

**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**

**GENERAL COUNSEL'S CROSS-EXCEPTIONS AND  
BRIEF IN SUPPORT**

**Respectfully submitted,**

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**GENERAL COUNSEL'S CROSS-EXCEPTIONS**

Counsel for the General Counsel (CGC) excepts to Administrative Law Judge Robert A. Ringler's Decision (ALJD) [JD(ATL)-14-14], issued on March 20, 2014, ALJD 5-8:29-9, 10-11:38-40, 12:19-25, as follows:.

1. The ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance of the protected concerted activities of its employee Charging Party Najia Zaidi.
2. The ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act by conducting a retaliatory investigation of Zaidi. The ALJ found that Zaidi was engaged in protected concerted activity and CGC established a prima facie case, but that Respondent demonstrated it would have taken the same action regardless of Zaidi's protected concerted activity.

In support of these exceptions, CGC relies on the record in this case and the ALJD.

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**BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

**I. INTRODUCTION**

The ALJ concluded that CGC established a prima facie case that Respondent's investigatory meetings were designed to retaliate against Zaidi. (ALJD 11:6-10). He reasoned, however, that Respondent demonstrated that it would have taken the same action in the absence of Zaidi's protected concerted activity. (ALJD 11:36-39). In doing so, the ALJ ignored two crucial facts. Respondent's investigation inexplicably continued even after Zaidi had been exculpated. Respondent failed to notify Zaidi of its exculpatory findings until two months after making those findings. Even then, she received mixed messages.

Regarding the allegation that Respondent had created the impression of surveillance, the ALJ concluded that Respondent's discreet search of Zaidi's e-mail as part of its investigation would not reasonably cause someone to presume surveillance. The ALJ evaluated the facts far too narrowly. He focused only on Respondent's investigation of Zaidi after her initial investigatory interview with Respondent. Due, perhaps, to a mistaken finding of fact not supported by the record, the ALJ ignored the initial investigatory interview itself and its tendency to create the impression of surveillance. In addition, the ALJ's findings of

fact seem to focus exclusively on the question of whether Respondent conducted actual surveillance rather than the true legal issue of whether Respondent created the impression of surveillance.

## **II. STATEMENT OF FACTS**

### **A. Zaidi Engaged in Protected Concerted Activity**

Zaidi works as a Front Services Dispatcher. Around December 3, 2012, she requested to meet with Respondent's Executive Director of Hotel Operations to discuss her concerns about the valet break room. (Tr. 574:15-23, 575:19-24). The ALJ found that Zaidi's discussion constituted protected concerted activity and that the executive displayed animus toward her activity. (ALJD 11:7-9, Tr. 590:3-17).

Around January 20, Zaidi went to her supervisor's office to discuss those same concerns. (Tr. 229:21-22, 230:23-25, 235:13-23). The supervisor testified that although he had heard other employees had similar concerns, Zaidi was the only one who approached him. (Tr. 232:11-18). The supervisor relayed Zaidi's complaint to the same executive to whom she had initially complained. (Tr. 237:7-19). The executive confirmed that he had already met with Zaidi about her concerns. (Tr. 238:17-22, 239:14-16).

### **B. Respondent Investigated Zaidi on the Heels of Her Concerted Activities**

Eleven days later, the executive, a man in charge of 2,900 employees (Tr. 561:12-15, 561:18-22), personally conducted an interview with Zaidi, regarding an alleged violation of one of its policies, the only time during his employment with Respondent that he had ever done so (Tr. 588:18-22). He did so without any effort to verify the authenticity of the documents that raised his suspicions (Tr. 589:18-23) and without any effort to discover who left the documents (Tr. 582:7-21). It was the first time the executive had met with Zaidi since

a previous discussion, which the ALJ found constituted protected concerted activity and in which the ALJ found the executive displayed animus toward that activity. (ALJD 11:7-9, Tr. 590:3-17).

**C. Respondent Continued Its Investigation with Knowledge that There Was No Basis for Discipline**

During its subsequent investigation, Respondent located exculpatory evidence for Zaidi (Tr. 259:5-6, 487-88:25-4, see also GCX 7) and found no other apparent violations (Tr. 488:5-13). Respondent concluded that the error was a one-time mistake. (Tr. 488:5-13). The investigation was concluded within two days. (Tr. 488:17-18). Zaidi was instructed to report for her next shift, having missed no work. (Tr. 260:12-17). Inexplicably, Respondent never informed Zaidi that it had found exculpatory evidence. It was not until she returned to work that Zaidi located the exculpatory e-mail on her own. (Tr. 334-35:17-10).

On that same day, with awareness of the exculpatory e-mail, Respondent conducted a meeting with Zaidi. (Tr. 489:3-18). Respondent's alleged purpose was to verify that Zaidi understood Respondent's policies. (Tr. 489:3-18, 506:11-25, 513:16-22, 528:2-4). In Respondent's security department, with two investigators present, Zaidi spoke with a coworker about matters that did not concern the purported purpose for the meeting. (Tr. 528:10-13). When Zaidi finished consulting her coworker, Respondent asked whether Zaidi had been trained on the policy she was alleged to have violated and asked her to provide a statement. (Tr. 287:17-18, 289:18-23, 528:14-19). Zaidi spent an hour generating a seven-page statement. (Tr. 289:24-8, see RX 13). At no time did Respondent ask why Zaidi was providing information it deemed unrelated to its unstated purpose for the interview. (Tr. 537:21-25). Her statement includes her belief that an unauthorized user had accessed her e-

mail account. (RX 13). Respondent reviewed Zaidi's statement and made no comment. (Tr. 528:20-25, 530:7-12).

