UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EKHAYA YOUTH PROJECT, INC.	*	
Respondent	*	
	*	
and	*	
	*	Case No. 15-CA-155131
DALANA ZIPPORAH MINOR,	*	15-CA-162082
An Individual	*	
	*	
	*	

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

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

Counsel for the General Counsel (Counsel) in the above matter, submits this Answering Brief Opposing Respondent's Exceptions to the Decision of the Administrative Law Judge (ALJD).

I. STATEMENT OF THE CASE

A. Proceedings Before Hearing

On June 29, 2015, Zipporah Legarde, formerly known as Dalana Zipporah Minor (Minor), filed the original charge with Region 15 of the National Labor Relations Board (Board), alleging that Ekhaya Youth Project, Inc. (Respondent) engaged in unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (Act), by placing Minor on administrative leave and then discharging her from employment in retaliation for, and in order to discourage, protected concerted activities, in Case No. 15-CA-155131. (GC 1(a)).[1] Minor later amended the charge on August 27, 2015, (GC-1(c)), on September 11, 2015, (GC 1(e)), and on September 28, 2015, (GC 1(g)) to include additional Section 8(a)(1) violations for the Respondent's coercive statements, and coercive rules and policies. On October 16, 2015, Minor filed the original charge in Case No. 15-CA-162082 alleging that Respondent engaged in additional Section 8(a)(1) violations by its maintenance of an additional unlawful and coercive rule. (GC 1(j). All

[1] Reference to the Exhibits of the General Counsel and Respondent will be designated as (GC #) and (EYP #) respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as "Tr." Arabic numerals after "Tr." are a reference to a specific page of the transcript, and an Arabic numeral following a page citation and colon are references specific lines of the page cited as "Tr. #:#."

charges were served upon the Respondent. (GC 1(b), (d), (f), (h), and (j)). On October 30, 2015, the Regional Director for Region 15 issued a Complaint and Notice of Hearing in 15-CA-155131 with a January 25, 2016 hearing date. (GC 1(k)). Respondent filed an answer. (GC 1(m)). On December 4, 2015, the Regional Director issued an order postponing the hearing. (GC 1(n)). On January 27, 2016, the Regional Director issued an Order Consolidating Cases, and Consolidated Complaint and Notice of Hearing in Cases 15-CA-155131 and 15-CA-162082 with a May 2, 2016 hearing date. (GC 1(q)). Respondent filed a second answer and incorporated by reference its prior answer. (GC 1(s)). On April 18, 2016, the Acting Regional Director issued an Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 15-CA-155131 and 15-CA-162082 (Amended CNOH). (GC 1(t)). On April 26, 2016, Respondent filed and served its Objections, Motion to Strike, and Answer (Answer) to the Amended CNOH, thereby incorporating by reference its prior two answers.[2] (GC 1(x)).

On May 2 and 3, 2016, Administrative Law Judge Arthur Amchan presided over the hearing in New Orleans, Louisiana.

B. Motion to Further Amend the Amended Complaint at Hearing

At hearing, Counsel moved the Honorable Judge Amchan to allow that the Amended CNOH be further amended to include Nicholas Davis (Davis) as an additional unlawfully discharged employee in violation of Section 8(a)(1) of the Act. The motion seeks to:

[2] Counsel refers to all three answers as "Answer" due to Respondent's incorporation of the first and second answers into its Answer dated April 26, 2016.

1. Amend paragraph 9(a) of the Amended CNOH to state as follows:

On multiple days during June 2015, more exact dates currently unknown to General Counsel, Respondent's Employees Dalana Zipporah Minor and Nicholas Davis engaged in concerted activities for the purposes of mutual aid and protection by (1) discussing Minor's salary with other employees; (2) discussing the work abilities of supervisors ; (3) discussing the work abilities of fellow employees; (4) discussing whether employees should receive promotions; (5) discussing the unfairness of the Continued Communication Policy ; and (6) discussing Respondent's mistreatment of fellow employees . Tr. at 6:19-7:18.

2. Amend paragraph 9(c) of the Amended CNOH to state that about June 22nd 2015 Respondent terminated Minor and Davis. Tr. at 7:19-20.

3. Amend paragraph 9(d) of the Amended CNOH to state that Respondent engaged in the conduct described above in paragraph 9(b) and 9(c) because Minor and Davis engaged in the conduct described above in paragraph 9(a), and to discourage employees from engaging in these or other concerted activities. Tr. at 7:21-25.

4. Amend paragraph 9(e) of the Amended CNOH to state that Respondent engaged in the conduct described above in paragraphs 9(b) and (c) because Minor and Davis violated the rules described above in paragraphs 5(a), 6, 7, and to discourage employees from engaging in these and other concerted activities. Tr. at 8:1-5

5. Amend the Remedy Section of the Amended CNOH to state as follows: (a) As part of the remedy for the unfair labor practice alleged above in paragraphs (9b) and (c), the General Counsel seeks an order requiring the Respondents reimburse Minor and Davis for all search for work and work-related expenses regardless of whether Minor and/or Davis received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall back pay period. Tr. at 9:12-19.[3]

(b) In order to fully remedy the unfair labor practices and set forth above, the General Counsel seeks an order requiring that Minor and Davis be made whole including reasonable consequential damages incurred as a result of the Respondent's unlawful conduct. Tr. at 9:20-24.

II. RESPONDENT'S EXCEPTIONS

A. Respondent Exception No 1

Respondent excepts to the Administrative Law Judge's (ALJ) failure to address Respondent's opposition to General Counsel's motion to amend the Complaint at hearing to add allegations on behalf of Nicholas Davis (Davis).

