

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

**BELLAGIO, LLC**

**and**

**Case 28-CA-106634**

**GABOR B. GARNER, an Individual**

**and**

**Case 28-CA-107374**

**NAJIA ZAIDI, an Individual**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF**

**Respectfully submitted,**

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## **I. INTRODUCTION**

By its exceptions, Bellagio, LLC (Respondent) urges the Board to ignore the record evidence and well-reasoned ruling of Administrative Law Judge Robert A. Ringler (the ALJ). The ALJ found that Respondent violated the Act by: denying the *Weingarten* rights of its employee, Gabor Bryan Garner (Garner), by refusing to allow him to be represented by a union representative during an investigatory interview; suspending Garner pending investigation (SPI or suspend) because Garner insisted on the union representation to which he was entitled; by prohibiting Garner from speaking about his SPI with his coworkers; and by engaging in unlawful surveillance in aggressively observing Garner until the time he left the facility. Respondent's own testimony and documentary evidence provided by Respondent firmly support the ALJ's findings. The Board should only grant Respondent's exceptions if it ignores the testimony of two impartial witnesses, rejects all but the favorable testimony given by Respondent, and disregards documents Respondent generated contemporaneously to the incidents that form the basis of the complaint in this matter.

## **II. RESPONDENT'S EXCEPTIONS**

### **A. The ALJ's Credibility Determinations Should not be Overturned**

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that the ALJ is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent cites only favorable portions of its witnesses' testimony, ignores documentary evidence contradicting that testimony, and urges the Board to accept inferences rejected by the ALJ. The ALJ cited the record to support his credibility determinations, and they should not be disturbed.

**B. The ALJ Correctly Found that Respondent Violated Garner's *Weingarten* Rights**

The ALJ found that Respondent violated 8(a)(1) by denying Garner union representation during an investigatory interview. (ALJD 12:34-38). In reliance on two cases, Respondent urges the Board to overrule the ALJ in this regard. Respondent cited *J.J. Cassone Bakery*, 345 NLRB 1305 (2005), to support its argument that a lack of factual or legal findings obligates the Board to overrule. In *J.J. Cassone*, the Board noted that the administrative law judge copied extensively from posthearing briefs and found this to be evidence of bias. *Id.* That is not the case here. The ALJ provided an independent analysis to support his findings. Respondent also cites *Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998). In that case, the matter was remanded for consideration of facts essential to the specific issues in question, namely, the parties' bargaining history, which the administrative law judge had failed to discuss. *Id.* Here, the ALJ gave due consideration to all essential facts with respect to Garner.

While the ALJ did not make findings of fact specific to the allegation immediately surrounding his legal conclusion, he made extensive relevant findings in the facts portion of the ALJD. Furthermore, this conclusion was reached in the context of three other established violations; in particular, that Respondent suspended Garner due to Garner's request. (ALJD 10:6-10). It is undisputed that Garner did not have union representation during the interview. *See* ALJD 2-3. Contrary to Respondent's assertion, there is ample support within the record that Respondent grossly violated Garner's rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Respondent states in its exceptions that it is an undisputed fact that Respondent

ceased its interview after Garner invoked his right to representation<sup>1</sup>. This is incorrect and General Counsel (CGC) disputed this assertion in his Brief to the ALJ, p. 16. In a statement Respondent drafted within two hours of interviewing Garner, Respondent states that it requested a statement from Garner several times after he invoked his right to representation. *See* GCX 3, Tr. 43:7-13, 46-47:14-17. However, because the fact that Garner had no union representation is truly not in dispute, and in light of the ALJ's thoroughly reasoned finding that Respondent suspended Garner for requesting union representation, the ALJ's finding that Respondent unlawfully denied Garner representation should not be disturbed.

**C. The ALJ Correctly Found that Respondent Unlawfully Suspended Garner**

The ALJ's finding that Respondent suspended Garner due to his request for union representation is overwhelmingly supported by the record, chiefly by Respondent's own documents. (ALJD 10:4-34).