**D. Respondent Did Not Inform Zaidi the Investigation Was Closed Until a Month after the Fact**

Three weeks after Zaidi's initial meeting with Respondent regarding her alleged violation and nearly the same amount of time after Respondent concluded that Zaidi had not violated company policy, Respondent informed Zaidi that its investigation was closed. (Tr. 257:11-14, 258:3-9,14-18, 665:18-24, GCX 40(a)). During this meeting, Zaidi stated that she believed Respondent was monitoring her e-mail. (Tr. 262:19-23, 350-51:19-5). Respondent denied this and stated that the investigation was closed. (GCX 40(a)).

**III. THE ALJ FAILED TO TAKE NOTE OF KEY FACTS IN FINDING THAT RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT IN ITS INVESTIGATION OF ZAIDI**

Counsel for the General Counsel respectfully submits that the ALJ overlooked key facts and misconstrued evidence in failing to find that Respondent's investigation of Zaidi was retaliatory.

**A. The ALJ Correctly Determined that CGC Established a Prima Facie Case**

As demonstrated by the facts above, the ALJ reasonably concluded that CGC established a prima facie case that Respondent's investigation was retaliatory. However, the ALJ made the following observations in finding Respondent's affirmative defenses convincing: Respondent has an interest in enforcing its policies and may properly do so through investigations. The record did not prove that the executive in question had access to Zaidi's e-mail. Nearly two months had passed from the time of Zaidi's meeting with the executive and the time he conducted the investigatory interview. The investigation did not result in discipline. Respondent lent assistance in Zaidi's efforts to exculpate herself. The

ALJ concluded that, had the executive actually searched Zaidi's e-mail, he would have found and deleted the exculpatory e-mail and would not have relinquished control over the investigation. None of these defenses adequately address the facts and the legal issue in this case. (ALJD 11:14-32).

**B. The ALJ Considered Respondent's Affirmative Defenses under an Incorrect Legal Framework**

Counsel for the General Counsel does not dispute that Respondent has a legitimate interest in investigating alleged misconduct. The problem in this case is that the circumstances surrounding the investigation and the manner in which it was conducted demonstrate that the investigation had the unlawful purpose of retaliating against Zaidi. The ALJ's finding that CGC did not prove that the executive accessed Zaidi's e-mail only aids an argument that Respondent did not contrive the investigation. But even an investigation based on legitimate grounds may nevertheless be conducted in an unlawful manner. As argued more fully below, CGC's theory does not depend on Respondent's actually searching Zaidi's e-mail.

**C. The ALJ's Conclusions Do Not Support a Finding of No Violation**

***1. The ALJ Misstated the Relevant Time Frame***

The ALJ's observation that two months had elapsed from the time that Zaidi complained directly to the executive who conducted the investigatory interview ignores the fact that Zaidi's supervisor had reported the same complaints to the executive only 11 days before. Zaidi's protected concerted activity was ongoing, and Respondent was aware at every pertinent level. In any case, these findings do not prove that Respondent did not seize the opportunity to retaliate against Zaidi.

**2. *The Lack of Discipline Does Not Show Lack of Retaliation***

While Respondent ultimately did not issue Zaidi discipline for the alleged policy violation – it would have been hard-pressed to justify such discipline in light of its conclusion that the error was a one-time mistake, that was corrected within seven minutes – it is what Respondent did in the intervening month before it informed Zaidi that the investigation was closed and the fact that it took a month to do so that make Respondent’s investigation retaliatory.

**3. *All Aid Offered by Respondent Was by Unrelated Individuals***

Although Respondent did attempt to help Zaidi locate the exculpatory e-mail, here the ALJ slightly misstates the facts. When Zaidi informed a supervisor who was privy to the investigation that she believed she had corrected the alleged violation, he instructed to prove it. (Tr. 253:9-16). It was a lower-level supervisor who was not aware of the investigation who responded to her request for assistance, and he was ultimately unsuccessful in helping her locate the exculpatory e-mail she sought. (Tr. 283-84:21-21, 285:1, 603:20-21). Contrary to the ALJ’s finding, the executive responsible for the investigation did nothing to aid Zaidi in freeing herself from suspicion.

**4. *The ALJ’s Conclusion Supports a Finding of Violation***

In fact, the ALJ observed that it was unlikely that such a high-level executive would stoop to retaliate in such a minor matter. (ALJD 11:27-29). This same observation calls into question why the executive took such a rare and intense interest in the matter to begin with. An investigator for Respondent testified that the executive personally contacted her prior to turning the matter over to human resources. (Tr. 479:22-24, 481:15-23). Even before contacting human resources and initiating a formal investigation, the executive showed the

investigator copies of the documents that led to his suspicion of Zaidi and informed the investigator that the documents came from his department. (Tr. 481:19-23, 482:24-2, 651:23-25). Only then did the executive provide a copy of the documents to human resources. (Tr. 652:8-10).

