

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

Advice Memorandum

DATE: August 26, 2009

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: ADF/AHI Companies (Pizza Hut) 512-5006-3300
Cases 4-CA-36658 and 4-CA-36657 512-5006-5010
512-5012-6738

These cases were submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by requiring employees to promise in writing to be bound by the provisions of the employee handbook, which included a statement setting forth the Employer's antiunion views.

We conclude that the Employer did not violate Section 8(a)(1) because the employees could not reasonably assume that they would be subject to discipline for failing to adhere to the Employer's antiunion policy.

FACTS

ADF Companies (the "Employer") is a franchise operator in the restaurant business. ADF owns and operates over 320 Pizza Hut, KFC, Taco Bell, Wing Street and Panera Bread restaurants.¹ The Charging Parties are delivery drivers at the Employer's Pizza Hut location in Camp Hill, Pennsylvania.

In February 2009, the Employer distributed a 16-page "Hourly Team Member Handbook" ("Handbook") to employees at the Camp Hill restaurant.² Page 2 of the Handbook contains a section entitled "Union Position Statement," which provides:

Our Company is committed to the basic principle that our employees are our most important resource. We take pride in treating our employees on an individual, one-on-one basis and have created our Open Door/Employee Concern Policy (see page 4) to address any employee concerns. Because of our philosophy, we

¹ ADF owns and operates restaurants in New York, New Jersey, Connecticut, Georgia, Tennessee, Florida, Alabama, Pennsylvania, Maryland, Virginia, West Virginia and the District of Columbia.

² All dates are 2009 unless otherwise indicated.

are opposed to the concept of unionization because we believe a "one size fits all" philosophy is inconsistent with our commitment to treat our employees as individuals. While we recognize that our employees have the right to make this important decision for themselves free from any improper restraints, threats or coercion, we want you to understand the Company's position.

The Handbook also contains a section entitled "Conduct and Discipline," located on page 11. According to this general section, "[d]isciplinary action will be taken when company policies, procedures or work rules are violated. Such actions may include but are not limited to coach and counseling, verbal warnings, written warnings, suspension or immediate termination."

The Handbook contains several other personnel policies which address such topics as attendance and punctuality, food safety, uniforms, cellular phone use, loitering, smoking, blogging and a no-solicitation rule. Many of these sections include explicit identification of the particular disciplinary actions that will result if employees fail to comply.

An acknowledgement of receipt form is located on the last page of the Handbook. This "Receipt of Team Member Handbook" form states:

I have received and read a copy of the Team Member Handbook and also understand the policies it contains and I agree to be bound by these policies. I understand that the rules, policies, and benefits contained in the Team Member handbook may be updated, modified, or deleted at any time and that it is my responsibility to stay informed of any changes. Furthermore, I understand that this Team Member handbook supersedes any previously issued handbooks and policy memoranda.

I will comply with the rules and regulations of The ADF/AHI Companies. I understand that my employment and compensation are "at will" which means they can be terminated at the company's or at my option, with or without cause and without notice at any time.

I also understand that neither this handbook nor any other communication by a management representative is intended in any way to create a contract of employment or to limit the company's discretion to discipline me or terminate my employment.

At the bottom of the page, there is a space for employees to sign, date and print their names. Employees must send their signed receipt forms to Human Resources.

After reviewing the contents of the Handbook, one of the Charging Party employees informed his supervisor that he would not sign the receipt form because he did not agree with the "Union Position Statement" contained in the Handbook. The employee also convinced some of his coworkers not to sign the form. On March 24, the Employer responded by sending a letter to all employees indicating that they had until April 8 to return their signed receipt forms. The Employer's letter stated, in pertinent part:

This letter is to ensure that all of our hourly employees are aware of our updated Team Member Handbook. It is imperative that each employee receives and reads the new handbook. Every hourly employee must sign and return the receipt, verifying that they have received the handbook and that we have provided them with the information. It is important that the handbook be issued to each employee because it contains many valuable benefits that we want our employees to be aware of. It contains operating standards and practices that are essential in working with our company. This handbook briefly describes our policies, benefits, and work rules and is intended to serve as written notice of what we expect from our employees. It is not to be construed as an employment contract.

Returning a signed form is a requirement for employment with our company...an employee may not agree with every policy or statement in the handbook, but as an employee, it is their responsibility to comply with the rules and regulations of our company to maintain employment...

On March 25, the store supervisor advised the Charging Parties that they could either submit their signed receipt forms or not return to work. The Charging Parties submitted their forms later that same day.³

³ The Charging Parties significantly altered the language of their receipt forms before turning them in to Human Resources. The altered forms essentially state that the Charging Parties do not agree to be bound by the Employer's policies. The Charging Parties do not believe that the Employer has noticed their alterations.

ACTION

We conclude in agreement with the Region that the charge should be dismissed, absent withdrawal, because the employees could not reasonably assume that they would be subject to discipline for failing to adhere to the Employer's antiunion policy.