**I. Authority**

The Board uses a *Wright Line* analysis in determining whether an employer disciplined an employee due to his assertion of *Weingarten* rights. *See T.N.T. Red Star Express*, 299 NLRB 894, 895 fn. 6 (1990). Under *Wright Line*, a violation is shown when there is: (1) protected activity by the employee (2) employer knowledge of the activity (3) adverse action taken by the employer and (4) when the employee's protected activity was a motivating factor for the employer's action. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

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<sup>1</sup> Respondent's Exceptions demonstrate a troubling disregard for accuracy. For example, in order to shore up Respondent's argument regarding the ALJ's credibility determination, Respondent states that "the ALJ rebuked Garner for testifying in narrative form on a number of occasions." Respondent provided no citation to the record to support this assertion, and CGC was unable to find any instance where this occurred.

## 2. *All Elements of Wright Line Were Met*

The ALJ found that when Garner asserted his right to union representation, he was engaged in protected concerted activity. (ALJD 10:5-6). His assertion was made directly to Respondent, who thereby had knowledge of the activity. The fact that SPI is not a step in progressive discipline does not mean it is not adverse. (ALJD 10 at fn. 22)<sup>2</sup>. As demonstrated by Respondent's SPI form, Garner faced the prospect of consequences ranging from unpaid time to termination. (ALJD 4-5:41-11). Respondent testified that SPI is uncomfortable for employees. (Tr. 649:13-14). In fact, SPI is arguably worse than progressive discipline, as it poses the immediate threat of termination in a way that some progressive discipline, such as a verbal counseling notice, does not. At the time Respondent suspended Garner, it gave no assurance that it would pay him or that it would not terminate him. Respondent urges a retrospective view of the SPI and its ultimately innocuous outcome without acknowledging the threatening nature of the SPI while in progress. While Respondent characterizes the SPI as having the purpose of allowing time for Garner to "cool off"<sup>3</sup> and for Respondent to obtain a shop steward, Respondent's own witness testified that using SPI for the purpose of obtaining a shop steward is improper. (Tr. 661:12-17). Respondent's emphasis on its

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<sup>2</sup> Respondent confuses the legal issue. The question is not whether the action taken was part of progressive discipline but whether it was adverse to the employee. *Wright Line*, 250 NLRB 1083 (1980).

<sup>3</sup> The ALJ properly dismissed Respondent's testimony that 5% of SPIs are to allow the employee to cool off. As the ALJ noted, there was no documentary evidence, and Respondent could not recall a single incident where this was the case. Furthermore, the ALJ might have considered the fact that Respondent's witness's credibility was called into question when she denied twice that a shop steward list existed (Tr. 637:22-25, 638:3-8) but later admitted that such a list was periodically requested and maintained by Respondent's employee relations department (Tr. 658-60:25-22). It is strange that Respondent claimed the need to SPI Garner when his shift was ten minutes from concluding. (Tr. 51:4-5, 38-39:16-3, 117:12-13). The ALJ noted that Respondent might have easily allowed Garner to wait or clock out early. (ALJD 10:18-20).

subjective purpose in suspending Garner overlooks the legally relevant matter of the SPI's effect.

### **3. Respondent Cites Distinguishable Authority**

Respondent cites *Roadway Express*, 246 NLRB 1127 (1979), as an example of an employer properly suspending an employee. In that case, the Board overturned the administrative law judge's finding that the employer violated the Act by suspending its employees because they refused to attend a meeting. *Id.* The prospect of an investigatory interview was uncertain. *Id.* In our case, the investigatory interview was in progress, and Garner had invoked his *Weingarten* rights before Respondent placed him on SPI. In *Roadway*, the Board noted:

Had [the employee] gone to the office, and had Respondent proceeded to conduct an investigatory interview in the absence of a union representative, we would have found that Respondent acted in derogation of [the employee's] *Weingarten* rights.

*Id.* at 1128. That is the situation here. Garner did not refuse to attend the investigatory interview as in *Roadway*; rather, he refused to give a statement during an investigatory interview after his request to have union representation was unfulfilled.