**5. *The Record Demonstrates that Respondent Retaliated***

Finally, Respondent never provided a reasonable explanation for the events that occurred after it closed its investigation. Even after the investigation was deemed closed, Respondent ordered an interview of Zaidi in its security office. Whatever Respondent's purpose, it allowed Zaidi to languish for an hour, writing seven pages setting forth her position with regard to the investigation she deemed ongoing. At no time during that interview did Respondent inform Zaidi that the interview was concluded, leaving Zaidi under the impression that she was still under investigation. In fact, it was not until nearly a month later that Respondent informed Zaidi that the investigation was closed. The same supervisor to whom she voiced her protected concerted complaint and who was aware within two days of the initial interview that the investigation was closed, only informed Zaidi after being prompted by human resources. To date, there is no evidence that Zaidi was ever informed that Respondent located the exculpatory e-mail.

**6. *Conclusion***

These are not the actions of an employer conducting a neutral investigation. These facts demonstrate that Respondent's action was retaliatory. CGC respectfully posits that the ALJ failed to consider these facts and improperly relied on unrelated factors in reaching his conclusions in this regard. CGC respectfully requests that the Board overturn the ALJ's

decision and find that Respondent conducted its investigation in a retaliatory manner, unlawful under Section 8(a)(1) of the Act.

**IV. THE ALJ MADE A MISTAKEN FINDING OF FACT AND OVERLOOKED KEY FACTS IN FINDING THAT RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT IN CREATING AN UNLAWFUL IMPRESSION OF SURVEILLANCE**

Counsel for the General Counsel respectfully submits that the ALJ performed an incorrect legal evaluation, relied on a mistaken finding of facts, and overlooked key facts in failing to find that Respondent created the impression of surveillance. An employer unlawfully creates an impression of surveillance if an employee would reasonably assume that her protected activities had been placed under surveillance. *Register Guard*, 344 NLRB 1142, 1144 (2005), *Flexsteel Industries*, 311 NLRB 257 (1993).

**A. The ALJ Did Not Perform the Correct Legal Analysis**

The ALJ's decision demonstrates a misdirected legal focus. The ALJ took issue with CGC's failure to provide proof of actual surveillance rather than analyzing whether Respondent had created the impression of surveillance.

**B. The ALJ Made a Mistaken Finding of Fact Not Supported by the Record**

In his analysis, the ALJ made a slight but crucial mistake of fact. The ALJ stated that during Respondent's initial interview of Zaidi, Respondent showed Zaidi the e-mail that demonstrated her alleged violation and the letter that accompanied the e-mail. The accompanying letter would demonstrate that the e-mail was delivered to Respondent and counter the reasonable assumption that Respondent had proactively searched out and located it. While Respondent informed Zaidi that the e-mail was provided by an anonymous source, the record provides no basis to conclude that Respondent ever showed Zaidi the accompanying letter or any evidence of its claim that the e-mail was delivered anonymously.

(Tr. 324:9-23). It is understandable, therefore, that Zaidi concluded that her activities were under surveillance, a claim that she repeated to Respondent's security personnel during her second interview and to her supervisor when he finally informed her that the investigation was closed. To Zaidi more than anyone else, the source of the letter and e-mail remained a "full-blown mystery." (ALJD 6:41-42).

**C. The Record Demonstrates that Respondent Created an Unlawful Impression of Surveillance**

For an entire month, Respondent benefited from the impression it had given Zaidi that her activities were under surveillance. Under these circumstances, coming on the tail of her protected concerted complaint, Zaidi and any other employee believing her position with her employer to be precarious and her activity to monitored is far less likely to make similar complaints. Indeed, while Zaidi complained to her supervisor regarding the valet break room, the record shows that she ceased pursuit of the petition she formed and made few other efforts to address her grievances regarding the matter.

Thus, while the record may not prove that Respondent conducted unlawful surveillance, this is not the legal issue to be decided. The ALJ did not evaluate whether Respondent created the impression of surveillance. The ALJ mistakenly relied on a fact not established by the record. Under this slightly misdirected evaluation and based on this flawed set of facts, the ALJ reached an improper conclusion and failed to find that Respondent violated Section 8(a)(1) of the Act by creating within Zaidi the reasonable impression that her protected concerted activities were under surveillance by Respondent.

**V. CONCLUSION**

Based upon the foregoing and the record evidence considered as a whole, CGC respectfully submits that the ALJ erred by failing to find that Respondent violated Section

8(a)(1) by conducting a retaliatory investigation against its employee and by creating an unlawful impression of surveillance.

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S CROSS-EXCEPTIONS AND BRIEF IN SUPPORT** in BELLAGIO, LLC., Cases 28-CA-106634 and 28-CA-107374, was served by E-Gov, E-filing, and by electronic mail, on this 9<sup>th</sup> day of May 2014, on the following:

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