

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IN THE MATTER OF:

ALIANTE GAMING, LLC d/b/a
ALIANTE CASINO AND HOTEL,

Respondent,

and

Case No. 28-CA-126480

LOCAL JOINT EXECUTIVE BOARD
OF LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 and BARTENDERS
UNION LOCAL 165 affiliated with
UNITE HERE

Charging Party.

**RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S CROSS
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Respondent Aliante Gaming, LLC d/b/a Aliante Casino and Hotel (the “Employer,” “Respondent,” or “Aliante”), pursuant to Sections 102.46(d) of the National Labor Relations Board’s (the “Board”) Rules and Regulations, submits this Answering Brief to the Charging Party’s Cross-Exceptions and Brief in Support of Cross-Exceptions to the decision of Administrative Law Judge Kenneth W. Chu (the “ALJ”) dated March 17, 2015 (“Cross-Exceptions”).

For the reasons set forth below, Charging Party’s Cross Exceptions should be denied. First, the ALJ correctly found that Buffet Manager, Bonnie Schafer-Rabonza (“Rabonza”),¹ never instructed or gave Cruz a directive not to discuss her suspension. On October 3, 2014, Counsel for the General Counsel filed its Notice of Intent to Amend Consolidated Complaint. Pursuant to the Amended Consolidated Complaint, Counsel for the General Counsel claimed that Aliante violated Section 8(a)(1) the National Labor Relations Act (“the Act”) when Rabonza, allegedly “promulgated and since maintained a directive or rule that its employees may not speak to its other employees about the discipline they receive.” According to Counsel for the General Counsel, Rabonza promulgated a directive or rule when she allegedly told Maria Lourdes Cruz Sanchez (“Cruz”) to:

Do me a favor, go home and don’t tell anybody, because nobody knows anything about it.

The “it” refers to a suspension pending investigation that Rabonza issued Cruz for providing horrendous service to Aliante’s President and General Manager Terry Downey (“Downey”).

¹ Although Aliante addressed Bonnie Schafer-Rabonza as “Schafer” in other filings, it will use “Rabonza” in the Answering Brief to be consistent with how the ALJ and Counsel for the General Counsel identified her.

The ALJ appropriately dismissed this allegation because the “record shows, and [he] find[s], that Cruz was never instructed or given a directive not to discuss her discipline.” (ALJD 18, 1. 16-18). As more fully explained below, the ALJ’s finding is supported by both fact and law and should not be disturbed.

Second, the ALJ properly rejected Charging Party’s Exhibit 16 (“CP 16”), which consisted of emails between management and meeting points from late-September 2014. This evidence post-dated Cruz’s termination and is not relevant to the issues in this case. Further, contrary to Charging Party’s position, CP 16 does not impeach Vice President of Human Resources Richard Danzak’s (“Danzak”) testimony regarding union activity in early 2014. As such, it had no bearing on this matter and was properly excluded.

Accordingly, Charging Party’s Cross-Exceptions are wholly unsupported and should be denied.

II. REVELANT FACTUAL BACKGROUND

A. The April 3, 2014 Incident

On April 3, 2014, Downey escorted his former in-laws to the Medley Buffet. (Tr. 205; GC Exh. 16). There were five people in the dining party and Downey was providing them with a complimentary lunch. (Tr. 212; GC Exh. 17). Since Downey was providing lunch for his guests, he had prepared a complimentary slip stating that they were to receive a free meal at Medley Buffet. (Tr. 212; GC Exh. 17).

As Downey approached Cruz to give her the complimentary lunch slip that he had prepared, Downey noticed that Cruz had her head down and “was doing something with some papers on the counter.” (Tr. 264; GC Exh. 16). Cruz, therefore, did not make eye contact with or smile at Downey. (GC Exh. 16). Cruz also did not greet or speak to Downey. (GC Exh. 16).

Due to Cruz “not paying attention” to him, Downey placed the complimentary lunch slip on the counter “in front of her” and told Cruz that he had a “comp here for five people.” (Tr. 214, 264; GC Exh. 16). In response, Cruz “slid the comp slip down and looked at it.” (Tr. 264). Cruz, however, testified that she “grabbed the comp” from Downey. (Tr. 617).

While still looking down, Cruz then asked Downey for his identification. (Tr. 214, 263-64; GC Exh. 16). Downey complied with the request and presented his identification to Cruz. (Tr. 214, 263; GC Exh. 16). After Downey gave Cruz his identification, Cruz looked up for the first time and told Downey “this is not you.” (Tr. 214, 263; GC Exh. 16). Downey then pointed at his name on the bottom of the complimentary slip and explained to Cruz that he was the person authorizing the complimentary. (Tr. 215; GC Exh. 16).

