

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

THE SCHERZINGER CORPORATION

and

Case 09-CA-165460

ROBERT COLLEY, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT  
OF EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

**I. STATEMENT OF THE CASE:**

This case was transferred to the National Labor Relations Board (Board) on June 17, 2016, following Administrative Law Judge Paul Bogas' Decision and Order. Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations (Rules and Regulations), this case was submitted to Judge Paul Bogas upon a joint motion and stipulation of facts executed by the parties to this matter, The Scherzinger Corporation (Respondent), Robert Colley, (Charging Party or Colley), and the General Counsel. The matter was before Judge Bogas upon a Complaint, subsequently amended, which alleged, *inter alia*, that Respondent, through maintenance of its Scherzinger Complaint Procedures (SCP), requires its employees to address complaints concerning their terms and conditions of employment only to management in violation of Section 8(a)(1) of the National Labor Relations Act (Act).

**II. SUMMARY OF THE RELEVANT FACTS:**

The facts are undisputed. Since at least August 2015, Respondent has maintained the SCP, a policy that governs how employees are expected to handle employment-related

complaints. (Jt. M. ¶ 3(a); Jt. Ex. C) <sup>1/</sup> Respondent issued the SCP to its employees and required them to execute it and be bound by its terms as a condition of their continued employment with Respondent. *Id.* Respondent acknowledges that it has not only maintained the SCP since August 2015, but has enforced the SCP as well. (Jt. M. ¶ 3(b); Jt. Ex. C)

Respondent's SCP details with specificity the forum in which it expects its employees to voice employment-related complaints. (Jt. Ex. C) Particularly, the SCP requires employees, when asserting workplace complaints, to first "discuss the problem or complaint with [the employee's] immediate supervisor." *Id.* If the complaint remains unresolved following the mandatory discussion with the employee's supervisor, the employee must then direct his or her complaint through the managerial hierarchy, beginning with the Department Manager and/or General Manager, moving next to the Human Resources Manager, and culminating with the President. *Id.* If a mutually agreeable solution is not achieved after speaking with the President, non-binding mediation, and ultimately binding arbitration, may be sought. *Id.*

Once a complaint proceeds beyond non-binding mediation, the SCP requires that, with the exception of certain claims that cannot be waived under applicable law, all unresolved issues "be solely, finally, exclusively and conclusively adjudicated through Arbitration before [the] American Arbitration Association." *Id.* Furthermore, pursuant to the SCP, employees are required to "[waive] any right [they] have to seek relief by or through a collective or class action," and "claims may not be joined or consolidated unless agreed to in writing by all parties." (Jt. Ex. C) Additionally, "[a]rbitration shall proceed solely on an individual basis without the right for any claims to be arbitrated on a class action basis or on bases involving claims brought in a purported representative capacity on behalf of others." *Id.* By requiring employees to be

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<sup>1/</sup> References to Judge Bogas' Decision and Order will be designated as (ALJD, p. \_\_\_\_); references to the Joint Motion and Stipulation of Facts, specifically the enumerated paragraphs, will be designated as (Jt. M. ¶ \_\_\_\_); and references to Joint Exhibits will be designated as (Jt. Ex. \_\_\_\_).

bound by the SCP, Respondent additionally requires employees to "[give] up their constitutional right to have a trial by jury, and [give] up their normal rights of appeal following the rendering of a decision." (Jt. Ex. C) Lastly, employees are required to sign the SCP, and "agree to rely on [the] Complaint Procedures to resolve issues related to [their] employment with Scherzinger Termite and Pest Control, both during and after [their] employment." *Id.*

### **III. EXCEPTIONS AND ARGUMENT:**

Counsel for the General Counsel excepts to the following:

**Exception No. 1:** The Administrative Law Judge's failure to find that the SCP, as a whole, violates Section 8(a)(1) of the Act by requiring employees to voice workplace complaints only to Respondent. (ALJD, p. 8, ll. 13-15)

Judge Bogas concluded that a reasonable employee would not construe the SCP as prohibiting employees from discussing workplace complaints with co-workers, and thus found that the policy did not violate Section 8(a)(1) of the Act in this respect. (ALJD, p. 7, ll. 42-45) In so finding, Judge Bogas focused initially on the inclusion of a "savings clause" which informs employees that the arbitration section of the policy was not meant to prohibit them from levying complaints with the Board and the Equal Employment Opportunity Commission (EEOC). (ALJD, p. 7, ll. 9-12) The Judge further concluded that the SCP only sets forth the procedure for employees to follow when addressing complaints to Respondent and does not preclude other channels of redress, including discussing such issues with co-workers. (ALJD, p. 8, ll. 5-8).

