

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE SCHERZINGER CORPORATION

and

ROBERT COLLEY, an Individual,

Case 09-CA-165460

RESPONDENT THE SCHERZINGER CORPORATION'S
ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Respondent The Scherzinger Corporation (“Respondent” or the “Company”) files its Answering Brief to the Exceptions filed by Counsel for the General Counsel on July 15, 2016, and respectfully submits the following:

I. INTRODUCTION

Counsel for the General Counsel excepts to Administrative Law Judge Paul Bogas’s (“ALJ”) determination that Respondent did not violate Section 8(a)(1) of the National Labor Relations Act (the “Act”) by requiring employees to address complaints regarding the terms and conditions of their employment exclusively to management. According to Counsel for the General Counsel, Respondent violated the Act by maintaining the Scherzinger Complaint Procedures (the “Agreement”) because, when read as a whole, the Agreement prohibits employees from discussing workplace complaints with co-workers or outside parties. This assertion is simply incorrect.

Perhaps the ALJ said it best when he noted that “[t]he existence of a procedure governing how employees are to present their complaints to the Respondent does not, without more, suggest that employees cannot also discuss their complaints among themselves.” (Decision, 7:37-39) There is nothing in the agreement that a reasonable employee would read to mean that he or she could not discuss workplace concerns with others, which mandates that the ALJ’s decision in this regard be upheld.

The Board should also uphold the ALJ’s decision not to require Respondent to file a motion to vacate District Judge Sandra S. Beckwith’s order compelling employees subject to the Agreement to arbitrate their claims. Both the ALJ and the Board lack jurisdiction to require the reversal of an on-point district court decision finding that the terms of the Agreement are lawful and enforceable. Such an order would be inappropriate and unconstitutional. It would also be

unnecessary because the agreement to arbitrate can be enforced independent of the class/collective action waiver.

For these reasons, Counsel for the General Counsel's exceptions should be overruled.

II. COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS ARE WITHOUT MERIT AND SHOULD BE OVERRULED.

A. The ALJ Properly Concluded That The Agreement Does Not Unlawfully Require Employees To Raise Workplace Concerns Only To Management.

A work rule or policy that does not explicitly restrict Section 7 rights may be found unlawful under the Act upon a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). Counsel for the General Counsel does not claim that the Agreement was promulgated in response to union activity or that the Agreement has ever been applied to require employees to bring workplace concerns only to management. The only issue before the Board, therefore, is whether employees would reasonably construe the Agreement to prohibit them from discussing workplace issues with co-workers or third parties.

Notably, the issue is **not** whether the Agreement "can" or "could" be construed to violate the Act. *Conagra Foods*, 361 NLRB No. 113, slip op. at 3–4 fn. 11 (2014), *enfd. in relevant part*, 813 F.3d 1079, 205 (8th Cir. 2016); *Lutheran Heritage*, 343 NLRB at 647 ("Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way") (Board's emphasis). Instead, Counsel for the General Counsel must meet

a more stringent test by producing evidence that a reasonable employee “would” construe the Agreement to restrict Section 7 activity. Counsel for the General Counsel cannot do so.

The Agreement, in relevant part, states:

Scherzinger Termite and Pest Control intend[s] to treat each employee fairly. We will do all we reasonably can to make this a good place to work. If you have a problem or complaint concerning your employment (includes wages, hours, working conditions, etc.) or if you believe you are not being treated fairly, you are expected to take the appropriate steps, as set forth below, to see that the matter is resolved. Remember, even if you think your supervisor should be aware of your problem, your problem may not be resolved unless and until you take the appropriate steps....

Nothing in this Agreement shall be interpreted to mean that Employee is precluded from filing complaints with the federal Equal Employment Opportunity Commission or the National Labor Relations Board....

No one may criticize you, penalize you, or treat you differently in any way for using this fair treatment procedure. This procedure is not intended to prevent you from discussing any matter with any level of Management, including the CEO, at any time.

