case stemmed from an unfair labor practice charge filed by an individual former employee alleging that after the former employee became the named plaintiff in a class action wage and hour lawsuit against the Employer, which included current and former employees, the Employer issued the former employee a letter banning that former employee from its premises. The Board found that the class action lawsuit constituted protected concerted activity, and further concluded that the Employer's "exclusion of the former employee, in response to the former employee's participation in protected concerted activity, would reasonably tend to chill employees from exercising their Section 7 rights." Notably, in finding the Employer's conduct unlawful, the Board reasoned that the Employer's current employees "would conclude they, too, might be subject to reprisal and reasonably would be deterred from participating in a work-related lawsuit or other protected concerted activity."

The underlying administrative proceeding, MEI-GSR Holdings, LLC d/b/a Gran Sierra Resort & Casino/HG Staffing, LLC, 32-CA-134057, was tried by Region 32 Field Attorney Noah Garber and investigated by Region 32 Senior Counsel Detailee Lillian Cho.

United States Court of Appeals For The D.C. Circuit Upholds Board's Order Overruling Anheuser-Busch

Washington, D.C. – On June 6, 2017, the D.C. Circuit, with clarification, enforced the Board's Order against American Baptist Homes of the West d/b/a Piedmont Gardens (the Employer), a continuing care retirement community in Oakland, California, for violating Section 8(a)(5) and (1) of the Act by failing to provide

Calendar of Events

- **March 22, 2018**

USF 14th Annual Jack Pemberton Lecture on Workplace Justice

- **April 12-13, 2018**

CLA 24th Annual Public Sector Conference San Francisco

Speaker Requests

The Region is available to provide speakers for your organization. To inquire about a speaker contact Region 20 at 415-356-5130 and ask to speak with Kathleen Schneider.

The San Francisco Regional office is located at 901 Market Street, Suite 400, San Francisco, CA 94103.

Practical Tips

E-Filing is easy!

witness statements and other information requested by the Service Employees International Union, United Healthcare Workers-West (the Union). The Union represents a bargaining unit of the Employer's certified nurses' assistants.

In June 2011, a charge nurse reported to the Director of Assisted Living that a nurse's assistant was sleeping on the job. The Director asked that charge nurse and another nurse's assistant who saw the incident, to submit written witness statements and assured them that their statements would be kept confidential. The Employer also obtained an unsolicited witness statement from another certified nurses' assistant. After the Union filed a grievance over the discharge, it requested information to process the grievance, including the names and titles of the three employee-witnesses and their written statements. The Employer refused to provide that information.

A full Board (then-Chairman Pearce, then-Members Miscimarra, Hirozawa and Johnson, and Member McFerran) found that the Employer's refusal to provide the names and titles of the witnesses was unlawful under the balancing test of *Detroit Edison v. NLRB*, 440 U.S. 301 (1979) (balancing the union's need for requested information against any legitimate and substantial confidentiality interests established by the employer). The Board majority (with then-Members Miscimarra and Johnson dissenting) determined that *Anheuser-Busch* (wholesale prohibition against forcing an employer to provide confidential witness statements) should be overruled, and detailed a new policy under which the Board would apply the Detroit Edison balancing test to the question of whether witness statements are subject to disclosure. The full Board then concluded that the new rule should be applied prospectively only and thus applied the *Anheuser-Busch* standard to the Employer's conduct.

In affirming the Board's findings, the Court held that the Employer lacked standing to challenge the Board's decision to overrule *Anheuser-Busch* and to apply a new test in future cases. The Court noted that the Employer's contention that it had standing to challenge the new test rested entirely on its claim that the cease-and-desist provision in the Board's order might be construed to hold it in contempt if, in the future, it failed to follow the new rule. The Court saw no basis in the Board's decision or order to support such a reading, but clarified that it would enforce the cited provision "only to the extent that it requires [the Employer] to comply with the witness-statement disclosure requirements that the Board actually applied in this case: those of *Anheuser-Busch*." The Court concluded that its clarification of the Order "eliminates any risk of the only injury that [the Employer] asserts it will suffer due to the Board's adoption of the new rule," and that the Employer therefore lacked standing to challenge the merits of the rule.

