

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

**FRESH & EASY NEIGHBORHOOD
MARKET, INC.**

and

Case 28-CA-064411

MARGARET ELIAS, an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF

I. INTRODUCTION

Counsel for the Acting General Counsel (General Counsel) submits the following Reply Brief to the Answering Brief (Answering Brief) filed by Fresh & Easy Neighborhood Market., Inc. (Respondent), on June 15, 2012.¹ Respondent's Answering Brief, which is primarily a restatement of its brief to the Administrative Law Judge (ALJ), fails to rebut the critical facts and law summarized by the General Counsel, and further fails in large measure to specifically address the issues and arguments raised in the General Counsel's Exceptions and Supporting Brief, filed on May 21, 2012.

It is respectfully submitted that the record as a whole, including the ALJ's credibility resolutions, findings, and conclusions, as described in the General Counsel's Exceptions, support a finding that Respondent violated Section 8(a)(1) of the Act as described in General Counsel's Exceptions.

¹ All dates herein are 2009, unless otherwise noted. In this brief, Counsel for the Acting General Counsel will be referred to as "General Counsel." Exhibits of the Acting General Counsel and Respondent will be designated as "GCX" and "RX" respectively, followed by the appropriate exhibit number(s). References to the transcript will be designated "Tr." Respondent's Answering Brief will be designated "Answering Brief," and to the Administrative Law Judge's Decision will be designated ALJD, followed by the appropriate page number(s).

II. ANALYSIS AND DISCUSSION

A. **The ALJ Erred by Failing to Find That Respondent Violated the Act by Orally Promulgating and Maintaining an Overly-Broad and Discriminatory Rule Prohibiting Employees from Obtaining Statements from Their Coworkers Regarding Allegations of Sexual Harassment.**

The ALJ erred by failing to find that Respondent, by maintaining a rule prohibiting concerted activity, violated Section 8(a)(1) of the Act. (ALJD 11) The record fails to support the ALJ's conclusion that Respondent had a legitimate business reason for prohibiting employees from obtaining statements from their coworkers regarding allegations of sexual harassment. (ALJD 6)

In examining whether an employer violates Section 8(a)(1) when it maintains a work rule, the Board has held that a work rule violates the Act if, by reasonable interpretation, it tends to chill employees in the exercise of their Section 7 rights.² In deciding whether a rule prohibiting an employee from discussing matters that arise during an investigative interview is a violation, the Board determines whether the employer's asserted business justification for the prohibition outweighs employees' Section 7 right to discuss such terms and conditions of employment. *Cello Partnership*, 349 NLRB 640, 658 (2007) citing *Caesar's Palace*, 336 NLRB 271, 272 (2001).

While Respondent's Answering Brief attempts to distinguish cases cited by the General Counsel, Respondent ignores the record evidence that demonstrates Respondent's Employee Relations Manager Monyia Jackson violated the Act when she directed Margaret Elias not obtain signatures or statements from employees in support of her sexual harassment

² *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). The Board has further held, "[i]f 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, 647 (2004).

complaint.³ In the present case, Jackson's directive either explicitly restricted Elias' Section 7 rights, was promulgated in response to Elias requesting statements or signatures in support of her sexual harassment complaint, or was applied to restrict Elias' exercise of Section 7 rights.⁴

Even if Elias had not engaged in protected concerted activity, Jackson's directive would have been reasonably construed to restrict employees Section 7 rights.⁵ *Lutheran Heritage Village-Livonia*, supra. As summarized by ALJ Gregory Z. Meyerson, in his decision in *Grand Canyon University*, JD(SF) 42-11, slip op. 29 (October 21, 2011) the Board attempts to strike a balance between employees' Section 7 right to discuss their terms and conditions of employment amongst themselves, and the right of an employer to maintain work rules under certain limited circumstances. Citing both *Desert Palace, Inc., d/b/a Caesar's Palace*, 336 NLRB 271 (2001) (Board reversing ALJ found that the employer's need to maintaining confidentiality of an ongoing drug investigation was a substantial business justification) and *Phoenix Transit Systems*, 337 NLRB 510 (2002), ALJ Meyerson noted that the burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights.

