

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**THE M RESORT, LLC d/b/a  
M RESORT SPA CASINO**

**and**

**Cases 28-CA-22299  
28-CA-22370**

**BRUCE ALLEN, an Individual**

**and**

**Case 28-CA-22309**

**RUSSELL L. SHOCK, JR., an Individual**

**and**

**Case 28-CA-22310**

**MICHAEL DeVITO, an Individual**

**and**

**Case 28-CA-22319**

**ROMAN MEDINA, an Individual**

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**To: Lester A. Heltzer, Executive Secretary  
National Labor Relations Board  
Office of the Executive Secretary**

**Respectfully submitted,**

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## **I. INTRODUCTION**

In its exceptions (R. Exc.), Respondent attempts to have the Board reject the findings and conclusions of Administrative Law Judge Lana H. Parke (the ALJ) regarding Respondent's unlawful discharges of security officers Bruce Allen (Allen) and Dean Skibickyj (Skibickyj) in December 2008<sup>1</sup> and several statements violating Section 8(a)(1) of the Act. The ALJ, however, amply supported her findings and conclusions and, as discussed below, each of Respondent's exceptions is without merit. The Board, therefore, should adopt her recommended Order.

## **II. ARGUMENT**

### **1. The ALJ Correctly Found that Allen Engaged in Protected Concerted Activity.**

Respondent excepts to the ALJ's finding that Allen's complaints about working conditions were concerted and protected. The facts support the ALJ's findings. Allen and other male officers complained about preferential treatment given to the female officers. Allen testified that in August, he and Skibickyj noticed the gate to St. Rose Parkway unsecured. The responsibility for securing the gate was that of the officers in the career center, Reggie Peterson (Peterson) and Laura Montgomery (Montgomery). Allen and Skibickyj went into the career center and noticed the two women playing poker. Allen asked if the two women knew that the gate was not secured and they answered that they could not see it from where they sat. Peterson even asked the two men if they wanted to play. Allen complained to Respondent's security director Maria Tamayo-Soto (Soto) about the conduct, but nothing was done. Allen testified that he complained to Soto about similar conduct by the two female officers in September; but again nothing was done. (TR. 71-74, 79-80). Soto

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<sup>1</sup> All dates are 2008 unless otherwise noted.

testified that after she was told that officers at the front gate were playing cards, she went to the gate and confronted Allen and Skibickyj. Those two denied playing cards and noted that they did not have the time to do so. Soto then went to the career center trailer and asked Peterson and Montgomery about playing cards. The two women said that the complaint Soto received must have arisen from the construction superintendent “Big Tony” seeing Montgomery play solitaire. Soto accepted the explanation without any further investigation and the matter was dropped. (TR. 563-65).

Allen and Skibickyj also discussed with other officers and complained to Soto about the conduct of security officer Maria St. Clair (St. Clair), including that employee’s pursuit of her private business of selling calling cards on Respondent’s time and making sexually suggestive remarks, taking two-hour lunches, and going into the contractors’ trailers. Allen testified that he asked Soto how it was that Alex Carroll (Carroll), Juno Ordillas, and other male officers were terminated on the spot for one infraction while Respondent took no action against St. Clair. (TR. 80-88). Respondent also accorded favorable treatment to Danielle Malone (Malone), about whom Allen complained to Soto in late November or the first week of December. When Allen attempted to tell Soto what Malone had been doing on the job site, Soto merely responded, “I don’t want any rumor-mongering about her.” (TR. 90). On the graveyard shift, the officers complained to Respondent’s vice-president of security and surveillance William Houtchens (Houtchens) and Soto about the absence of a shed, and to Soto about not receiving the jackets they were promised. (TR. 305-08).

Allen mentioned these concerns at the December 10 meeting with Respondent’s director of human resources Douglas McCombs (McCombs), Respondent’s investigator Anthony Perez (Perez), and Respondent’s employee relations counselor Laura Martinez

(Martinez). (TR. 96-97). That meeting preceded the discharges of Allen and Skibickyj by just three days. The ALJ correctly found that Allen's complaints were concerted and that they led to his discharge.

2. The ALJ Properly Inferred that Soto Threatened Employees with Discharge.

Respondent excepts to the ALJ's finding that Soto's explanation of Carroll's discharge could be inferred as a threat of discharge for engaging in protected concerted activity. (ALJD, pp. 6, 21). Allen testified that Soto told officers that Carroll was discharged for complaining too much and that Allen himself was a complainer. (TR. 66-68). The ALJ also relied on Soto's own testimony regarding Carroll's complaints and how it purportedly "made other officers uncomfortable." (ALJD, pp. 6, 6-7 fn. 11). The ALJ's conclusion that Soto's statement constituted a threat of discharge thus is amply supported by the record.

3-4. The ALJ Properly Found that Perez Violated Section 8(a)(1) of the Act.

Respondent's third and fourth exceptions relate to the ALJ's finding that Perez violated the Act when questioning Allen. Contrary to Respondent's contention in its third exception, the ALJ did not "expand" the Complaint allegations by finding that Perez' questions to Allen during the December 10 meeting. Although the Complaint did not allege a violation by Perez, as the ALJ noted, neither McCombs nor Martinez objected to Perez' questions and could thereby be found to have assented to them. (ALJD, p. 17, fn. 35). Thus, even in the absence of a motion to amend the Complaint, the ALJ's finding and conclusion were based on the record evidence and was proper.