The underlying administrative proceeding, *American Baptist Homes of the West d/b/a Piedmont Gardens*, Case 32-CA-63475, was tried by

Questions to the Editor

If you have questions or content you would like addressed in upcoming issues of the newsletter, please email those questions to carmen.leon@nlrb.gov

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Region 32 Field Attorneys Noah Garber and Amy Berbower and investigated by Field Attorney Garry Connaughton.

ALJ Finds Uber Violated the Act By Maintaining Unlawful Rule That Prohibits Employees From Contacting The Board

Washington, D.C. – On June 13, 2017, Administrative Law Judge Mara-Louise Anzalone (the ALJ) issued her decision in Uber Technologies, Inc., 20–CA–181146, finding that Uber Technologies, Inc. (the Employer), violated Section 8(a)(1) of the Act by maintaining a Dispute Resolution Agreement (the Agreement) that employees would reasonably understand to prohibit them from filing unfair labor practice charges and/or otherwise access the Board. The employees at issue in this case were software engineers over whose employment this agreement was maintained. Though the General Counsel pled the case under the additional theory that the Agreement is facially unlawful because it requires employees to waive their right to pursue employment-related claims through class or collective action, that issue was stayed by the General Counsel pending an expected ruling from the United States Supreme Court in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S. Ct. 809 (Jan. 13, 2017). In making her decision with regard to the theory litigated by stipulated record, the ALJ found that employees would reasonably understand the Agreement to interfere with their ability to file a Board charge. The ALJ specifically found the Agreement ambiguous when read as a whole from the perspective of an employee attempting to discern whether, by signing it, the employee is waiving that right. The ALJ stated that "[e]ssentially, the Agreement plays 'cat-and-mouse' with the reasonable employee-reader by referencing filing Board charges and accessing the Board without asserting, in plain and understandable language, that the Agreement does not impede on these critical Section 7 rights." The ALJ's recommended order includes rescinding or revising the Agreement to make clear to employees that it does not bar or restrict them from filing charges with the Board, and notifying current and former employee-software engineers that the Agreement has been rescinded or revised.

This case is currently pending before the Board on exceptions. This case was investigated by Region 20 Field Attorney Carmen León and tried by Region 20 Field Attorney Richard McPalmer.

ALJ Finds Employer Unlawfully Interrogated, Suspended and Discharged Employees During Union Organizing Campaign and Board Affirms

San Francisco, CA - On April 20, 2017, Administrative Law Judge Amita Tracy (the ALJ) found Novato Healthcare Center (the Employer) unlawfully interrogated its employees in violation of Section 8(a)(1), and unlawfully suspended and discharged five employees during an organizing campaign by the National Union of

Healthcare Workers (the Union) in order to discourage membership in a labor organization, in violation of Section 8(a)(3) and (1).

The Employer, a skilled-nursing facility, accused four prominent Union supporters and another employee of sleeping during a night shift the week before a representation election. The Employer suspended the employees and then discharged them a mere two days before the election. In her decision, the ALJ found the Employer's witnesses incredible. She concluded that, contrary to the Employer's assertions, of the four prominent Union supporters, two had not been asleep at all. The other two had been resting during their rest break, which was permitted by the Employer. She further concluded that the Employer had suspended and discharged the fifth employee in order to cover for its unlawful motive in discharging the four Union supporters.

The ALJ found the General Counsel's case was supported by ample evidence of animus, including the timing of the adverse actions, the Employer's concurrent unlawful interrogation of its employee, its involvement of union avoidance consultants in the disciplinary investigation and decision, its perfunctory investigation into the allegations, statements made by the Employer regarding its opposition to the Union, and its disparate treatment of the discriminatees compared to past employees who had been accused of sleeping on the job. Furthermore, the ALJ concluded that the Employer could not show it would have taken the same action absent the employees' protected activities. In particular, the ALJ highlighted that the Employer had received reports of other employees allegedly sleeping at work during the night shift the week before, but it did nothing to investigate or discipline those employees.