Shortly after Downey gave his identification to Cruz, another Team Member approached Downey and said “hello” to him. (Tr. 263; GC Exh. 16). The Team Member also asked Downey “how the day’s business was going.” (Tr. 263; GC Exh. 16). When the Team Member started talking with Downey, Cruz looked befuddled. (Tr. 277-78). Cruz, however, did not say anything to Downey. (Tr. 277). Instead, she remained busy with whatever she was doing on the counter. (Tr. 278). During the entire transaction, Cruz “never made any type of an attempt at a greeting, conversation or farewell.” (Tr. 277-78; GC Exh. 16).

After speaking with Downey, the other Team Member started walking towards the hostess line at the buffet. (Tr. 265). Upon seeing this, Downey told his guests to go with the Team Member who had appropriately greeted him. (Tr. 265).

After leaving his guests, Downey returned to his office and asked his assistant to contact Robert Bethune (“Bethune”), the Vice President of Food and Beverage. (Tr. 205-06, 266). Bethune then contacted Rabonza and told her that there had been a service incident involving Downey. (Tr. 677-78; GC Exh. 34). When Bethune arrived at Downey’s office, Downey

proceeded to tell him about the unacceptable service experience he just endured at Medley Buffet. (Tr. 209, 266).

At some point during the late afternoon on April 3, Bethune and Rabonza reviewed the video of the incident. (Tr. 678-81, 700). Based upon what she saw on the video, Rabonza stated that Cruz did not meet Aliante's service standards. (Tr. 680). After reviewing the video, Bethune and Rabonza went to Human Resources, where Bethune informed the Vice President of Human Resources, Richard Danzak ("Danzak") about the poor guest service experience that Downey had just experienced. (Tr. 761). At this point, Danzak felt no need to personally speak with Downey, because there was "no reason not to believe the President of the company." (Tr. 764). As Danzak explained, Downey was particularly credible because he had "no reason to make up anything." (Tr. 767). In his position, "he's looking out for the best interest of the property," which makes his complaint even "more believable than a guest who might have been disgruntled." (Tr. 767). Danzak also personally knew and believed that Downey was "an honest and trustworthy person". (Tr. 800).

The following day, Heidi Heath ("Heath"), Aliante's Team Member Relations and Risk Manager, instructed Rabonza to suspend Cruz pending an investigation. (Tr. 425, 541-42). A suspension pending investigation was appropriate due to Cruz's active disciplines, prior coaching sessions, and her general behavior, as witnessed on the video by Rabonza and Bethune. (Tr. 312).

B. The April 4, 2014 Suspension

Rabonza met with Cruz before Cruz started her shift on April 4, 2014. (Tr. 541, 683). The purpose of the meeting was to suspend Cruz pending an investigation into the April 3 incident with Downey. (Tr. 425; 541-42). Such suspensions are not considered discipline. (Tr. 394).

During the meeting, Rabonza informed Cruz that she was being suspended because she violated company policy. (Tr. 541, 683). Rabonza also informed Cruz that managers would not discuss her suspension, “so if she wanted someone to know, or if anybody did know, it would be strictly com[ing] from her.” (Tr. 690-91). Cruz, however, testified that Rabonza gave her a notice of her suspension and told her “do me a favor, go home and don’t tell anybody, because nobody knows anything about it.” (Tr. 614). Cruz did not say anything in response to receiving the suspension. (Tr. 683).

Rabonza’s account of her statement to Cruz complied with manager training, called HR 101, that Aliante provides to all managers and supervisors. (Tr. 748-49; RX B(18)). During this training, managers and supervisors are told “that it is NOT appropriate” for managers to tell employees that they must keep any coaching/discipline conversation confidential or to themselves. (Tr. 690, 749; RX B(18) (emphasis in original)). Aliante also trains its managers and supervisors that “Team Members may share disciplinary information or details of the investigation that pertain to them directly, as long as the information is isolated to only them.” (Tr. 690, 749; RX B(19)).

