Oral Argument Not Yet Scheduled

Nos. 16-2325, 16-2782

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

LONG ISLAND ASSOCIATION FOR AIDS CARE, INC.

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JULIE BROIDO
Supervisory Attorney

KYLE A. deCANT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-3823

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

Statement of jurisdiction 1

Statement of the issues 2

Statement of the case 3

I. The Board's findings of fact 4

A. LIAAC promulgates and maintains a confidentiality statement prohibiting employees from discussing wages or other terms and conditions of employment with employees, non-employees, and the media 4

B. LIAAC threatens to discharge Acosta and then discharges him for refusing to agree to the confidentiality statement 5

II. The Board's conclusions and Order 7

Standard of review 8

Summary of argument 10

Argument 11

I. Substantial evidence supports the Board's finding that LIAAC violated Section 8(a)(1) by maintaining an overbroad confidentiality statement 11

II. The Board is entitled to summary enforcement of its uncontested finding that LIAAC threatened to discharge Acosta, and substantial evidence supports the Board's finding that LIAAC violated Section 8(a)(1) by discharging him for refusing to agree to the unlawful confidentiality statement 14

III. The Board acted within its broad discretion in ordering LIAAC to post the remedial notice 20

Conclusion 25

TABLE OF AUTHORITIES

Cases **Page(s)**

Abbey's Transportation Services, Inc. v. NLRB,
837 F.2d 575 (2d Cir. 1988) 9

Avon Roofing & Sheet Metal Co.,
312 NLRB 499 (1993) 17

Boch Imports, Inc. v. NLRB,
826 F.3d 558 (1st Cir. 2016) 12

Central Hardware Co. v. NLRB,
407 U.S. 539 (1972) 12

Cibao Meat Products, Inc. v. NLRB,
547 F.3d 336 (2d Cir. 2008) 9

Cintas Corp. v. NLRB,
482 F.3d 463 (D.C. Cir. 2007) 12, 13

Citizens Investment Services Corp. v. NLRB,
430 F.3d 1195 (D.C. Cir. 2005) 9

Denson Electric Co.,
133 NLRB 122 (1961) 16, 19, 20

Double Eagle Hotel & Casino,
341 NLRB 112 (2004) 19

Double Eagle Hotel & Casino v. NLRB,
414 F.3d 1249 (10th Cir. 2005) 19

Fibreboard Paper Products Corp. v. NLRB,
379 U.S. 203 (1964) 9

Flex Frac Logistics, LLC v. NLRB,
746 F.3d 205 (5th Cir. 2014) 12

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

Grey v. Heckler,
721 F.2d 41 (2d Cir. 1983) 17

Hickmott Foods, Inc.,
242 NLRB 1357 (1979) 22

HTH Corp.,
356 NLRB 1397 (2011) 12

Ishikawa Gasket America, Inc.,
337 NLRB 175 (2001) 20, 23

Ishikawa Gasket America, Inc. v. NLRB,
354 F.3d 534 (6th Cir. 2004) 20

KBI Security Serv., Inc. v. NLRB,
91 F.3d 291 (2d Cir. 1996) 15

Keiser University,
363 NLRB No. 73 (2015) 19

Kolkka Tables & Finnish-American Saunas,
335 NLRB 844 (2001) 16

Lane v. NLRB,
186 F.2d 671 (10th Cir. 1951) 23

Lutheran Heritage Village-Livonia,
343 NLRB 646 (2004) 12, 13

NLRB v. Air Contact Transport, Inc.,
403 F.3d 206 (4th Cir. 2005) 16

NLRB v. American Geri-Care, Inc.,
697 F.2d 56 (2d Cir. 1982) 18

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

NLRB v. Caval Tool Division,
262 F.3d 184 (2d Cir. 2001) 9

NLRB v. City Disposal Systems, Inc.,
465 U.S. 822 (1984)..... 9

NLRB v. Consolidated Bus Transit, Inc.,
577 F.3d 467 (2d Cir. 2009) 15

NLRB v. Express Publishing Co.,
312 U.S. 426 (1941)..... 21

NLRB v. G&T Terminal Packing Co.,
246 F.3d 103 (2d Cir. 2001) 8-9

NLRB v. HTH Corp.,
693 F.3d 1051 (9th Cir. 2012) 12

NLRB v. Katz's Delicatessen of Houston Street, Inc.,
80 F.3d 755 (2d Cir. 1996) 23