Section 8(a)(1) of the Act prohibits an employer from interfering with, threatening or coercing employees in the exercise of their Section 7 rights to support or oppose a labor organization, or to engage in or refrain from engaging in concerted activity. At the same time, Section 8(c) of the Act states:

Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

In balancing the provisions of these two sections of the Act, the Board has held that employers are permitted to express their views on whether employees should choose a labor organization to represent them, so long as their comments regarding unionization are unaccompanied by threats of reprisal, promise of benefits, or other coercion.⁴

Thus, an employer's inclusion of antiunion policy language in an employee handbook, standing alone, does not violate the Act.⁵ However, inclusion of antiunion policy language in an employee handbook does violate the Act if it also communicates to employees that they can be disciplined for failing to adhere to those antiunion policies.⁶

⁴ Langdale Forest Products Co., 335 NLRB 602, 602 (2001) (stating "absent threats or promise of benefit, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees, in an effort to convince them that they would be better off without a union"). See also La Quinta Motor Inns, 293 NLRB 57, 60-61 (1989), citing NLRB v. Gissel Packing Co., 395 US 575, 617-19 (1969).

⁵ See Mediplex of Danbury, 314 NLRB 470, 478 (1994); Mayfair Midwest, Inc., 148 NLRB 1602, 1603 (1964).

⁶ See Heck's Inc., 293 NLRB 1111, 1120 (1989) (explaining that the Section 8(a)(1) violation was "based on the

Consistent with these principles, the Board has held that it is unlawful for an employer to require its employees to sign a form agreeing to abide by the terms of a handbook containing antiunion policy language, where the handbook and form together communicate to employees that they could be disciplined for failing to adhere to the handbook's antiunion policies. In La Quinta Motor Inns, for example, the employer unlawfully required employees to sign an acceptance form stating, "I agree to be bound by the policies and procedures contained herein," where the handbook also included a policy section expressing the employer's opposition to unions.⁷ Similarly, in Heck's Inc., the employer unlawfully required employees to promise in writing to be bound by the provisions in the employee handbook, which included a provision that the employer did not want any of its employees to be represented by a union and that there was no need for a union.⁸ In neither case did the handbooks assure employees that they had a right to make their own choice regarding unionization.⁹

By contrast, in Noah's New York Bagels, the Board held that it was lawful for an employer to require its employees to sign a form acknowledging receipt of a handbook containing antiunion policy language because the relevant

promise to adhere to the policy extracted from the employees in writing...under the threat of discipline (including discharge) for noncompliance" because such conduct "has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act..."); La Quinta Motor Inns, 293 NLRB at 61.

⁷ 293 NLRB at 61-62.

⁸ 293 NLRB at 1119-20.

⁹ See also Leather Center, Inc., 312 NLRB 521, 528-29 (1993) (employer unlawfully required employees to sign an acknowledgement form stating, "I understand that it is my responsibility to read and comply with the policies contained in this manual" where the handbook also included a statement that the employer was union-free and intended to remain that way); Matheson Fast Freight, 297 NLRB 63, 74-75 (1989) (employer unlawfully required employees to promise in writing to observe the policies contained in the handbook where the handbook clearly stated that the employer intended to operate with nonunion employees because unionization would destroy the "one-on-one relationship" employees enjoyed with management).

handbook provisions, taken as a whole, made clear that the language was merely an expression of the employer's views and that employees had the right to make their own choice regarding unionization.¹⁰ Although the handbook articulated several reasons why the employer believed a union was unnecessary and included a request that employees not sign union authorization cards, it also stated:

The federal government gives employees the right to organize and join unions. It also gives employees the right to say "no" to union organizers and not join unions.

Further, the employee acknowledgement form contained no provision for the imposition of discipline if the employer's antiunion policy was not followed. Accordingly, the employer did not unlawfully require employees to sign the handbook because the handbook language did not create the impression that employees would be disciplined if they failed to conform to the employer's antiunion views.¹¹

Here, we conclude that the Employer's conduct was lawful. The Handbook did contain a "Union Position Statement," and the Employer required employees to sign a form agreeing to be bound by the Handbook's policies, rules and regulations. However, nowhere in the Handbook did the Employer refer to its position regarding unionization as a policy or rule with which employees were expected to comply. In contrast, as noted above, many of the other personnel policies contained specific disciplinary procedures to be followed in the event of noncompliance. Furthermore, the Handbook's "Union Position Statement" provided that "employees have the right to make this important decision for themselves free from any improper restraints, threats or coercion. Thus, like in Noah's New York Bagels, the Employer accompanied its antiunion sentiments with specific assurances to employees that they have the right to organize and join unions. Therefore, the Employer's conduct was not coercive within the meaning of Section 8(a)(1) because its employees, unlike those in La Quinta Motor Inns and Heck's, could not reasonably assume that they would be disciplined if they failed to conform to the employer's antiunion views.¹²

¹⁰ 324 NLRB 266, 273 (1997).

¹¹ Id.

¹² Compare Nestle USA, Cases 31-CA-23778, 23846, Advice Memorandum dated June 25, 1999 at 5-6 (employer's antiunion handbook policy, when read in conjunction with the acknowledgement of receipt, unlawful despite statement that

Accordingly, we conclude that the Region should dismiss the charge, absent withdrawal.

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employees have the right to organize and join unions; the handbook contained other provisions - including a rule mandating employees' withdrawal from outside activities or interests deemed contrary to the employer's own interests - that negated the employer's acknowledgement of employee rights, and the antiunion policy was more forcefully emphasized than here).