(Joint Ex. C)

Counsel for the General Counsel first asserts that the Agreement restricts employees from communicating with the Board – despite clear language to the contrary – because the “savings clause” in the Agreement applies only to the arbitration provision. Counsel for the General Counsel apparently reaches this conclusion because the term “Agreement” is not used prior to the arbitration section.¹

Notwithstanding that Counsel for the General Counsel’s reading of the Agreement is beyond tortured, this argument simply makes no sense. Would any reasonable employees actually believe that, although they clearly can discuss their working conditions with the Board

¹ Counsel for the General Counsel initially argued that the “savings clause” was “buried” within the Agreement, which the ALJ also rejected, but has waived this argument by not including it in its exceptions brief.

upon filing an arbitration claim against Respondent, they cannot do so unless or until they file for arbitration? Counsel for the General Counsel misses the forest for the trees by torturing the language of the Agreement to manufacture any interpretation of the “savings clause” to support its position. But, as explained above, this is not the standard. At the end of the day, the ALJ correctly rejected Counsel for the General Counsel’s argument by concluding that “[t]he agreement is a single document encompassing internal review, mediation and arbitration, and the General Counsel does not point to any language showing that, contrary to the plain language, the clause exempting Board complaints from ‘the agreement’ only exempts such complaints from one part of the agreement.” (Decision, 7:26-29) There is nothing in the Agreement that would cause a reasonable employee to believe that he or she could not go to the Board to discuss or remedy workplace concerns.

The ALJ also correctly rejected Counsel for the General Counsel’s claim that reasonable employees would interpret the Agreement to bar them from discussing workplace issues with co-workers or third parties. The intent and focus of the Agreement is clearly to outline steps employees may take to address their concerns with management, keeping in mind one obvious fact: an employer cannot remedy problems about which it is unaware.

Counsel for the General Counsel takes specific issue with Respondent’s stated “expectation” that employees would utilize the procedures outlined in the Agreement. (Counsel for the General Counsel Exceptions Brief at 5) But the Board has already addressed a similar complaint procedure contained in a “What about Unions?” section of an employee handbook in *U-Haul Co. of California*, 347 NLRB 375 (2006). The *U-Haul* policy stated as follows:

We know that you want to express your problems, suggestions, and comments to us so that we can understand each other better. You have that opportunity here at U-Haul. This can be done without having a union involved in the communication between you and

the company. Here you can speak up for yourself at all levels of management. We will listen, and we will do our best to give you a responsible reply. *Furthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me* [the company president and chairman of the board of directors]. (Emphasis in original)

The ALJ found that the “if your supervisors cannot resolve your problems, you are expected to see me” language violated Section 8(a)(1) of the Act because it would “reasonably be interpreted by employees as requiring them to resolve their workplace problems through internal measures rather than by exercising rights guaranteed them by Section 7 of the Act,” especially since the language was accompanied by the employer’s stated preference to remain union free. *Id.* at **18.

The Board reversed, finding that the employer’s stated expectation that employees would utilize a particular process was not the same as mandating such a process be followed or prohibiting employees from discussing workplace issues with third parties:

First, the judge erred in reading the disputed statement in isolation, rather than considering it in the context in which it appears. The statement appears in the same paragraph, and immediately follows, the Respondent’s assertion that its employees “can speak up for yourself at all levels of management” and that it will “listen” and do its best to give them a “responsible reply.” The statement that employees “can speak up for yourself” invites, but does not require, the presentation of workplace problems to management. **Concededly, the Respondent was “expecting” that the employees would accept the invitation. But, that expectation is far short of a command that they do so.**

Second, even if the disputed statement could be read as a direction to employees to present their workplace problems to the Respondent’s managers, or at least an encouragement to do so, **the handbook does not foreclose employees from also using other avenues (e.g., the union, follow employees, the NLRB.) In addition, the handbook does not state that the employee must go to management before using other avenues. Further, there is no evidence that the statement has been applied to foreclose such access.** Therefore, the handbook statement would not

reasonably forestall employees from bringing their work-related complaints to persons or entities other than the Respondent.

Id. at **18-19 (emphasis added). The fact that the employer’s “expectation” was stated in a policy emphasizing the company’s desire to remain union free did not alter the Board’s analysis.

Id. at **20. *See also Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 316 (D.C. Cir. 2015) (handbook policy telling employees to “voice [their] complaints directly to your immediate supervisor or to Human Resources” and that “[c]omplaining to our fellow employees will not resolve problems” upheld as lawful).

The Agreement at issue here is even more benign than the one approved in *U-Haul*. Like the *U-Haul* policy, the Agreement tells employees that they are free to speak up to any member of management. It also sets forth Respondent’s “expectation” that employees follow the outlined procedures to resolve workplace issues, but it does not command employees to do so. The policy also does not require employees to contact managers first, prohibit employees from discussing their concerns with any third party, or provide discipline for employees who do not follow the complaint procedures.² Finally, as in *U-Haul*, there is no evidence that the Agreement has been applied to foreclose employees from utilizing other avenues (the Board, co-workers, customers, etc.) to address workplace concerns.