NLRB v. Local Lodge No. 707, Int'l Ass'n of Machinists and Aerospace Workers,
817 F.2d 235 (2d Cir. 1987) 9-10

NLRB v. Mexia Textile Mills,
339 U.S. 563 (1950)..... 23

NLRB v. Seven-Up Bottling Co.,
344 U.S. 344 (1953)..... 20

NLRB v. Southwestern Greyhound Lines,
126 F.2d 883 (8th Cir. 1942) 21

NLRB v. Town & Country Electric, Inc.,
516 U.S. 85 (1995)..... 9

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

NLRB v. Vanguard Tours, Inc.,
981 F.2d 62 (2d Cir. 1982) 12

Pergament United Sales, Inc. v. NLRB,
920 F.2d 130 (2d Cir. 1990) 18

Quantum Electric, Inc.,
341 NLRB 1270 (2004) 16

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 8, 9

Viox Services, Inc.,
308 NLRB 697 (1992) 13

Virginia Electric & Power Co. v. NLRB,
319 U.S. 533 (1943) 10, 21, 22

Woelke & Romero Framing, Inc. v. NLRB,
456 U.S. 645 (1982) 15

Statutes:

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157) 8, 9, 11-13, 22, 23
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 2, 3, 7, 8, 10-17, 19, 20, 23
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(c) (29 U.S.C. § 160(c)) 9, 20
Section 10(e) (29 U.S.C. § 160(e)) 2, 8, 15
Section 10(f) (29 U.S.C. § 160(f)) 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 16-2325, 16-2782

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

LONG ISLAND ASSOCIATION FOR AIDS CARE, INC.

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT AND
CROSS-PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, and the cross-petition of Long Island Association for AIDS Care, Inc. ("LIAAC") to review, a Board Order issued against LIAAC on June 14, 2016, and reported at 364 NLRB No. 28. (JA 199-

209.)[1] The Board had jurisdiction over the proceeding pursuant to Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board's Order is final with respect to all parties. The Board applied for enforcement of its Order on July 1, 2016, and LIAAC cross-petitioned for review on August 10, 2016. Both filings were timely because the Act imposes no time limit on the initiation of enforcement or review proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the unfair labor practices occurred in New York.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that LIAAC violated Section 8(a)(1) of the Act by promulgating and maintaining an overbroad confidentiality statement.

2. Whether the Court should summarily enforce the portion of the Board's Order addressing its uncontested finding that LIAAC violated Section 8(a)(1) of the Act by threatening to discharge Marcus Acosta for refusing to agree to an unlawful confidentiality statement; and whether substantial evidence supports

[1] Record references in this brief are to the Joint Appendix ("JA"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to LIAAC's opening brief.

the Board's finding that LIACC again violated Section 8(a)(1) by discharging Acosta for his refusal.

3. Whether the Board acted within its broad discretion in ordering LIAAC to post a standard remedial notice.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by employee Acosta, the Board's General Counsel issued a complaint alleging that LIAAC violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promulgating and maintaining a confidentiality statement that restricted employees' rights to discuss wages and other terms and conditions of employment, and by threatening to discharge and discharging Acosta for refusing to agree to the unlawful statement. (JA 202; 117-21, 123.) A hearing was held before an administrative law judge, who issued a decision finding that LIAAC violated the Act. (JA 202-09.) After considering the parties' exceptions, the Board issued a Decision affirming with modifications the judge's rulings, findings, and conclusions, and adopting his recommended Order, as amended. (JA 199-202.)