In the present case, Respondent has failed to meet that burden. While Respondent correctly quotes the factors used to determine whether the employer in *Caesar's Palace* had a legitimate and substantial business justification, Respondent failed to cite to any credible

³ Employees have a right to discuss amongst themselves matters that are discussed during an employer's investigation. *Phoenix Transit System, Inc.*, 337 NLRB 510 (2002).

⁴ This right to freedom of communication is not limited to organization rights, "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit System*, 337 NLRB 510, 513 (2002) (citing *Container Corporation of America*, 244 NLRB 318, 322 (1979)).

⁵ Central to the protections provided by Section 7 of the Act, is the employees' right to communicate to coworkers about their wages, hours, and other terms and conditions of employment. The Board and courts have long recognized the importance of employees' freedom in communication to the free exercise of organization rights. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972).

record evidence supporting a finding that it also had a legitimate and substantial business justification. In addition, Respondent failed to demonstrate that Jackson's directive was launched against Elias in order "to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." *Caesar's Palace*, supra at 271. Noticeably, Respondent's claim that Jackson's rule was implemented to "avoid fabrication of evidence" and to avoid "operational disruptions and inappropriate conduct towards potential witnesses," is in direct and irreconcilable conflict with the Jackson's testimony. (Answering Brief at p. 20 fn. 19)

More specifically, Jackson, whom the ALJ credited, admitted that all the complaints against Elias lacked merit. Furthermore, Jackson testified that the reason she issued the directive to Elias was because Elias made employees "uncomfortable" when she solicited signatures or statements from employees. (Tr. 173; 187) Respondent, in advancing this defective claim, fails to address and ignores extant Board law which holds that an employee's subjective belief that union solicitation constitutes harassment cannot, without more, deprive that solicitation of the protection of the Act.⁶ *Nicholas County Health Care Center*, 331 NLRB 970, 982-983 (2000). Accordingly, is respectfully requested that the Board reject the ALJ's finding that Respondent did not violate the Act by promulgating an overly-broad and discriminatory rule.

B. The ALJ Erred by Failing to Find That Respondent Violated the Act by Interrogating its Employee Margaret Elias

Respondent, by its Answering Brief, also fails to rebut the General Counsel's arguments regarding Jackson's interrogation of Elias during the August 31, 2011 interview.

⁶ The Board has held that Union solicitations do not lose their protection simply because a solicited employee is the subject of persistent solicitation and feels "bothered," "harassed" or "abused" by them. *Frazier Industries, Co.*, 328 NLRB 717, 718-719 (1999).

Respondent simply ignores Board law addressing what acts constitute interrogation.

Although the ALJ did not address the merits of this allegation, looking at the totality of the circumstances, Respondent violated Section 8(a)(1) the Act by interrogating Elias and demanding that Elias disclose the purpose of the statement which she had employees sign.⁷

In evaluating the “totality of the circumstances,” and in applying *Rossmore House*, the Board considers “the *Bourne* factors,” stated in *Bourne v NLRB*, 332 F. 2d 47, 48 (2d Cir. 1964).⁸

Moreover, when considering communications from an employer to employees, the Board applies an “objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect.” *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

More specifically, Respondent only addresses the first *Bourne* factor which relates to how Respondent deals with concerted activity. Respondent apparently claims that Jackson’s questioning did not take place against a background of hostility, though the credible record evidence does not support this position. Here, Jackson’s questioning, in the context of complaints she had received from three separate employees regarding Elias, takes place against a background of hostility. Jackson admitted that she questioned Elias regarding three separate complaints she had received from Team Leader Mike Anderson, and employees Krista Yates and Gary Hamner. These complaints, alleging that Elias had engaged in

⁷ Although questioning employees is not *per se* unlawful, the test is whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984).