The ALJ correctly found that Garner's protected concerted activity was Respondent's motive for issuing the SPI. (ALJD 10:4-27). The ALJ took note of the close proximity in time between the protected activity and the SPI, and Respondent's own written statement and testimony.

### **4. The ALJ's Articulated Reasons for Dismissing Respondent's Affirmative Defenses Should not be Overturned**

As to Respondent's affirmative defenses, the ALJ found them unconvincing. (ALJD 10:14-27). Respondent argues that the ALJ improperly shifted the burden. He did not. If a *prima facie* case of a violation is made by General Counsel, the burden shifts to the employer

to show that it would have taken the same action even in the absence of the protected activity. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1189 (2004). The ALJ found that Respondent's argument that the SPI was due to Garner's agitation to be an unreasonable explanation unprecedented in Respondent's practice and contradicted by Respondent's contemporaneously-formed reports. (ALJD 4, 10:7-10). Respondent's statements cite Garner's failure to complete the interview as the reason for the SPI. (ALJD 10:7-10, fn. 21). They do not attribute the SPI to Garner's agitation, despite mentioning it, and no discipline was issued to Garner for his behavior during the interview. (ALJD 3:1-13, 10:21-23).<sup>4</sup>

**D. The ALJ Correctly Found that Respondent Unlawfully Prohibited Garner from Discussing the SPI**

The testimony of four individuals, including two impartial witnesses and Respondent's supervisor, support the ALJ's finding that Respondent forbade Garner from discussing his SPI. (ALJD 5:14-21). Respondent does not dispute that it gave the directive, rather that the directive was not a new rule. A rule is unlawful if it explicitly restricts activities protected by the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Employees have a Section 7 right to discuss discipline. *Caesar's Palace*, 336 NLRB 271, 272 (2001). The test for whether a statement made by an employer is unlawful is whether the words could reasonably be construed as coercive. *Double D. Construction Group*, 339 NLRB303, 303-04 (2003)<sup>5</sup>. There were roughly six other employees present at the time

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<sup>4</sup> Having found that Garner's protected activity was the cause for his SPI, the ALJ was unconvinced by Respondent's unsupported testimony that SPI is a common measure taken against agitated employees. The ALJ understandably discredited this testimony. (ALJD 4 at fn. 6).

<sup>5</sup> Respondent speculates that those present, many of whom did not testify, would not opine that Respondent promulgated a new rule. Even a substantiated opinion is not the basis for determining whether a rule was promulgated.

Respondent ordered Garner to cease discussing his discipline<sup>6</sup>. Respondent explicitly forbade Garner from discussing his discipline and made no contemporaneous declaration that the rule applied only to Garner. Thus, all six employees might have reasonably interpreted Respondent's statement as implementing a new, more restrictive policy forbidding discussion of discipline. See *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 777 (2006). The ALJ correctly found that Respondent committed a violation. (ALJD 12:3-5). Cf. *Lucky Cab Company*, 360 NLRB No. 43, fn 20 (2014) (Board finds employer's directive to employee "not to speak to anyone as she left [the] property," unlawful instruction interfering with employee's right to discuss discharge with fellow employees).

**E. The ALJ Correctly Found that Respondent Created the Impression of Surveillance of Garner's Union Activities**

The test for determining whether an employer has created the impression of surveillance is whether an employee would reasonably assume that his protected activities had been placed under surveillance. *Register Guard*, 344 NLRB 1142, 1144 (2005), *Flexsteel Industries*, 311 NLRB 257 (1993). There is no requirement that surveillance be surreptitious as Respondent suggests. Garner engaged in protected concerted activity in discussing his SPI with coworkers. *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011). Although Garner discussed his SPI in a public area of Respondent's facility, the testimony of two impartial witnesses and Respondent's supervisor established that Respondent followed Garner from the site of the investigatory interview (Tr. 100-01:15-5, 217:21-25), ordered him to cease his conversation and leave, and then followed him until he exited the area. (ALJD 4-

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<sup>6</sup> In *Flamingo Las Vegas Operating Co.*, 359 NLRB 1 (2013), the unlawful statement was made during a conversation between *two individuals*, and other significant matters were discussed. *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006), involved a phone call between one supervisor and one employee.