I. THE BOARD'S FINDINGS OF FACT

A. LIAAC Promulgates and Maintains a Confidentiality Statement Prohibiting Employees from Discussing Wages or Other Terms and Conditions of Employment with Employees, Non-Employees, and the Media

LIAAC is an organization that provides prevention and treatment services for HIV/AIDS at its facility in Hauppauge, New York. (JA 202.) During the relevant period, LIAAC required its employees to read and sign a confidentiality statement prohibiting employees from disclosing specified information. (JA 202; 125.) The first two paragraphs required employees to safeguard the confidentiality of information protected by the Health Insurance Portability and Accountability Act and a New York law governing HIV testing. (JA 202; 125.) The third paragraph "strictly prohibited" the disclosure or personal use of all "non-public information," which the statement defined as including "administrative information such as salaries [and] employment contracts." (JA 202; 125.) The fourth paragraph prohibited employees from being "interviewed by any media source, or answer[ing] any questions from any media source regarding their employment at LIAAC," or "the workings and conditions of LIAAC," without prior permission from LIAAC. (JA 202; 125.) The final paragraph stated that "any breach of confidentiality will result in disciplinary action up to and including suspension or termination of employment and criminal prosecution." (JA 202; 125.)

On February 24, 2014, LIAAC hired Marcus Acosta as an outreach specialist to conduct surveys regarding drug use and mental illness, and shortly afterward he also became a prevention specialist focusing on HIV testing and counseling. (JA 202; 11-12.) Upon hiring Acosta, LIAAC requested that he read and sign the confidentiality statement, which he did on March 14. (JA 202; 22-24, 125.)

B. LIAAC Threatens To Discharge Acosta and then Discharges Him for Refusing To Agree to the Confidentiality Statement

In November 2014, Acosta read a newspaper article reporting an investigation that found LIAAC's CEO to have misappropriated cost-of-living adjustment ("COLA") benefits intended for LIACC employees. (JA 202; 13-14.) Many LIAAC employees already knew about the investigation, and Acosta learned that his coworkers were especially frustrated by the news because they had worked for years without raises. (JA 202-03; 17, 19-20.)

Concerned with how LIAAC assigned raises, Acosta approached his supervisors in February or March 2015 to ask about LIAAC's policy regarding raises and whether employees were entitled to COLA benefits. (JA 203; 17-18.) His supervisors suggested that he talk to LIAAC's director of human resources, Robert Nicoletti. (JA 203; 19.) When Acosta met with Nicoletti, Acosta reported his coworkers' concerns about the lack of raises, and asked how LIAAC decided to award them. (JA 203; 19-21.) Nicoletti replied that LIAAC granted raises based

on supervisors' performance evaluations and changes in employees' job titles, but he did not explain how and when COLA benefits were allocated. (JA 203; 19-21, 49.)

In March, LIAAC again requested that all employees sign its confidentiality statement. (JA 203; 22.) Acosta disagreed with the third and fourth paragraphs because he did not want to be prohibited from discussing salaries with other employees, non-employees, and the media. (JA 203; 22-23.) He signed the statement but highlighted and underlined the sections of those paragraphs that he disagreed with, and wrote "under duress" three times next to his signature. (JA 203; 26-27.)

At a regularly-scheduled meeting with his supervisor on March 20, Acosta requested a raise for completing a year at LIAAC, given that other employees had asked for and received raises. (JA 203; 29.) Acosta's supervisor responded that his job performance had significantly improved and that she would look into it. (JA 203; 29-30.)

Four days later, Acosta's supervisor again informed him that his performance had improved. (JA 203, 207; 30-31.) Shortly after, one of Acosta's coworkers informed him that he had a meeting with Nicoletti and another human resources official. (JA 203; 30-31.) Nicoletti opened the meeting by telling Acosta, "this is a yes or no conversation, there is no room for discussion." (JA

203; 31-32.) He then handed Acosta the confidentiality statement and asked what Acosta did not understand about it. (JA 203; 32.) Acosta replied that he did not understand why he was required to sign a statement prohibiting him from speaking about wages and executive salaries and from talking to the media when he believed he had the right to do so. (JA 203; 32.) Nicoletti became upset and told Acosta to "sign or get fired, sign or get fired." (JA 203; 32, 36.) Acosta signed the statement, but again wrote "under duress" three times near his signature. (JA 203; 31-32.) Acosta handed the statement back to Nicoletti, who yelled, "You just terminated yourself!" (JA 203; 32.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 26, 2015, the Board (Members Miscimarra, Hirozawa, and McFerran) issued a Decision and Order finding, in agreement with the administrative law judge, that LIAAC violated Section 8(a)(1) by promulgating and maintaining a confidentiality statement that prohibited them from discussing wages and other terms and conditions of employment with employees, non-employees, and the media. (JA 199.) The Board also agreed with the judge that LIAAC violated Section 8(a)(1) by threatening to discharge Acosta for refusing to agree to the unlawful confidentiality statement. Finally, the Board found that LIACC further violated the same Section of the Act by discharging Acosta for his refusal. In so ruling, the Board explained that because maintaining the