⁸ The *Bourne* factors include consideration of whether the interrogated employee engaged in Section 7 activities in an open and active manner; the background of the interrogation; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; the truthfulness of the reply; whether a valid purpose for the interrogation was communicated to the employee; and whether the employee was given assurances against reprisals. See also *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Medcare Associates, Inc.*, 330 NLRB 935, 935 (2000).

misconduct by threatening and intimidating employees or using profanity against them, were all found to be meritless by Jackson. (ALJD 9; Tr. 172-173; 187-188)

Respondent, citing the administrative law judge's decision in *Charles Schwab & Co., Inc.*,⁹ argues that Jackson's questions were a result of Elias' own sexual harassment complaint. However, *Charles Schwab* is factually distinguishable from the present case. Unlike the present case, the administrative law judge in *Charles Schwab*, before addressing the legal issue of whether the employee's sexual harassment complaint constituted protected concerted activity, found that the employee had fabricated the alleged incidents of harassment in order to cover up her own performance issues. *Id.* slip op. at 10. In the present case, Jackson admitted that Elias' sexual harassment complaint was meritorious, and the employee who perpetrated the sexual harassment was disciplined. (Tr 187; ALJD 11) Tellingly, Respondent further admitted that the only employee complaint that had merit was from Elias. Furthermore, unlike *Charles Schwab*, Elias was questioned about her own alleged wrongdoing, in addition to her protected concerted activity. While Respondent attempts to couch Jackson's interview of Elias as an attempt to "lawfully conduct a harassment investigation consistent with federal anti-discrimination provisions," there is no evidence that Elias' participation in the interview was voluntary, that any assurances were ever given to Elias that she would suffer no reprisals as a result of her conversation with Jackson, or that Respondent conducts its sexual harassment investigations by questioning complainants about their own alleged misconduct. (Answering Brief at 23.) To that end, Respondent further fails to explain how Jackson's questioning Elias about her own alleged misconduct could be in any way related to Elias' sexual harassment complaint. When viewed under the "totality of the circumstances" test it is clear that the interrogation set forth

⁹ JD (SF)-79-04, Case 28-CA-19445 (December 16, 2004).

above violated the Act. Jackson violated Section 8(a)(1) of the Act by interrogating and threatening Elias. *Miller Electric Pump*; supra; *Rossmore*, supra.

1. The ALJ erred by failing to find that Elias engaged in protected concerted activity.

Elias' complaint related to sexual harassment in the workplace concerns an issue that affects all employees. See *Ellison Media Company*, 344 NLRB 1112 (2005) (employee engaged in protected concerted activity when she discussed filing a sexual harassment complaint). Citing *Hollings Press*, Respondent argues that Elias was not engaged in protected concerted activity or conduct that was for the mutual aid or protection of employees. However, this position is not supported by Board law or the credible record evidence. *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employee's call to the Department of Labor constituted concerted activity under the logical outgrowth theory even though no other employees knew about or authorized the employee to make the call). Accordingly, Elias engaged in protected concerted activity by raising complaints with Respondent's management, and the ALJ erred in finding otherwise.

2. Elias' activity was concerted

Elias engaged in protected concerted activity when she sought the signatures of her co-workers in support of her sexual harassment complaint. The Board's test for determining whether an individual's activity is protected under Section 7 is set forth in *Meyers Industries, Inc.*¹⁰ Once the activity is deemed to be concerted, a Section 8(a)(1) violation will be found if the employer knew of the concerted nature of the employee's activity; the concerted

¹⁰ 281 NLRB 882 (1986) (*Meyers II*), supplementing *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985). Under *Meyers*, to establish Section 7 protection, an employee's activity must relate to a term or condition of employment and must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. At 885.

activity was protected by the Act; and the adverse employment action at issue was motivated by the employee's protected concerted activity.¹¹ Under *Meyers*, to qualify as Section 7 protected concerted activity, the employee's activity must be both "concerted" as well as "for mutual aid and protection."¹³ Respondent, while denying that Elias engaged in protected concerted activity, admits it was aware of Elias speaking to, and gathering signatures from, employees in support of her sexual harassment complaint.

