

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of:

BELLAGIO, LLC,

and

GABOR B. GARNER,

An Individual,

and

NAJIA ZAIDI,

An Individual.

Case No. 28-CA-106634
28-CA-107374

**BELLAGIO, LLC’S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE’S DECISION**¹

Pursuant to section 102.46 of the National Labor Relations Board’s Rules and Regulations, as amended, Bellagio, LLC (the “Employer”) excepts to Administrative Law Judge Robert Ringler’s (“ALJ”) Decision² (the “Decision”) as follows:

1. To the conclusion of law that Bellagio violated Section 8(a)(1) of the Act by “refusing to allow Charging Party Gabor Garner (“Garner”) to be represented during an investigatory interview.” Decision at p. 12:35-40. The ALJ failed to make any factual findings to support such a conclusion and therefore the Decision is flawed. *See* Decision at 12-13.

¹ Bellagio’s brief in support of its exceptions is being submitted contemporaneously herewith.

² Case No. 28-CA-106634 (Gabor Garner) and Case No. 28-CA-107374 (Najia Zaidi) were consolidated for administrative purposes. The following exceptions concern Judge Ringler’s findings as to Gabor Garner only. All of the allegations regarding Najia Zaidi were dismissed, and Bellagio has taken no exception to the dismissal of those allegations.

Garner was asked no further questions once he requested a *Weingarten* representative, and the investigatory interview was terminated once a *Weingarten* representative could not be located. 32:6-7 (Wiedmeyer); 90:25-91:2 (Sanchez); 115:6 (Garner). *Weingarten* requires nothing more, and the allegation should be dismissed.

2. To the conclusion of law that Bellagio violated Section 8(a)(1) of the Act by placing Garner on suspension pending investigation (“SPI”) “because he refused to participate in the [May 13, 2013] disciplinary interview without Union representation.” Decision at 12:40. First, Bellagio’s placement of Garner on SPI did not violate the Act because placing an employee on SPI is not a disciplinary act. *See* JX 1 at 9; 629:12-630:25; RX 32 (Garner’s PAN history); RX 33 (Garner’s pay history for May 13-15, 2013); 631:14-634:19; *see also* RX 17 (Garner’s May 15, 2013 verbal warning which does not list the SPI as prior discipline); *see also Promedica Health Systems Inc.*, 343 NLRB 1351, 1351-1352 (2004). Second, placing Garner on SPI suspended the investigation for less than twenty-four hours, was with pay, and allowed Garner to have the benefit of a due process interview with the presence of a shop steward. It also protected the Company’s legitimate interests in investigating a customer complaint. Bellagio’s conduct satisfied *Weingarten*’s requirements and the allegation should be dismissed. *See Roadway Express, Inc.*, 246 NLRB 1127, 1127-30 (1979).

3. To the ALJ’s determination that the General Counsel established a *prima facie* case under *Wright Line*. Decision at 10:4-10.

4. To the ALJ’s failure to conclude that Bellagio satisfied its burden under *Wright Line*, because the preponderance of the evidence established that Garner was placed on SPI because he became agitated during the May 13, 2013 interview. Decision at 10:14-34.

5. To the conclusion of law that Bellagio violated Section 8(a)(1) of the Act by “promulgating, maintaining and enforcing an oral rule prohibiting employees from discussing disciplinary matters under investigation by Employee Relations.” Decision at 13:5-6. Brian Wiedmeyer, on a single occasion, instructed Garner to leave the Front Services Dispatch area immediately because Garner had been placed on SPI. He did not announce a new rule of general applicability, and indeed, all of the employees who testified about Wiedmeyer’s statement, including Garner himself, conceded that they did not believe that Wiedmeyer had promulgated a new rule which prohibited them from discussing his discipline or any other discipline in the workplace. *See Flamingo Las Vegas Op. Co., LLC*, 359 NLRB No. 98, at 5-7 (Apr. 25, 2013).