confidentiality statement was unlawful, discharging Acosta for refusing to agree to the unlawful statement was itself a violation of the Act. (JA 199-200.)

The Board's Order requires LIAAC to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. (JA 200.) Affirmatively, the Order requires LIAAC to rescind paragraphs 3 and 4 of the confidentiality statement, or revise those paragraphs to clarify that they do not prohibit employees from discussing their wages and other terms and conditions of employment with nonemployees and the media. (JA 200.) The Order also requires LIACC to notify employees who were required to sign with acknowledgments that those paragraphs have been rescinded or revised, and to provide them with the revised policy. (JA 200.) The Order further requires LIAAC to offer Acosta reinstatement to his former job or to a substantially equivalent position, and to make him whole for any lost earnings and benefits. (JA 200.) Finally, the Order requires LIAAC to post a remedial notice at its facility in Hauppauge. (JA 200.)

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. G&T Terminal*

Packing Co., 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*; as this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988).

"[T]his court reviews the Board's legal conclusions to ensure that they have a reasonable basis in law. In doing so, we afford the Board 'a degree of legal leeway.'" *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (quoting *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995)). Accordingly, this Court will only reverse the Board's legal determinations if they are arbitrary or capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008). In particular, the legal conclusion that Section 7 of the Act protects a specific employee activity "implicates the Board's expertise in labor relations." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)).

The Board's remedial power under Section 10(c) of the Act is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord NLRB v. Local Lodge No. 707*,

Int'l Ass'n of Machinists and Aerospace Workers, 817 F.2d 235, 238 (2d Cir. 1987). Therefore, the Board's judgments about such matters must be upheld on review unless an objecting party can show that the Board's remedial choices represent "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's conclusion that LIAAC violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad confidentiality statement. The confidentiality statement is unlawful because it contains overly broad prohibitions, some of which explicitly prohibit employees from disclosing wages and other terms and conditions of employment for any reason, thus barring them from discussing those topics among themselves, as well as other prohibitions that employees would reasonably construe to prohibit them from speaking with the media about those topics for any reason. Accordingly, the statement violates employees' Section 7 rights to discuss those protected topics with fellow employees, non-employees, and the media.

It is undisputed that LIAAC's human resources director handed Acosta a copy of the confidentiality agreement and directed him to "sign or get fired." The administrative law judge found this to be an unlawful threat in violation of Section

8(a)(1) of the Act, and LIAAC did not except to this finding before the Board. The Board is therefore entitled to summary enforcement of the portion of its Order that corresponds to this uncontested finding.

Substantial evidence supports the Board's further finding that LIAAC violated Section 8(a)(1) of the Act by discharging Acosta for refusing to agree to the confidentiality statement. Simply put, as the Board explained, because the confidentiality statement itself is unlawful, LIAAC acted unlawfully by discharging Acosta for refusing to agree to it.

Accordingly, the Board acted well within its broad discretion in ordering LIAAC to post a standard remedial notice, and LIAAC fails to demonstrate that the notice cannot be fairly said to effectuate the policies of the Act. The notice is narrowly tailored to mirror the language of the cease-and-desist and affirmative portions of the Board's Order, which LIAAC nowhere challenges.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT LIAAC VIOLATED SECTION 8(a)(1) BY MAINTAINING AN OVERBROAD CONFIDENTIALITY STATEMENT

Section 7 of the Act protects employees' rights "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. In interpreting this provision, the Board has long recognized "the importance of freedom of communication to the free exercise of

organization rights." *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Accordingly, the Board, with judicial approval, has read Section 7 to protect an employee's right to discuss terms and conditions of employment with coworkers as well as the media. *See, e.g.*, *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007); *HTH Corp.*, 356 NLRB 1397, 1405, 1422-23 (2011), *enforced*, 693 F.3d 1051 (9th Cir. 2012).