Counsel for the General Counsel respectfully submits that Judge Bogas erred in finding this provision of the SCP to be lawful and that the policy, as a whole, does not run afoul of the Act. Judge Bogas correctly acknowledged that Board law requires that the policy is "not to be considered in isolation," *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 2 (2016), but rather

must be read as a whole in evaluating its lawfulness. (ALJD, p. 6, ll. 41-42 & p.7, ll. 4-7) Moreover, he correctly stated that, “any ambiguity in the rule must be construed against the drafter.” *Id.*, citing *Lafayette Park*, 326 NLRB at 825. However, Judge Bogas failed to correctly apply these principles and, instead, focused only on isolated components of the SCP in concluding that it does not preclude employees from discussing workplace complaints with co-workers. Doing so constitutes reversible error.

When read as a whole, the SCP places strict and detailed restraints on how employees are to go about addressing work place complaints and, thus, would not be reasonably construed by employees to allow them to deviate from its edicts. In this regard, it outlines a hierarchical procedure for employees to voice workplace complaints, starting at the lowest supervisory level, and ending with the President, before proceeding to non-binding mediation and arbitration. The mandatory arbitration component of the SCP, which Judge Bogas found to be unlawful, requires employees to “forgo any rights to the resolution of employment-related disputes through collective or class action.” (ALJD, p. 6, ll. 16-17) The SCP prohibits the pursuit of employment related complaints via class wide or collective action, and proscribes any actions being brought in a representative capacity on behalf of others.

Importantly, in drafting the SCP, Respondent explicitly allowed for only two deviations from the policy as a whole: (1) it informs employees that the arbitration agreement is not meant to prohibit them from seeking redress with the Board and the EEOC; and (2) it informs employees that the policy is not “intended to prevent [them] from discussing any matter with any level of Management, including the CEO, at any time.” (Jt. Ex. C) No other exceptions were made. Any doubt as to whether the policy also excepts discussing complaints with co-workers should be construed against Respondent. *T- Mobile*, supra, slip op. at 2.

In analyzing the contents of the SCP, Judge Bogas failed to view it in proper context. Examining the precise verbiage used, and the tone in which the SCP is written, is tremendously important. The SCP is not written in a manner which gives employees any leeway in deciding how best to express workplace complaints. Rather, its tone conveys that Respondent is a controlling authority giving its subordinates permission to engage in certain actions. For example, Respondent's "expectation," that employees use the SCP, is undoubtedly more than a simple invitation to use the SCP for resolving disputes. Judge Bogas' conclusion that Respondent merely "expects" but does not "require" employees to use the SCP in addressing workplace complaints is not supported by a proper reading of the policy. (ALJD, p. 8, ll. 3-11) Indeed, the opening paragraph of the SCP notifies employees that they are "expected" to use the SCP in raising work-related complaints while the very last paragraph of the policy requires employees to agree to rely on the SCP "to resolve issues related to [their] employment." (Jt. Ex. C) Such "expectation" cannot be read in a vacuum while Respondent simultaneously requires employees to agree to use the SCP in order to obtain, or maintain, gainful employment with Respondent. Employees must agree to use the SCP in order to keep, or obtain employment, and deciding not to use the SCP to resolve workplace issues, by the very wording of the SCP itself, is not an option.