C. Charging Party’s Exhibit 16

The hearing on the matter took place over the course of five days. On the last day of the hearing, December 2, 2014, Charging Party introduced CP16, to which Respondent’s counsel objected on the grounds of relevancy. (*See* Tr. p. 852). Specifically, CP 16 consisted of a few emails between management dated late-September 2014 and the bullet points for upcoming small meetings with Team Members regarding recent union activity. Respondent’s counsel objected to the admission of Charging Party’s Exhibit 16 based on relevancy because the emails post-dated Cruz’s termination and, as such, cannot show that Cruz’s discharge was motivated by union animus. (*See* Tr. p. 852). The ALJ sustained Respondent’s objection because the emails were

irrelevant – none of the emails mentioned Cruz or her termination. (Tr. p. 852). The ALJ explained that he allowed the subpoena to extend to October 2014 because he “wanted to see if there were any handbills that referenced the discharge of Ms. Cruz after the – after her termination and whether that has some anti-union animus involvement.” (Tr. p. 853). Charging Party disagreed and argued that Exhibit 16 created a factual issue with Danzak’s testimony regarding Union activity in 2014. (See Tr. p. 854). Charging Party further stated that “these documents go to show the level of Employer response throughout 2014.” (Tr. p. 854). The ALJ was not persuaded and stated “I think I can render a fair decision and – based on the evidence of Union activity prior to her discharge.” (Tr. p. 854). Accordingly, the ALJ placed Charging Party Exhibit 16 in the rejected exhibit file. (Tr. p. 855).

III. LEGAL ARGUMENT

A. Rabonza Did Not Direct Cruz To Not Talk About Her Suspension.

The ALJ correctly found that Rabonza never instructed or gave Cruz a directive not to discuss her suspension.² (ALJD p. 18, l. 17-18). Rabonza emphatically denied telling Cruz that she could not speak about her suspension to other Team Members. (Tr. 690-91). Instead, Rabonza did the opposite and informed Cruz that management would not discuss it. (Tr. 690-91). Rabonza’s testimony is consistent with the training she received on this issue, where she was instructed “that it is NOT appropriate” for managers to tell employees that they must keep any coaching/discipline conversation confidential or to themselves. (Tr. 690, 749; RX B(18) (emphasis in original)).

² Although the ALJ described the suspension pending investigation as “discipline,” it is undisputed that such suspensions are not considered discipline. (Tr. 394). Aliante actually does not issue disciplinary suspensions. (Tr. 394). This is because Aliante pays employees for “any missed time” if they are returned to work after being suspended pending investigation. (Tr. 394).

Although Cruz claimed that Rabonza asked her for a favor by not talking about the suspension, Cruz's testimony should not be credited. As Respondent established, Cruz had a history of violating company policy and she was disciplined for such violations. For example, on May 2, 2013, Aliante issued Cruz a documented coaching for engaging in disrespectful behavior towards a guest. (GC 25). Subsequently, she was again counseled three times for exhibiting unacceptable behavior towards guests and employees. (GC 32(b), 33(b)). Cruz also received a written warning on April 3, 2014, for being rude and discourteous towards a guest. (GC 23). When Cruz received these multiple counseling and disciplines, she was not told to keep such counseling and disciplines confidential. There is simply nothing in the record to even support such an inference.

Despite the fact that Cruz has never been directed not to talk about her prior disciplines, Cruz self-servingly stated that Rabonza – out of the blue and for the first time – asked Cruz “for a favor” by not talking about her suspension. Considering managers like Rabonza are trained not to give such instructions and Cruz was never given such requests in the past, the logical inference is that Rabonza never made such representations to Cruz, which is consistent with her testimony. Crediting Rabonza's testimony, based upon an objective analysis of the record, results in the conclusion that Rabonza did not ask Cruz for any favors regarding discussing the suspension.

Therefore, the ALJ appropriately found that the record shows “that Cruz was never instructed or given a directive not to discuss her discipline.”

B. Rabonza's Alleged Statement Would Not Have Been Unlawful

Even assuming that the version of the events that Cruz testified to were true, the ALJ correctly found that Rabonza's statement was neither a directive, nor a work rule. (ALJD p. 18,

l. 19-33). The Board set forth a framework for determining whether a supervisor's statement constitutes a "work rule" for purposes of violating the Act in *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006) and *Las Vegas Operating Co., LLC*, 359 NLRB No. 98 (2013). As proclaimed by the Board in those matters, a single, isolated conversation between management and an employee cannot logically be considered promulgation of a work rule. *See St. Mary's Hospital of Blue Springs*, 346 NLRB at 777 (rule communicated to single employee where the restriction was tailored to a specific event is not a violation of the Act); *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, slip op. at 2. (Cross Exceptions, p. 4). In its Cross-Exceptions, Charging Party argues that "Respondent violated Section (8)(a)(1) when Rabonza told Cruz not to 'tell anybody' about her suspension-pending-investigation." (*See* Cross Exceptions, p. 4). Charging Party's position is contrary to Board law and the record evidence, as well as inconsistent with the Amended Complaint. As such, Charging Party's cross exceptions should be denied.