The Board affirmed the ALJD on September 29, 2017, *Novato Healthcare*, 365 NLRB No. 137 (2017). This case was investigated by Region 20 Field Attorney Jason Wong and litigated by Region 20 Field Attorney Marta Novoa.

ALJ Finds YP Advertising & Publishing, LLC Violated The Act By Refusing To Bargain

San Francisco, CA - - On June 29, 2017, Administrative Law Judge Amita Baman Tracy (the ALJ) issued her decision in YP Advertising & Publishing, LLC (the Employer) finding that the Employer violated Section 8(a)(5) of the Act by delaying its response to numerous requests for information from the International Brotherhood of Electrical Workers Union, Local 1269 (the Union); direct dealing with employees; and unilaterally changing employees' compensation.

The ALJ found that the Employer unduly delayed in producing information responsive to numerous requests by the Union spanning over two years. The ALJ rejected the plethora of defenses offered by the Employer, finding that the Employer failed to explain to the Union the reason for the delay and failed to bargain with the Union on a

mutually acceptable accommodation for the production of the information. The ALJ also found that the Employer unilaterally implemented a new reduced compensation plan for a particular product without notifying or bargaining with the Union. The reduced compensation plan contained a monthly cap on commissions unlike the collective-bargaining agreement (CBA) provision and imposed sales rates for its employees, advertising sales representatives, which were lower than those in the CBA. The ALJ also determined that the Employer directly dealt with employees by authorizing two clerical employees to work-at-home without notifying or bargaining with the Union, and by instructing employees that if they wanted to sell the product, they had to sign and obtain a Union representative's signature on an "exception agreement," whereby each employee agreed to accept the reduced compensation plan.

This case is currently pending before the Board on exceptions. This case was investigated by Region 20 Field Examiners Sam Hoffman and Norma Pizano, and Field Attorney David Reeves. The case was tried by Region 20 Field Attorney Jason Wong.

COMPLIANCE CORNER

Bauer's Intelligent Transportation - 100% Compliance Obtained

On the heels of the winning ALJD issued on November 25, 2016, finding that Bauer's Intelligent Transportation (the Employer), violated Sections 8(a)(1), (3), and (4) of the Act by suspending, discharging, and reassigning employee commuter drivers, the Region conducted a thorough compliance investigation. The post-hearing investigation resulted in the Region issuing a Compliance Specification setting forth amounts owed to the two discriminatees for backpay, expenses, and excess tax liability. The Employer agreed to pay 100% of the computed amounts without need for a compliance hearing. The unfair labor practice hearing was litigated by Region 20 Field Attorneys Marta Novoa and Cecily Vix, while Region 20 Field Examiner Norma Pizano handled the Compliance matters.

EF International Language Schools - 100% Compliance Obtained

After a history of litigation starting with Administrative Law Judge Mary Miller Cracraft's September 15, 2014, decision that EF International Language Schools (the Employer) violated the Act by threatening and terminating an employee teacher because of her personal and e-mail discussions with co-workers about their terms and conditions of employment, the Region obtained 100% compliance. The Board upheld the ALJ's decision on October 1, 2015, and ordered the Employer to make whole the former employee for lost wages and

benefits. The Region sought compliance but the Employer filed a petition for review of the Board's Decision and Order in the Court of Appeals, D.C. Circuit. The court enforced the Board order in full and, again, the Region sought compliance with the terms of the court judgment. In the end, the Employer paid the former employee 100% of the backpay and benefits computed by the Region without need for further litigation. The case was investigated and litigated by Region 20 Field Attorney Jason Wong. Compliance Officer Karen Thompson handled the matter after issuance of the Board Order and obtained full compliance.

Region 20 RD Jill Coffman after speaking on the "Know Your Rights with Chuck Finney" radio show on June 14, 2017. Left to right: Jill Coffman, radio show observer, Practitioners Tom Lenz and Bruce Harland, and host Chuck Finney.

The NLRB is an independent federal agency that protects the rights of most employees to engage in concerted activity, union activity or to refrain from engaging in these activities. Additional information can be found on the San Francisco Regional page.

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