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1). An employer's conduct violates Section 8(a)(1) if it "maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004); *accord Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 568 (1st Cir. 2016); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d Cir. 1982). An employer thus violates the Act by maintaining an overbroad prohibition against employees discussing wages and other terms and conditions of employment with employees and non-employees. *Vanguard Tours*, 981 F.2d at 66-67; *accord Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014). A rule that explicitly restricts such Section 7 activity is unlawful on its face; a rule that employees would reasonably construe as prohibiting such activity is also unlawful.

Cintas Corp. v. NLRB, 482 F.3d at 467; *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

Substantial evidence supports the Board's finding that the confidentiality statement maintained by LIACC is "facially invalid" because it explicitly and "'strictly prohibit[s]'" employees from disclosing "'salaries [and] contents of employment contracts'" for any reason, and provides no exception that would permit employees to discuss those topics among themselves. (JA 204-05, quoting JA 125.) The confidentiality statement is also unlawful because it prohibits employees from communicating with the media "regarding their employment at LIAAC [or] the workings and conditions of LIAAC" without being requested to do so by LIAAC's management. (JA 199, 204-05; 125.) As the Board explained, employees would reasonably construe this language as prohibiting them from discussing their terms and conditions of employment with the media, as indeed Acosta did. (JA 199, 204-05; 125.) Moreover, the confidentiality statement concludes by specifying that the penalty for engaging in any of the prohibited activities is "disciplinary action up to and including suspension or termination of employment." (JA 199, 204-05; 125.) This explicit imposition of discipline on employees for violating a rule prohibiting Section 7 activity is itself a violation of Section 8(a)(1). *Viox Servs., Inc.*, 308 NLRB 697, 697-98 (1992).

LIAAC makes only a cursory challenge to these unassailable findings. Thus, LIACC does not dispute that the confidentiality statement "strictly prohibit[s]" employees from discussing "non-public information" among employees or non-employees, which is expressly defined to include "salaries [and] contents of employment contracts." (JA 202; 125.) Although LIAAC asserts (Br. 30) that salaries are in fact public information, this ignores the confidentiality statement's explicit identification of salaries and employment contracts as "non-public information" that cannot be discussed. (JA 204-05; 125.) LIAAC also errs in claiming (Br. 30-31) that the confidentiality statement's fourth paragraph merely controls who may speak to the media on its behalf. That paragraph contains no such limitation. Instead, it explicitly and wholly bars employees from discussing their employment or the workings and conditions of LIAAC with the media. (JA 205 n.7.)

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT LIAAC THREATENED TO DISCHARGE ACOSTA, AND SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT LIAAC VIOLATED SECTION 8(a)(1) BY DISCHARGING HIM FOR REFUSING TO AGREE TO THE UNLAWFUL CONFIDENTIALITY STATEMENT

Regarding LIAAC's unlawful threat to discharge Acosta, it is undisputed that on March 24, 2015, human resources director Nicoletti expressly told Acosta that he had two choices: sign the confidentiality statement "or get fired." (JA 203; 32, 36.) It is also undisputed that when Acosta responded by writing "under

duress" three times next to his signature, Nicoletti yelled at Acosta, "You just terminated yourself!" (JA 203; 31-32.) On these facts, the administrative law judge found that LIAAC had violated Section 8(a)(1) of the Act by threatening Acosta with discharge for refusing to sign the unlawful confidentiality statement. (JA 205-07.) LIAAC did not file any exceptions to the judge's finding, which the Board adopted. (JA 199 n.6.)

Section 10(e) of the Act provides in relevant part that "no exception that has not been urged before the Board . . . shall be considered by the court," absent "extraordinary circumstances" not present here. LIACC does not dispute its failure to file exceptions to the judge's finding that it violated the Act by threatening to discharge Acosta for refusing to sign the confidentiality statement. Thus, even if LIACC had raised the issue in its opening brief, which it did not do, the Court would lack jurisdiction to consider such a challenge. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) ("[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board."); *accord KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996). Accordingly, the Board is entitled to summary enforcement of the portions of its Order corresponding to the uncontested finding. *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009).