As found by the ALJ, Perez' questioning of Allen was coercive and his question "Whose side are you on?" was interrogation regarding Allen's comment that he might aid employees who were contemplating filing an EEOC charge against Respondent. Respondent

argues that the employees' potential charge was not the type of conduct that the Board has found to be protected concerted activity, but rather individual. (R. Exc., ¶ IV). Respondent, however, appears to miss the point that Allen's consideration of helping the employees makes Allen's conduct protected concerted activity, especially in view of the similar concerns held by male security officers then employed by Respondent. The ALJ correctly held that Respondent violated the Act by Perez' questions to Allen on December 10.

5. The ALJ's Properly Applied *Wright Line* to Allen's and Skibickyj's Discharges.

In its fifth exception, Respondent argues that the ALJ's statement that General Counsel met its burden under *Wright Line* with regard to "the four employees' discharges" (ALJD, p. 20) "surmisably applies" to alleged discriminatees Michael DeVito, Roman Medina, Russell Shock, and Joseph Varmer, who were linked together throughout the processing of this matter due to their conduct relating to personnel files. Respondent then argues that the ALJ used the *Wright Line* analysis relating to the four intertwined employees to find Respondent's discharge of Allen and Skibickyj to be unlawful.

The ALJ clearly, and inadvertently, stated "four employees" when she intended to say "two employees." The entire paragraph containing these words deals solely with the ALJ's *Wright Line* analysis of the discharges of Allen and Skibickyj. To "surmise" that the ALJ was referring to the other four employees is baseless. The ALJ's application of the *Wright Line* analysis to the discharges of Allen and Skibickyj was

6. The ALJ Correctly Found that Respondent Failed to Satisfy Its Burden.

In Respondent's sixth exception, where it argues that the ALJ incorrectly failed to consider Respondent's confidentiality interest in finding that Respondent failed to meet its burden under *Wright Line*, Respondent relies upon the Board's decision in *Caesar's Palace*,

336 NLRB 271 (2001), just as it did before the ALJ. However, in contrast to *Caesar's Palace*, the employee discharged here purportedly for violating Respondent's direction to keep was the December 10 meeting confidential – Allen – was the person who provided the information to the employer, and not an anonymous letter. Also, in *Caesar's Palace*, “[e]ach employee acknowledged that they understood the confidential nature of the investigation. Further, none of them objected to the confidentiality requirement or asked for a clarification.” *Id.* at 271. Allen never acknowledged that the confidentiality of Respondent's investigation. Further distinction is evident in the following summary by the Board in *Caesars Palace*:

Because the investigation involved allegations of a management cover-up and possible management retaliation, as well as threats of violence, the Respondent's investigating officials sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated.

*Id.* at 272. Here, there were no allegations of a management cover-up or possible retaliation. As Houtchens testified, there were no threats of violence concerning the accessing of personnel files. (TR. 484). Nor was there any evidence that needed to be preserved. These critical distinctions remove the present case from the ambit of the Board's rationale in *Caesar's Palace*. See, e.g., *Intermet Stevensville*, 350 NLRB 1349, 1355 (2007); *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enforced Westlaw No. 02-1165 (D.C. Cir. 2003). Respondent's reliance on its demand for confidentiality as a basis for terminating the two employees was misplaced and the ALJ correctly disregarded it in arriving at her decision.

7. The ALJ Correctly Found that Allen and Skibickyj Did Not Harass Michael Murray.

In its seventh exception, Respondent argues that the ALJ incorrectly ignored its “secondary” reason for discharging Allen and Skibickyj, *i.e.*, that the two employees created a “hostile work environment” for security officer Michael Murray (Murray). (R. Exc. ¶ 7).

Respondent ignores its own failure to complete the investigation of what Allen said to Murray, especially Houtchens direction to Perez to end the investigation without even questioning Allen and Skibickyj about Murray's allegations, to which the ALJ gave great weight. This failure by Respondent was found by the ALJ to evidence Respondent's unlawful motivation. (ALJD, p. 20). Finally, the ALJ's determination that Houtchens expressed shifting reasons for the discharge of these two employees made her finding that Respondent had discharged Allen and Skibickyj unlawfully an eminently reasonable – and correct – conclusion. (ALJD, p. 20-21).

8. The ALJ's Recommended Order Effectuates the Purposes of the Act.

Respondent eighth and final exception is that the ALJ's erred in finding that her recommended Order would effectuate the purposes the Act. The ALJ's recommended Order, however, contains traditional Board remedies such as reinstatement, backpay, and posting of a Notice to Employees that are obviously appropriate here.

**III. CONCLUSION**

For all the reasons set forth above, the Board should overrule Respondent's exceptions and adopt the ALJ's recommended Order.

Dated at Las Vegas, Nevada, this 14<sup>th</sup> day of January 2010.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**, in Cases 28-CA-22299, 28-CA-22309, 28-CA-22310, 28-CA-22319 and 28-CA-22370, was served via E-Gov, E-Filing, E-Mail, and Federal Express overnight mail on this 14<sup>th</sup> day of January, 2010, on the following:

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