Although Charging Party does not appear to argue that Rabonza's statement constitutes a "work rule," it nevertheless contends that Rabonza's "directive" violated the Act because it was "clearly threatening." (*See* Cross-Exceptions, pp. 4-5). Charging Party apparently fails to recognize that, under the Board's standard, an employer's directive must be an actual "work rule" with binding effect on employees in order to violate the Act. *See Praxair Distribution, Inc.*, 359 NLRB No. 7, slip op. 6 (2012) (dismissing allegations based upon a "directive" issued to an employee because the directive "did not amount to a 'rule' of any kind" and, therefore did not constitute an unlawful confidentiality rule). Charging Party's position cannot withstand legal scrutiny.

There is no question that a "directive" and a "statement directed" to an employee are the same. Indeed, a statement "**directed**" to one employee cannot be considered a work rule in

violation of the Act. This is further established by the Board's reasoning in *St. Mary's Hospital of Blue Springs*. In *St. Mary's Hospital of Blue Springs*, a supervisor reprimanded an off-duty employee who was an active union supporter for telephoning another employee to discuss a labor-management issue while that employee was working at the hospital. *St. Mary's Hospital of Blue Springs*, 346 NLRB at 777. During a heated phone call, the supervisor told the off-duty employee: "You cannot call and you cannot talk and you cannot call the nurses while I am here and talk about the union." *Id.* at 776-77. Although the employer in *St. Mary's Hospital of Blue Springs* gave its employee a directive, the Board still found that the supervisor's comments "could not reasonably be interpreted as establishing that he intended to implement a new, more restrictive solicitation policy regarding employee in the hospital." *Id.* This was due to the directive being issued to only one employee. *Id.*

In fact, the Board applied the same reasoning in *Las Vegas Operating Co., LLC*, 359 NLRB No. 98, where it found that a "directive" issued by a manager to one employee does not create an illegal work rule. Slip op. at 2. In that matter, the Board relied on the reasoning of *St. Mary's Hospital of Blue Springs* (as discussed above) when it dismissed allegations that an employer promulgated an overly-broad rule. The Board dismissed the allegations because the employer's general manager only "directed" his comments to one employee. *Id.*

As established, Aliante's policy is that Team Members are free to discuss any discipline with co-workers. (Tr. 690, 749; RX B(18)-(19)). Supervisors are fully trained on this policy and instructed that it is not appropriate to tell Team Members that their disciplines are confidential. (Tr. 690, 749; RX B(18)-(19)). Even if Rabonza violated this policy, which both she and Aliante both vehemently deny, her statement was directed *solely* to Cruz. As such, under *St. Mary's Hospital of Blue Springs* and *Las Vegas Operating Co., LLC*, 359 NLRB No. 98, Aliante could not be considered to have promulgated a rule in violation of the Act.

Accordingly, the ALJ appropriately dismissed this allegation based on the holdings in *St. Mary's Hospital of Blue Springs* and *Las Vegas Operating Co., LLC*, 359 NLRB No. 98.

Furthermore, in an attempt to circumvent the ALJ's decision and well-established Board law, Charging Party mischaracterizes the record and posits that Rabonza's statement was an "unlawful admonition that Cruz not speak about her suspending with an implied threat of further reprisal should she do so." (Cross Exceptions, pp. 4-5). In support of its position, Charging Party incorrectly relies on the Board's decision in *Aladdin Gaming, LLC*, 345 NLRB 585 (2005). In *Aladdin Gaming, LLC*, the Board found that an employer violated Section 8(a)(1) of the Act by threatening employees if they did not stop wearing union buttons. 345 NLRB at 598. Although a manager for the employer did ask an employee to "do him a favor" and take off the union button, the manager also threatened to suspend the employee if he did not remove the button. *Id.* at 597-58. It was the threat of suspension that elevated the comments into an illegal work rule against wearing union buttons. *Id.* at 598. The fact that the manager asked "for a favor," standing alone, was not viewed as a "directive" that violated the Act. Considering Rabonza did not threaten Cruz with retaliation if she failed to comply with her request, *Aladdin Gaming, LLC* cannot be applied to the current situation.

Therefore, the ALJ appropriately found that Rabonza's comments, even given Cruz's version of the events, were not an unlawful work rule directive.