The Board, agreeing with the judge, also found that LIAAC further violated Section 8(a)(1) by then discharging Acosta for his refusal. (JA 199-200.) The finding is supported by substantial evidence and consistent with settled law. As the Board explained (JA 199-200), if a work rule violates Section 8(a)(1), an employer cannot discharge an employee for refusing to agree to the unlawful rule. *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 214-15 (4th Cir. 2005); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849 (2001). This is so because an employer cannot justify discharging an employee for failing to comply with a policy that is itself unlawful. *Denson Electric Co.*, 133 NLRB 122, 131 (1961). As a result, "[a] refusal to comply with an unlawful order does not constitute 'insubordination upon which a sustainable discharge can be based.'" *Quantum Elec., Inc.*, 341 NLRB 1270, 1281 (2004) (quoting *Kolkka Tables*, 335 NLRB at 852).

Here, the evidence—including Acosta's uncontroverted testimony—establishes that LIAAC discharged Acosta because he refused to agree to the unlawful confidentiality statement. (JA 199-200). As noted, it is undisputed that human resources director Nicoletti handed Acosta a copy of the statement and instructed him to "sign or get fired"—a threat that LIAAC does not challenge. (JA 199, 203; 32, 36.) When Acosta returned a copy of the statement with the words "under duress" accompanying his signature, Nicoletti squarely told him that he had

just terminated his own employment. (JA 203, 205; 32, 88.) Accordingly, the Board found that because LIAAC discharged Acosta for his refusal to agree to the unlawful confidentiality statement, the discharge itself violated Section 8(a)(1). (JA 199-200.)

LIAAC asserts (Br. 25-30) that it discharged Acosta for his alleged "negative attitude, poor work performance, and antagonistic attitude toward management," not for refusing to agree to the confidentiality statement. Those claims are flatly contrary to the record evidence. As shown above, Acosta's uncontroverted testimony establishes that Nicoletti directly told him he had "just terminated [him]self!" by refusing to agree to the confidentiality statement. (JA 203, 205; 32.) Further, Chief Program Officer Ray Ward corroborated Acosta's testimony, which was unrebutted because Nicoletti did not testify. (JA 203, 204-05; 88.) Thus, Nicoletti's statements to Acosta stand as a party admission against interest. *See Grey v. Heckler*, 721 F.2d 41, 48 (2d Cir. 1983); *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 499 (1993). Moreover, LIACC's assertion (Br. 25-30) that it discharged Acosta for a bad attitude and poor performance cannot be squared with Acosta's credited testimony that his supervisor, Sophia Noel, told him twice, including on the morning of his discharge, that his performance had

improved significantly, and also said that he would be considered for a raise. (JA 203, 207; 29-31.)[2]

It is settled that the Board's factual "findings are not lightly overturned. Its acceptance of an administrative law judge's findings regarding witness credibility will not be reversed unless those findings are 'hopelessly incredible.'" *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 138 (2d Cir. 1990) (quoting *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982)). LIACC utterly fails to meet that heavy burden. Where, as here, key testimony is both uncontroverted and corroborated, and includes an admission against interest, there is no basis for disturbing the Board's amply supported finding that LIACC discharged Acosta for refusing to sign the confidentiality statement. (JA 199, 207.)

LIACC wastes considerable ink in arguing (Br. 14-22) that Acosta did not engage in concerted activity by refusing to sign the confidentiality statement. In effect, LIACC's argument is a rejoinder to an aspect of the administrative law judge's recommended decision that the Board did not adopt. Although the judge made a recommended finding that Acosta engaged in concerted activity, the Board did not adopt that finding, as reflected in the Board's Amended Conclusions of

---

[2] The administrative law judge found that Ward's further testimony, that Acosta was spreading negativity to his coworkers, was inconsistent with Acosta's credible testimony regarding Noel's positive appraisals, and contradicted Noel's written review of Acosta's performance. (JA 206; 83-86, 89.) Her review actually stated that Acosta was "absorbing" negativity from his coworkers, not that he was spreading it. (JA 178.)

