

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 REPLY BRIEF
TO RESPONDENT'S ANSWERING BRIEF TO EXCEPTIONS
FILED BY THE GENERAL COUNSEL**

I. INTRODUCTION:

Pursuant to Section 102.46(h) of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this reply brief to Respondent's answering brief to the exceptions to the decision of Administrative Law Judge Paul Bogas filed by the General Counsel. Counsel for the General Counsel respectfully submits that Judge Bogas incorrectly determined that Respondent's Scherzinger Complaint Procedures (SCP), as a whole, do not violate Section 8(a)(1) of the National Labor Relations Act (Act). Further, with respect to the remedial Order recommended by Judge Bogas for Respondent's unlawful maintenance of a mandatory arbitration procedure, Judge Bogas erred in failing to require Respondent to file a motion with the United States District Court for the Southern District of Ohio to vacate the District Judge's Order compelling individual arbitration.

II. ARGUMENT:

A. Judge Bogas erred in concluding that Respondent's SCP, as a whole, does not run afoul of Section 8(a)(1) of the Act.

Respondent disputes the General Counsel's assertions that the "savings clause," found only in the arbitration section of the SCP, is limited to that section and does not apply to the SCP

as a whole. (R. Ans. Br., p. 4-5) ^{1/} Respondent argues that no reasonable employee would read the “savings clause” to apply only to the arbitration section. Respondent asks, “[w]ould any reasonable employees actually believe that, although they clearly can discuss their working conditions with the Board upon filing an arbitration claim against Respondent, they cannot do so unless or until they file for arbitration?” *Id.* Based on the language of the SCP, the logical answer to Respondent’s question is yes. Given the placement of the “savings clause,” within the arbitration section only, and the fact that the sentence preceding the “savings clause” refers to claims which cannot by law **be forcibly arbitrated**, such as those suitable to the NLRB or EEOC, it is certainly reasonable that an employee will conclude that the “savings clause” refers only to such claims, and not to the remainder of the SCP. (Jt. Ex. C) Consequently, reasonable employees would also conclude that their complaints, prior to reaching arbitration, must first be discussed with the various levels of management only. Respondent relies on the purported “intent and focus” of the SCP, in a not-so-subtle attempt to distract from settled law. (R. Ans. Br., p. 5) Respondent’s intent in drafting the policy is inconsequential; all that matters is how a reasonable employee would construe the policy. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

Respondent further relies on *U-Haul Co. of California*, 347 NLRB 375 (2006) to defend against General Counsel’s contention that Respondent does not merely expect its employees to rely on the SCP, but in fact requires them to do so. (R. Ans. Br., p. 5) In likening the SCP to the provision found lawful in *U-Haul*, Respondent points out that the SCP uses the term “expectation,” contains the aforementioned “savings clause,” and that there is no evidence that

^{1/} References to the Administrative Law Judge’s Decision will be designated as (ALJD, p. ____); references to Respondent’s Answering Brief will be designated as (R. Ans. Br. ____); and references to Joint Exhibits will be designated as (Jt. Ex. ____).

the SCP has been applied to foreclose employees from utilizing other avenues.^{2/} Respondent, though, is comparing apples to oranges. The *U-Haul* provision was included in an employment handbook and was not a stand-alone policy containing an unlawful arbitration agreement like the SCP. *U-Haul Co. of California*, 347 NLRB at 378. Moreover, there is no evidence that the employee handbook at issue in *U-Haul* also required an employee signature acknowledging that the employee would follow the policies contained within the handbook in order to gain or maintain employment. Therefore, the Board's refusal in *U-Haul* to read the "expectation" language as something more is justified; there was no accompanying attestation requirement. Here, on the other hand, Respondent requires employees to sign and agree that they will use the SCP as a condition of obtaining or keeping employment with Respondent. Such requirement undoubtedly converts the expectation into a requirement. *U-Haul*, because it is clearly distinguishable, does not change that conclusion; Respondent's reliance on it is misplaced.