C. The ALJ Properly Excluded Charging Party's Exhibit 16 as Irrelevant.

Charging Party's Exhibit 16 is inadmissible because it is irrelevant and, as such, the ALJ properly rejected its admission into evidence. During the December 2 hearing, Charging Party introduced its Exhibit 16 for admission into the record. (*See Tr.* p. 852). Respondent objected to the admission of Charging Party's Exhibit 16 because it consisted of emails that post-dated Cruz's termination and were not relevant to the issues in this case. The ALJ sustained

Respondent's objection based on relevance and noted that neither Cruz, nor her termination, were mentioned anywhere in those documents. Charging Party now argues that these emails are relevant to show that Respondent harbored union animus and to impeach Danzak's testimony that union involvement remained steady from 2012 to 2014, and that there was no upsurge in early 2014. Charging Party's argument is unconvincing.

Charging Party's Exhibit 16 does not show that Respondent harbored union animus at the time Cruz was terminated. Charging Party argues that CP 16 is relevant because it shows "consisten[cy] with Respondent's pre-discharge communications showing that it was opposed to unionization at the property." (*See* Cross Exception, p. 5). Charging Party further contends that CP 16 helps to show "that Respondent's concern for union organizing, was not fleeting, but sustained over the period of time that encompassed the discharge." (Cross Exceptions, p. 6). Charging Party's reliance on CP 16 to show sustained concern for union organizing throughout 2014, including the time of Cruz's discharge, is seriously misplaced. First, undercutting Charging Party's position, there are no emails or communications from Respondent regarding union activity from February 2014 until late-September 2014. As such, there is no evidence of continued union activity throughout this time. In fact, there is no evidence of any union activity (i.e., no communications between management) at the time of Cruz's termination. The only logical explanation for the large gap in discussions about the union is that Respondent was not concerned about union activity during this time period, which encompasses Cruz's termination.

Additionally, CP 16 does not impeach Danzak's testimony that there was not an upsurge of union activity in early 2014. In its Cross-Exceptions, Charging Party contends that, because CP 16 indicates Danzak's involvement in orchestrating what it referred to as "anti-union" meetings, when coupled with the "pre-discharge communications," CP 16 serves as evidence of Respondent's union animus. Charging Party's argument fails, however, because: (1) it does not

show an upsurge in union activity in early 2014; and (2) does not establish union animus at the time Cruz was terminated. Indeed, belying Charging Party's position, CP 16 shows that there was not an upsurge in union activity in early 2014 because, unlike the February 2014 emails, Respondent takes a more aggressive approach in CP 16 and actually sets forth a plan to address the increased union activity. In contrast, the February 2014 emails and communications merely discuss a couple of incidents of handbilling in the employee lunchroom and generalized discontent with unionization. Tellingly, the February 2014 emails do not show any indication that Respondent is arranging for Team Member meetings to discuss the Union. Irrefutably, if there had been an upsurge in union activity in early 2014, as Charging Party would have the Board believe, the February 2014 emails would similarly set forth a plan to meet with the Team Members to address the Union.

Additionally, in support of its position, Charging Party points to the language in the bullet points for the Team Member meetings for September 2014, which states "For the last few months, we have heard that a small group of union pushers have been trying to sell the idea of bringing a union in here is a good idea -- EVEN IF WE DON'T AGREE WITH THEM." (*See* Cross Exceptions, p. 5). Charging Party argues that this statement contradicts Danzak's testimony that there was not a "spike" in union activity in early 2014. (*See* Tr. p. 757-59; 805-806). Charging Party's argument is unfounded. Respondent's bullet points for the Team Member meetings in late-September 2014, which refer to union activity in the prior few months, do not demonstrate that there was a spike in union activity in February 2014. The only inference that can be made from these notes is that, in the prior few months – i.e., July and August (and maybe June 2014) – there had been some union activity. Counting a few months back from these late-September 2014 notes would surely not encompass *early* 2014 and, as such, are not "diametrically opposed" to Danzak's testimony. Further belying Charging Party's position is the

absence of any communications between February 2014 and late-September 2014 regarding union activity. Thus, CP 16 does not contradict Danzak's testimony denying any upsurge in union activity in early 2014 and, therefore, was properly rejected as irrelevant.

Therefore, CP 16 does not show any pattern of union animus in 2014, nor contradict Danzak's testimony and, as such, its admission into evidence would only serve to cloud the issues and prejudice the Board. Accordingly, the ALJ properly refused to allow CP 16 into the record evidence.

IV. CONCLUSION

For the foregoing reasons, the Board should deny the Charging Party's Cross-Exceptions to the ALJ's decision.

Date: June 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of June 2015, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** via the E-Filing system on the NLRB's website, and a copy was electronically transmitted to:

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/s/ Michele R. Pacconi
An employee of Fisher & Phillips LLP