5:32-21). The agent of Respondent who exercised surveillance had no other explanation for why was in the area with Garner. *See* Tr. 57. Under the circumstances, Respondent's actions are not those of an employer coincidentally present during employees' protected concerted activity. Rather, Respondent made a deliberate effort to observe Garner's actions. Respondent reacted forcefully in the face of Garner's protected activity, then continued to monitor Garner until it was physically impossible for him to engage the group. The ALJ reasonably concluded that Respondent created the impression that Garner's activity was under surveillance. (ALJD 12:3-5).

**F. The ALJ Properly Admitted GCX 3 and 4**

General Counsel's Exhibit 3 is a written statement made by Respondent's representative within two hours of the events in question. (Tr. 43:7-13). GCX 4 is a written statement made by another of Respondent's representatives concerning the events in question. (Tr. 108:2-22). Respondent voiced no objection to the admission of either of these documents for any purpose. (Tr. 43:18-23, 28:16-19). Respondent waived its right to object to these exhibits. *Iron Workers Local 46*, 320 NLRB 982, fn. 1 (1996). Respondent relies on the factual assertions made in both of these documents in the statement of facts section of its Exceptions.

Even if the documents were not explicitly admitted by the judge for a proper purpose, the documents were nevertheless properly admitted as opposing party statements. FRE 801(d)(2). Respondent's argument that these documents do not satisfy FRE 801(6) is without merit<sup>7</sup>. With respect to GCX 4, the record demonstrates that the document fits squarely within the definition of documents allowed. *See* Tr. 27:4-19, 108:2-22.

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<sup>7</sup> Contrary to Respondent's assertion, the ALJ did not state that GCX 3 was admitted as a business record.

### **G. The ALJ Ordered a Proper Remedy**

The ALJ's order requires that Respondent take the remedial action of "remov[ing] from its files any reference to the unlawful SPI." Respondent's argument that this order is moot is incorrect. As demonstrated by the record, Respondent generates paperwork in connection with SPI and presumably retains that paperwork as part of its employees' files. *See* GCX 25, Tr. 52-53:7-2. It is more likely that Respondent simply does not track SPI issued to its employees, as Respondent stated in its Exceptions. *See* also Tr. 645:19-25, 646:11-13. If, however, Respondent has already discarded all documentation relating to Garner's SPI, then Respondent may be said to have complied with the order. However, without this assurance from the outset, the order is not moot.

The first "We Will Not" remedy ordered in the ALJ's order is tailored to fit the legal context in which employees are entitled to the rights provided in *Weingarten*, which Respondent denied Garner. The order's inclusion of the words "Union representative of your choice" does not violate the Act. Respondent cites outdated precedent for the rule that an employee may not request a particular union representative. Board law supports an employee's right to do so. *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001). Notice postings should be worded so as to be plain to the employees whom they are meant to inform. Requiring notices to contain a list of all exceptions to the general rule of law would dilute the effectiveness of the order. A reasonable interpretation of the notice's wording would not lead an average employee to conclude that Respondent is never permitted to prohibit employees from discussing discipline.

#### IV. CONCLUSION

The ALJD with regard to Garner is comprised of proper credibility determinations and thorough reasoning based on the record as a whole. Respondent's Exceptions to the ALJD should be dismissed. The ALJ's decision, except for those issues which are being raised in exceptions by the General Counsel, should be upheld.

Dated at Las Vegas, Nevada, this 9<sup>th</sup> day of May 2014.

Respectfully submitted,

*/s/ Nathan A. Higley*

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## CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF** in Bellagio, LLC, Cases 28-CA-106634 and 28-CA-107374 was served via E-Gov, E-Filing, and electronic mail, on this 9<sup>th</sup> day of May 2014, on the following:

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