Law. (JA 199-200, 205.) Instead, as shown above p. 16, the Board relied on the straightforward and settled principle that where, as here, an employer maintains an unlawful work rule, discharging an employee for refusing to agree to the unlawful rule is itself a violation of Section 8(a)(1). (JA 199-200.) Accordingly, LIACC's arguments about concerted activity (Br. 14-20) are beside the point. For the same reason, LIACC also tilts at windmills by insisting (Br. 20-22) that the instant case does not fall under any exception to *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced as modified*, 414 F.3d 1249 (10th Cir. 2005), which, again, was part of the judge's analysis that the Board did not adopt.

Finally, LIAAC fares no better in mischaracterizing (Br. 22-23) the cases on which the Board did rely, *Denson Electric* and *Keiser University*, 363 NLRB No. 73, 2015 WL 9460023 (2015), *appeal pending* 11th Cir. Case Nos. 16-10341 & 16-10625 (oral argument held Jan. 23, 2017), as involving employers that discharged employees for engaging in concerted activity, rather than for refusing to agree to unlawful rules. Contrary to LIACC's claim (Br. 23), in *Keiser University*, neither the Board nor the administrative law judge made a finding as to whether the employee engaged in concerted activity. Instead, the Board affirmed the judge's finding that the employee "was discharged for refusing to sign" an unlawful agreement. *Keiser University*, 2015 WL 9460023, at *5. Thus, as the Board, affirming the judge, "found that the language of [the agreement was]

unlawful, the discharge . . . was also unlawful." *Id.* Similarly, in *Denson Electric*, the Board found that the employer violated Section 8(a)(1) both when it "imposed . . . the unlawful requirement to cease and desist from concerted activities," and when it discharged those employees "by reason of their refusal to accept such unlawful condition of employment." *Denson Electric*, 133 NLRB at 131. Accordingly, the Board appropriately relied on those cases in finding that LIACC violated Section 8(a)(1) by discharging Acosta for refusing to sign the unlawful confidentiality statement. (JA 199-200.)

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING LIAAC TO POST THE NOTICE

Section 10(c) of the Act (29 U.S.C. § 160(c)) broadly empowers the Board to "devis[e] remedies to effectuate the policies of the Act." This broad grant of authority means that "the relation of remedy to policy is peculiarly a matter for administrative competence." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). One of the Board's standard remedies is a remedial notice, which is designed to "most effectively apprise employees of their rights, and of the unlawful acts of respondent employers or unions." *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), *enforced* 354 F.3d 534 (6th Cir. 2004).

Moreover, it is settled that ordering "the posting of notices advising employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by [Section] 10(c) of the

Act." *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 438 (1941); *accord NLRB v. Southwestern Greyhound Lines*, 126 F.2d 883, 887 (8th Cir. 1942) (recognizing the Board's authority to order the posting of a notice stating that the employer will not engage in the conduct from which it is ordered to cease and desist). An employer challenging the Board's remedial order therefore has the difficult burden of proving that the chosen remedy is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.*, 319 U.S. at 540. LIACC utterly fails to meet its burden.

Tellingly, LIACC does not challenge any aspect of the Board's remedial Order other than the notice-posting requirement. Yet, the standard, narrowly tailored remedial notice that the Board adopted in this case merely reflects the uncontested cease-and-desist and affirmative language recited in paragraphs one and two of the Board's Order. (JA 200-01.) Thus, the notice begins by noting that the Board found LIAAC violated the Act, and then describes employees' rights under Section 7. (JA 201.) Consistent with the Board's Decision and Order, the notice continues by informing employees that LIAAC "will not promulgate and/or maintain a rule prohibiting employees from discussing their wages and other terms and conditions of their employment with employees or nonemployees and the media." (JA 201.) Next, the notice states that LIAAC will neither "threaten to discharge or discipline employees" nor "discharge employees" for refusing to

agree to such an unlawful rule. (JA 201.) The notice also informs employees that LIAAC will not interfere with employees' Section 7 rights "in any like or related manner." (JA 201.) The notice then tracks the affirmative portion of the Order, informing employees that LIAAC will either rescind the unlawful paragraphs from the confidentiality statement "or revise them to make clear that they do not prohibit employees from" engaging in communications protected by the Act. (JA 201.) Finally, the notice describes LIACC's affirmative obligation under the Order to compensate Acosta, including offering him "full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position," and making him whole for any loss of earnings and benefits resulting from his unlawful discharge. (JA 201.)