Generally, activity that is engaged in with the "object of initiating or inducing or preparing for group action" may constitute concerted activity.¹⁴ The Board will also consider whether the activity involved a common concern regarding conditions of employment and whether the issue was framed as a common concern to determine whether activity is concerted.¹⁵ Here, the evidence demonstrates that by reporting the incident, Elias sought to alert management of a workplace concern -- that is, sexual harassment by a fellow employee -- and to prepare for group action insofar as her complaint would ensure that it would not happen again, and that people would not "write things like that on the board." (ALJD 6) While she garnered support for her sexual harassment complaint, Elias spoke with two other employees and a supervisor. Significantly, Giro admitted to Elias that she believed that the changed wording was inappropriate. (ALJD 7; Tr. 61; 76) Furthermore, Store Manager Bruce Churley admitted that the altered wording on the whiteboard was inappropriate.

¹¹ *Meyers I*, 268 NLRB 493, 497.

¹³ *Meyers II*, 281 NLRB at 885.

¹⁴ *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

¹⁵ *Wal-Mart Stores, Inc.*, 341 NLRB No. 111, slip op. at 9 (2004) ("an individual is acting on the authority of other employees where the evidence suggests a finding that concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group"), quoting *Amelio's*, 301 NLRB 182 n.4 (1991). See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

3. Elias' Activity was for mutual aid and protection

Elias' concerted activity was also for the purpose of "mutual aid and protection." Elias filed the complaint on behalf of not only herself, but other employees who had concerns about sexual harassment in the workplace.¹⁶ It is clear that the altered wording was a concern for more than Elias, as Respondent disciplined the employee responsible for the misconduct. In this respect, this case is unlike *Holling Press*, where the employee was unable to show that her actions were undertaken for the mutual benefit of others even though the actions were found to be concerted.

The nature of Elias' complaint in the instant case is markedly different from that in *Holling Press*. More specifically, in *Holling Press*, there was no evidence that the employee was acting on behalf of anyone else but herself. Here, as discussed above, Elias engaged in discussions with at least one of her fellow employees (Giro) who shared similar concerns regarding the altered wording on the whiteboard. Despite Respondent's claim otherwise, an agreement among all employees as to what constitutes a concern is not necessary to find that Elias was engaged in protected concerted activity or engaged in conduct for the mutual aid and support of employees.¹⁷ Board law supports General's Counsel's contention that the ALJ's finding that Elias did not engage in protected concerted activity is erroneous.

¹⁶ By its very nature, illegal harassment in the workplace is a legitimate employment-related matter. *Kysor Industrial Corp.*, 309 NLRB at 237 fn. 3 (1992); *Tradesmen International, Inc.*, 332 NLRB 1158 (2000), enf. denied, 275 F.3d 1137 (D.C. Cir. 2002).

¹⁷ See *Holling Press*, supra, citing *Circle K Corp.*, 305 NLRB 932 (1991), rev. den., enf. 989 F.2d 498 (6th Cir. 1993) (even though solicited employees did not support the charging party and subjectively thought that she was acting in bad faith, those subjective thoughts of the solicitees did not undermine the Section 7 nature of her activities). See also *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enf. 853 F.2d 996 (1st Cir. 1988) (employee who repeatedly, but unsuccessfully, attempted to elicit support from other employees was engaged in Section 7 activity). See *Whittaker Corp.*, 289 NLRB at 933-934 (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming).

Accordingly, it is respectfully requested that the Board reverse the ALJ's erroneous finding in this regard.

III. CONCLUSION

It is respectfully submitted that the record amply demonstrates that Respondent has violated Sections 8(a)(1) of the Act as alleged. The General Counsel urges the Board to issue an appropriate remedial order requiring Respondent to: 1) post an appropriate notice at its facility and 2) and provide whatever other relief the Board deems just and necessary to remedy Respondent's violations of the Act.

Dated at Phoenix, Arizona, this 2nd day of July 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S REPLY BRIEF in FRESH & EASY NEIGHBORHOOD MARKET, INC., was served by E-Gov, E-filing, and E-mail on this 2nd day of July 2012 on the following:

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