As noted in Counsel's Cross-Exception Nos. 13 and 33, the ALJ erroneously failed to amend the Amended CNOH as requested by Counsel at trial and failed to make findings of fact and legal conclusions regarding the proposed hearing amendments.

The Board will permit the litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within 6 months of a timely filed charge and is closely

[3] Counsel also moved to amend, in the alternative, Remedy paragraph (a) to reference Amended CNOH paragraphs to 9(b) and (c) regardless of whether Mr. Davis is added to the Amended CNOH as an unlawfully terminated employee. (Tr. 10:3-9).

related to the allegations of the timely charge. *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 (Dec. 16, 2014). The Board's test for determining whether the otherwise untimely allegation is closely related to the timely charge is set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers (1) whether the otherwise untimely allegation involves the same legal theory as a timely filed allegation; (2) whether the otherwise untimely allegation arises from the same factual situation or sequence of events or involves similar conduct during the same time period, and with a similar object; and (3) whether a respondent would raise the same or similar defenses to both allegations. Id. at 1118; *see also Carey Salt Co.*, 360 NLRB No. 38, slip op. at 6 (2014).

All of the requested amendments at trial meet the criteria established in *Redd-I Inc.* 290 NLRB 1115 (1988).The verbal amendment adding Davis to the Amended CNOH meets the Board's criteria. First, the termination of Davis involves the same theories of unfair labor practices as the allegations related to the termination of Minor. Additionally, the termination of Davis arises out of the same factual situation as the termination of Minor. Significantly Davis and Minor were terminated on the same day, and with significantly similar supporting documentation, and with citations to the same unlawful work rules. Finally, Respondent raises substantially similar *Wright* Line defenses for the discharge of Minor and Davis. (GC 9; GC 10). Based on the above, the amendments at trial were proper.

B. Respondent Exception No. 2

Respondent excepts to the ALJ's findings and conclusion that Respondent's rules

Prohibiting "boisterous or disruptive activity in the work place," "inappropriate familiarity among staff members," and "the disclosure of personnel information" would reasonably be construed to prohibit Section 7 activity and, thus, violate Section 8(a)(1) of the Act.

Consul urges the Board to uphold the ALJ's findings and conclusions regarding the rules noted above.

In determining whether a work rule violates the Act, the Board considers whether the rule would reasonably tend to chill employees in the exercise of their statutory rights. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007), (discussing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board engages in a two-step inquiry that first focuses on whether the rule restricts Section 7 activity on its face. *Id*. If the rule does not violate the Act on its face, the Board considers whether one of the following three conditions exists: (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. *Id.* Rules which are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. *See University Medical Center*, 335 NLRB 1318, 1320–22 (2001).

<u>(a) Rule Restricting Boisterous or Disruptive Activity</u>

At pages 2-3 of the Handbook, Respondent maintains a rule that "Boisterous or disruptive activity in the workplace" may result in disciplinary action. (GC 2, at 2-3). The use of "boisterous" as a descriptor of prohibited conduct is overly broad and vague and is reasonably read to restrict activity protected by Section 7. The use of "disruptive" is

excessively vague, because Respondent's Handbook fails to give any context about what conduct the Respondent seeks to curtail. Therefore this rule fails the first prong of the *Lutheran Heritage Village-Livonia*, because it is reasonably read to restrict protected activity. 343 NLRB at 646-647*; See Sisters Food* Group, 357 NLRB No. 168 (2011) (holding that a rule requiring employees to work harmoniously with other employees is unlawfully imprecise and overbroad).

(b) Rule Regarding Inappropriate Familiarity Among Staff Members

The rule is unlawfully vague and unlawfully overbroad. It encompasses unspecified conduct in the workplace and outside of the workplace. It has no limiting principle whatsoever on its face. It is reasonably read to prohibit and apply to any action by an employee based only on a subjective determination by Respondent's management, and therefore must be interpreted to prohibit Section 7 activity. This rule is distinguishable from a permissible rule because Respondent has not tried to describe how exactly an employee might complain about Respondent in a fashion that does not chill Section 7 activities. Additionally, the rule was also cited in the termination documents that Respondent issued to Davis and Minor, therefore it was applied to restrict their protected concerted activities and fails the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; (GC 9; GC 10).

(c) Rule Regarding The Disclosure Of Personnel Information

At page 4 of the Handbook, Respondent states as a "Non-Disclosure" rule, that

> The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project such confidential information includes, but is not limited to, the following examples: . . .
> 3. Financial information
> 4. Personnel information . . .

> Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information. (GC 2, at 4).

As stated in General Counsel's Cross-Exception No. 4, Respondent's non-disclosures rule parts 3 and 4 should be reasonably read to prohibit employees from speaking about their salaries, grievances, hours, and any other terms and conditions of employment, and is therefore unlawfully overbroad. *See Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

Further, at page 6 of the Compliance Policy at a section named "Personal and Confidential Information," Respondent states employees, "Will protect personal and confidential information concerning the organization's system, employees, and youth and families." (GC-3, at 6). The rule is impermissibly overbroad and vague, and is reasonably read to unlawfully prohibit employees' right to discuss their terms and conditions of employment. Additionally, the rule was cited in the termination documents that Respondent issued to Davis and Minor, therefore it was applied to restrict their protected concerted activities and fails the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; (GC-9, 10).

C. Respondent Exception No. 3

Respondent Excepts the ALJ's Remedy, Order and proposed Notice to Employees.

In that the ALJ's merit findings and related conclusions should be upheld, the Remedy, Order and Notice related to the merit findings and related conclusions should be sustained.

III. CONCLUSION

Based on the above and the entire record in this matter, Counsel asserts that Respondent's Exceptions should be denied in their entirely.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed a copy of the foregoing COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE with the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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