While the Board's decision regarding the lawfulness of the handbook policy in *U-Haul* is distinguishable from the instant matter, its discussion of the unlawful mandatory arbitration clause in that case proves useful here. Regarding the unlawful arbitration agreement, the Board specifically noted that the policy contained the following language: "[y]our decision to accept employment or to continue employment with [U-Haul Company of California] constitutes your agreement to be bound by the UAP." *U-Haul Co. of California*, 347 NLRB at 377. In responding to then Chairman Batista's dissent, the majority noted that "[e]mployees were required to agree to the policy as a condition of continued employment. Having entered into the agreement under those circumstances, a reasonable employee would be deterred from violating

^{2/} Counsel for the General Counsel does not concede that the SCP has not been applied to foreclose employees from other avenues; indeed the SCP has been applied to prevent employees from seeking collective and class action, a fact which Respondent admits. In any event, while it should go without saying, the absence of evidence regarding whether the SCP has been applied to foreclose employees from utilizing other avenues does not somehow alter the applicable standard here, i.e. whether a reasonable employee would construe the policy to restrict Section 7 rights.

it ” *Id.* at 378, fn. 10. Thus, *U-Haul* actually supports the General Counsel’s precise argument: a reasonable employee, who is forced to agree to make use of a particular policy as a condition of employment, would be deterred from taking a course of action which directly conflicts with that policy.

Respondent notes that, “employees are free to speak up to any member of management.” (R. Ans. Br., p. 7) ^{3/} Respondent then doubles down on this point. In arguing that the SCP is not a strict set of guidelines for reporting workplace complaints, Respondent argues that the SCP “expressly states that employees can discuss issues with ‘any level of Management, including the CEO, at any time.’” (R. Ans. Br., p. 8; Jt. Ex. C) Put differently, in an attempt to show that the SCP does not place strict limitations on employees when voicing workplace complaints, presumably to prove that employees are free to raise complaints in various different forums, Respondent argues that the SCP allows employees to deviate from the established hierarchy and speak to **all levels of management**. This is precisely the issue with the lawfulness of the SCP. It only permits employees to speak with **management** when voicing workplace complaints. And while directing employees to speak with all levels of management, the SCP fails to notify employees that they may also speak amongst themselves or with outside parties.

Respondent argues that the SCP does not specifically refer to discussions with co-workers or third parties because it does not apply to such communications. This does not justify the policy’s silence regarding employees’ right to speak with each other and outside

^{3/} Respondent argues that “neither Colley nor Davenport was required to go through any of the pre-arbitration steps listed in the [SCP], and Respondent has never sought to compel them to engage in these steps.” (R. Ans. Br., p. 7, fn. 2). The record evidence is devoid of any factual information, whether through stipulation or documentation, to support Respondent’s assertion. To the extent Respondent attempts to add factual support for its position after the record in this matter has been closed, its actions must not be condoned, and no weight should be given to its baseless recitation of presumed facts not in the record.

parties. Moreover, Respondent offers nothing of substance to support such claim. Respondent cannot answer one simple question: how can a reasonable employee understand that Respondent's SCP does not apply to protected activities, if the policy itself does not so state? The Board, however, has answered that question; "any ambiguity in the rule must be construed against the drafter." *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 2 (2016), citing *Lafayette Park*, 326 NLRB at 825.

Indeed, a reasonable employee would only interpret a policy based on the plain language of the policy itself, and as Respondent has acknowledged, the SCP alerts employees to their ability to speak with all levels of management only, and it provides no provision for deviation. Furthermore, this is the same policy which further restricts employees ability to seek class and/or collective action in disputing workplace issues. For all the reasons cited above, Judge Bogas erred in concluding that the SCP, as a whole, does not violate Section 8(a)(1) of the Act.

B. Judge Bogas incorrectly failed to Order Respondent to file a motion to vacate the District Court's Order compelling individual arbitration.

Respondent argues that the cases cited by the Counsel for the General Counsel in exception number two are inapposite to the instant case because they involved different subject matters. According to Respondent, because those cases involve the filing of a lawsuit and/or criminal charges in retaliation for protected concerted activities, and the instant matter deals with an unlawful arbitration agreement (where it argues that the General Counsel does question the validity of arbitration agreements when class/collective waivers are not involved), the cases are inapplicable. *Id.* Respondent misses the point. When an employer uses the legal system to unlawfully interfere with an employee's Section 7 rights, the Board has ordered the requested remedy. See *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), *Federal Security Inc.*, 336

NLRB 703 (2001). Here, Respondent used the legal system to prevent employees from engaging in protected concerted activities (filing a class complaint), and as such, has reaped a benefit from its unlawful conduct. The cases cited by the General Counsel are very much on point.

For the reasons stated above, and those cited in the General Counsel's brief in support of its exceptions, the Board should correct Judge Bogas' failure to require Respondent to file a motion to vacate the District Court's Order compelling individual arbitration.

III. 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: August 12, 2016

Respectfully submitted,

/s/ Daniel A. Goode

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CERTIFICATE OF SERVICE

August 12, 2016

I hereby certify that I served the attached Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief to Exceptions filed by the General Counsel on all parties by electronic mail today to the following at the email addresses listed below:

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