Judge Bogas also erred in determining that the "savings clause" applied to the entire policy as a whole, instead of just the arbitration section where it is found. Nowhere in the SCP, prior to the arbitration section, does the policy use the term "Agreement." (Jt. Ex. C) Further, Step 6 (Arbitration), Section (d), refers to the arbitration section as an "Agreement to arbitrate," specifically capitalizing the letter "a" in the word "Agreement." Therefore, in Step 6 (Arbitration), Section (e), where the policy states that nothing in the "Agreement" (read:

Agreement to arbitrate) shall prevent an employee from filing a complaint with the EEOC and the Board, using the same capitalized form of "Agreement," that "savings clause" clearly pertains only to the arbitration section, not the policy as a whole. Finally, in the SCP section which requires employees to agree to rely on the procedures, Respondent refers to the policy as the "Complaint Procedures," not the "Agreement." It is abundantly clear that the "savings clause" refers only to the "Agreement to arbitrate," not the policy as a whole. It cannot be found that a reasonable employee would read the "savings clause" as a right to seek redress outside of the SCP, especially given the context of the remaining sections of the procedures.

Upon proper application of the law, there can be no other finding but that a reasonable employee would construe the SCP, as a whole, to prohibit protected activity. It is not necessary that the SCP explicitly prohibit employees from speaking to each other or outside parties when voicing workplace complaints; it does so by virtue of the language as a whole, and the context in which it is written. A reasonable employee would read the SCP to prohibit and interfere with Section 7 activity, as it: (1) prohibits collective action; (2) mandates that employees voice singular and individual workplace complaints through the managerial hierarchy only; and (3) only permits employees to deviate from it for two narrow reasons. It is glaringly silent in articulating the right of employees to raise issues amongst themselves, or broach their concerns with an outside party, namely a labor organization. Indeed, Judge Bogas' decision does not address whether a reasonable employee would read the SCP to prohibit employees from speaking with a labor organization. In drafting the SCP, Respondent obviously contemplated exceptions to its application but failed to include the right of employees to speak amongst themselves or to an outside organization. The SPC's silence on those issues speaks volumes.

Accordingly, Counsel for the General Counsel respectfully submits that Judge Bogas erred in failing to find that the SCP, as a whole, violates Section 8(a)(1) of the Act, and urges the Board to reverse his finding that the SCP, as a whole, does not prohibit employees from discussing workplace complaints with co-workers or outside parties.

**Exception No. 2:** The Administrative Law Judge's failure to require Respondent to file with the United States District Court (Court) a motion to vacate any order compelling employees to adhere to the unlawful arbitration policy in the event Respondent's dismissal motion is, or already has been, approved by the Court. (ALJD, p. 9-10)

Judge Bogas appropriately found that the mandatory arbitration section of Respondent's SCP violates Section 8(a)(1) of the Act and required Respondent to notify the Court that it no longer opposes the complaint on the basis of the SCP. However, Judge Bogas failed to order Respondent to additionally file with the Court a motion to vacate any Court Order dismissing any plaintiffs pursuant to the unlawful mandatory arbitration agreements, if any such Court Orders have already issued, or should any issue while this matter is pending before the Board.

The Board has ordered this remedy where an employer has used the legal system to unlawfully interfere with an employee's Section 7 rights. In *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), the Board stated "[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction." Further, in *Federal Security Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps in filing a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered.

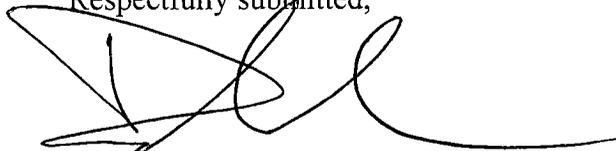
A failure to order Respondent to file with the Court a motion to vacate the Court's Order compelling arbitration, if indeed one has already issued, allows Respondent to profit from its unlawful conduct. Nothing in the remedy sought by the General Counsel would preclude Respondent from amending its motion to compel individual arbitration to seek lawful collective or class arbitration rather than a class or collective lawsuit, so long as employees were able to exercise their collective legal rights in some forum. Requiring Respondent to file a motion to vacate is necessary to not only fully remedy the violations found, but is also essential to protect the rights of those individuals negatively impacted by Respondent's unlawful actions.

**IV. CONCLUSION:**

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel respectfully submits that the decision of the Administrative Law Judge should be reversed with respect to the findings and conclusions described above.

Dated: July 15, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Daniel A. Goode', with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

July 15, 2016

I hereby certify that I served the attached Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions on all parties by electronic mail today to the following at the email addresses listed below:

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