When read in the proper context, Respondent’s “expectation” is simply a reminder to employees that management cannot fix problems about which it is unaware – not a warning that employees should not discuss the terms and conditions of their employment with each other or third parties (“Remember, even if you think your supervisor should be aware of your problem,

² These undisputed facts are not changed by the mere presence of an acknowledgement at the end of the Agreement. The acknowledgement does not turn the pre-arbitration steps, which are not mandatory, into requirements. *Lafayette Park Hotel*, 326 NLRB 824 (1998); *U-Haul, supra*, at 387. Notably, neither Colley nor Davenport was required to go through any of the pre-arbitration steps listed in the Agreement, and Respondent has never sought to compel them to engage in these steps. In addition, as stated above, the Agreement does not prohibit employees from discussing workplace complaints with any third party.

your problem may not be resolved unless and until you take the appropriate steps.”). Indeed, the Agreement expressly tells employees that they are free to file complaints with the Board or other government agencies. Unlike the *U-Haul* policy, the Agreement contains no mention of unions or Scherzinger’s stance on unionization, so there can be no argument that the Agreement implies negative consequences could result if an employee chooses to complain about the terms and conditions of his or her employment to a union or other third party.

Counsel for the General Counsel’s further assertion that the Agreement outlines a mandatory and stringent “hierarchical procedure for employees to voice complaints, starting at the lowest supervisory level, and ending with the President, before proceeding to non-binding mediation and arbitration” is belied by the text of the Agreement itself. The Agreement expressly states that employees can discuss issues with “any level of Management, including the CEO, at any time.” (Jt. Ex. C) There are, in fact, no “strict and detailed restraints on how employees are to go about addressing work place complaints,” as Counsel for the General Counsel suggests.

Notably, the Agreement does not specifically refer to discussions with co-workers or third parties in either the outlined procedures or the exemptions to those procedures for the simple fact that it **does not apply to such communications**. In this regard, the ALJ was correct when he recognized that Counsel for the General Counsel “attempts to place an unfair burden on the Respondent by arguing that it should reasonably be understood to be prohibiting protected activity because it did not state that such activity was not prohibited.” (Decision, 7:40-42) The Agreement relates to the process Respondent’ employees may follow to ensure that their concerns are addressed – it has no application to co-worker or third party communications. Objectively reasonable employees (who, incidentally, would not pick apart each word of the

Agreement as Counsel for the General Counsel attempts to do to support its exceptions) would not interpret the Agreement otherwise.

Counsel for the General Counsel's assertion that the Agreement violates the Act because it requires employees to address workplace complaints only to management is without merit.

B. The ALJ Properly Concluded That Respondent Need Not File A Motion Vacating The District Court's Order Upholding The Agreement.

For the reasons identified in Section IV of Respondent's Brief in Support of Exceptions, which is incorporated herein by reference, the ALJ was correct not to require Respondent to file a motion vacating District Judge Beckwith's order upholding the Agreement and requiring employees subject to the Agreement to pursue claims against Scherzinger in arbitration. In addition, even if the class/collective action waiver contained in the Agreement were unlawful, which it is not for the reasons outlined in Respondent's exceptions and supporting brief, the inclusion of the waiver does not invalidate the entire Agreement. Counsel for the General Counsel does not (and cannot in good faith) assert that an agreement to arbitrate claims against an employer, by itself, violates the Act. As a result, employees may lawfully be required to arbitrate claims against Respondent, regardless of whether the class/collective action waiver is enforced.

The cases cited by Counsel for the General Counsel are inapposite. The situations presented in those cases – filing a lawsuit and/or criminal charges against an employee for engaging in protected concerted activity – have nothing to do with arbitration agreements which, as stated above, may be enforced separate and apart from class/collective action waivers.

The ALJ and the Board lack the authority to either (1) require a federal district court to rescind a previously entered order or (2) require a party to file a motion to vacate an order filed in a separate lawsuit pending in a U.S. District Court. For all of the reasons identified above and

in Respondent's Brief in Support of Exceptions, Counsel for the General Counsel's Exception No. 2 is without merit.

III. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel's exceptions should be rejected in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 29, 2016, a copy of the foregoing was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

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