LIAAC fails to demonstrate that the notice is a patent attempt to achieve ends other than those that effectuate policies of the Act. *Virginia Elec. & Power Co.*, 319 U.S. at 540. To begin, it sets up a straw man by suggesting that the Board imposed a broad cease-and-desist order and notice, which the Board did not do here. (Br. 31, citing *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).) LIAAC also errs in suggesting (Br. 32-33) that notice-posting is unnecessary because it has already revised the confidentiality statement. Whether it has done so, and whether the revised statement complies with the Board's Order, are matters to be resolved in a subsequent compliance proceeding; in any event, an employer's compliance

"does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950). LIAAC is also wrong to argue (Br. 32-33) that it should be exempt from the notice-posting requirement because this was the first time it was found to have violated the Act. The Board is empowered to order the posting of a remedial notice even if the employer is a first-time offender. *See, e.g.*, *Lane v. NLRB*, 186 F.2d 671, 674 (10th Cir. 1951) (citing *Mexia Textile Mills*, 339 U.S. 563).

LIAAC gains no more traction by asserting that the notice's standard reminder to employees of their Section 7 rights is "overbroad, punitive and harsh." (Br. 33.) Because the Board found that LIAAC violated Section 8(a)(1)—which prohibits employers from interfering with, restraining, or coercing employees' Section 7 rights—the notice appropriately reminds employees of their rights. (JA 201.) *See Ishikawa Gasket American, Inc.*, 337 NLRB at 176. LIAAC also errs in contending (Br. 36-37) that the notice's provisions regarding Acosta are confusing because LIAAC allegedly is unable to reinstate him. It is settled that such matters are appropriately reserved for a subsequent compliance proceeding. *See, e.g.*, *NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996). In any event, LIAAC's contention, even if true, would not relieve it of an

obligation to offer Acosta a substantially similar position should one become available in the future.

Finally, LIAAC errs in challenging (Br. 33-37) aspects of the administrative law judge's proposed notice that the Board did not adopt. (JA 201, 208-09.) Thus, the Board's revised notice does not contain the language, which appears in the administrative law judge's proposed notice, stating that LIAAC will not require employees to sign a confidentiality statement. Accordingly, LIAAC's argument (Br. 34) that the judge's proposed language would confuse employees misses the mark. (JA 201, 209.) LIAAC similarly errs in challenging (Br. 35-36) language in the judge's proposed notice stating that LIAAC will rescind the third and fourth paragraphs of the confidentiality statement. According to LIAAC, it has already revised those paragraphs, but it ignores that the Board's revised notice states that LIAAC could revise those paragraphs as it did. (JA 201, 209.) LIAAC also errs in complaining (Br. 34-35) about the judge's proposed language (JA 209) stating that it will not discipline employees for engaging "in protected concerted activities." Again, the Board did not adopt the judge's proposed language; instead, the Board replaced it with new language stating that LIAAC will not discipline employees who "refus[e] to agree to an overbroad and unlawful confidentiality policy statement." (JA 201.) Accordingly, all of LIAAC's challenges to the Board's remedial notice must fail.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the petition for review.

Respectfully submitted,

/s/ Julie Broido

JULIE BROIDO
Supervisory Attorney

/s/ Kyle A. deCant

KYLE A. deCANT
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570
(202) 273-2978
(202) 273-3823

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

February 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-2325, 16-2782
v.	)	
	)	Board Case No.
LONG ISLAND ASSOCIATION FOR AIDS CARE, INC.	)	29-CA-149012
	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 5,437 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 6th day of February, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-2325, 16-2782
v.	)	
	)	Board Case No.
LONG ISLAND ASSOCIATION FOR AIDS CARE, INC.	)	29-CA-149012
	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Debra Lynne Wabnik, Esq.
David R. Ehrlich, Esq.
Stagg, Terenzi, Confusione & Wabnik, LLP
401 Franklin Avenue, Suite 300
Garden City, NY 11530

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 6th day of February, 2017