6. To the conclusion of law that Bellagio violated Section 8(a)(1) of the Act by “engaging in surveillance of employees Union or protected concerted activities[.]” Decision at 13:1-5. The conclusion it is not supported by the facts. Bellagio did not surreptitiously spy on Garner. The evidence clearly established that Wiedmeyer – along with at least a half dozen other Bellagio employees – came upon Garner having a loud, public conversation in the Front Services Department’s busiest work area. It is black-letter law that observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *See, e.g., Aladdin Gaming, LLC*, 345 NLRB 585, 585-586 (2005) (citing *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991)).

7. To the finding that Bellagio’s placement of Garner on suspension pending investigation was disciplinary in nature. Decision at 10, fn. 22.

8. To the failure to discredit Garner’s denial that he was not upset and irate during the May 13, 2013 interview was credible. Decision at 4:20-30.

9. To relying on Garner's "demeanor" when determining his credibility, when witness demeanor is an exceptionally poor indicator of truthfulness, *see, e.g.*, Judge Richard A. Posner, REFLECTIONS ON JUDGING, p.124 (2013) (explaining that "nonverbal clues to veracity are unreliable and distract a trier of fact ... from the cognitive content of a witness' testimony" and collecting authority), and disregarding the significant inconsistencies, omissions, and implausibility of Garner's testimony. *See Permaneer Corp.*, 214 NLRB 367, 368-69 (1974).

10. To the failure to credit the testimony of Wiedmeyer and Max Sanchez regarding the May 13, 2013 interview and the events that followed. Decision at 4:20-30.

11. To the finding that Wiedmeyer and Sanchez' statements "conspicuously fail to mention that [Garner's] agitation caused the SPI." Decision at 4:25. Wiedmeyer's statement provides however that Garner "turned very argumentative and was deflecting the issue by accusing the guest of lying" and states that "I placed him on SPI so he could not return to work until the investigation had been completed." GCX 3. Sanchez' statement also explains that Garner "became even more agitated and stated to Wiedmeyer that unless he called a shop steward [for Garner] ... he was going back to work." GCX 4.

12. To the failure to credit and give weight to Susan Moore's undisputed testimony that placing Garner on SPI was in accordance with Bellagio's practice whereby approximately 5% of the employees who are placed on suspension pending investigation are put on SPI because they were "agitated in a meeting with a supervisor." Decision at 4, fn. 6.

13. To the failure to dismiss the allegations contained in paragraphs 5(f), (i), (j), (k), (l) and (m) of the Consolidated Complaint.

14. To the ALJ's admission of Wiedmeyer's May 13th statement, GCX 3, and Sanchez' May 13th statement, GCX 4, as "business records" and admissible for their truth.

Witness statements do not fall within the business records hearsay exception under Fed. R. Evid. 803.

15. To the remedial order because it is moot insofar as Garner's personnel records already omit reference to his SPI because, as Ms. Moore explained, it is not disciplinary.

16. To the remedial order and notice because it is contrary to Board precedent and violates Section 10(e) of the Act insofar as it is not sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the alleged unfair labor practices. Decision at 13-14. Appendix A. Section 1a of the order and the first "We Will Not" clause are contrary to Board law because they appear to require Bellagio to provide employees with a chosen representative regardless of context. They are also not tailored to the facts of this case because Garner did not request a particular representative, thus ordering Bellagio to comply with such requests is inappropriate. Section 1d of the order and the fourth "We Will Not" are contrary to Board law. Under appropriate circumstances, such as preventing retaliation against witnesses, Bellagio is entitled to require employees to maintain confidentiality. The notice's blanket prohibition against any such rule impermissibly constricts that right and is not tailored to the facts of this case.

WHEREFORE, Bellagio respectfully requests that its exceptions to the ALJ's findings and conclusions of law regarding Case No. 28-CA-106634 be sustained and the allegations in paragraphs 5(f), (i), (j), (k), (l) and (m) of the Consolidated Complaint be dismissed.

Dated: April 25, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

In addition to filing the foregoing Exceptions in the above captioned matter via the NLRB's electronic filing system, we hereby certify that copies have been served this 25th day of April, 2014, by First Class Mail, upon:

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