

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COSTCO WHOLESALE CORPORATION

and

Case 05-CA-169958

TEAMSTERS LOCAL 592, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

**GENERAL COUNSEL'S
CROSS-EXCEPTION AND BRIEF IN SUPPORT**

Joseph E. McGlew-Castaneda, Counsel for
the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201
(410) 962-2775
(410) 962-2198 (FAX)
joseph.mcglew-castaneda@nlrb.gov

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, counsel for the General Counsel files the following Cross-Exception to the decision of the Honorable Donna N. Dawson, Administrative Law Judge, in her decision in this proceeding, issued on February 24, 2017.

I. INTRODUCTION

On June 6, 2016, the Regional Director for the National Labor Relations Board (the Board), Region 5, issued a Complaint and Notice of Hearing based on a charge filed by the Teamsters Local 592, International Brotherhood of Teamsters (the Charging Party or the Union), alleging that Costco Wholesale Corporation (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying employee Justin Daniels' (Justin's) request to be represented by a Union representative during an investigatory interview that he reasonably believed would result in discipline. The hearing took place on October 11, 2016, in Richmond, Virginia.

On February 24, 2017, the Administrative Law Judge issued her decision, finding that Respondent violated Section 8(a)(1) of the Act and recommending an order requiring Respondent cease and desist engaging in certain unfair labor practices and take affirmative action designed to effectuate the policies of the Act. Specifically, the Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by instructing employee Justin not to discuss a February 4, 2016 verbal altercation and investigatory interview concerning the altercation with anyone else.

On March 23, 2017, Respondent filed Exceptions and a Brief in Support of Its Exceptions to the Administrative Law Judge's Decision (ALJD).

II. FACTS

Counsel for the General Counsel incorporates by reference the statement of facts from the General Counsel's Answering Brief to Respondent's Exceptions. (GC Answering Brief 2-7).

III. CROSS-EXCEPTION

1. Exception

Counsel for the General Counsel takes exception to the Administrative Law Judge inadvertently misstating Board precedent concerning an oral promulgation of a rule. (ALJD 10: 7-11).

2. Argument

Although the Administrative Law Judge appropriately determined that Marc Cibellis' (Cibellis') statement was an unlawful, coercive statement in violation of Section 8(a)(1) of the Act and not an oral promulgation of a rule, she inaccurately cited Board precedent referencing oral promulgations of rules. (ALJD 10: 7-11) (applying *Lucky Cab Co.*, 360 NLRB 271 (2014)).

In *Lucky Cab Co.*, the complaint alleged respondent violated Section 8(a)(1) of the Act by "orally promulgating and enforcing an overly broad and discriminatory rule prohibiting employees from discussing discipline issued to them." 360 NLRB at 277. The administrative law judge failed to address this particular allegation, and the General Counsel filed exceptions. The Board determined that respondent instructed an employee after being discharged "not to speak to anyone as she left the [respondent's] property." *Id.* The Board explained the statement was unlawful "even if it did not constitute [an] oral promulgation of a formal workplace rule applicable to all employees." *Id.* at 277 n. 20. The Board further explained, "we need not pass on the complaint's allegation that [the statement] was such a rule." *Id.*

Similar to the instant case, the Board in *Bellagio, LLC*, 362 NLRB No. 175, slip op. at 1 n. 3 (2015) explained that an instruction prohibiting an employee from discussing a suspension pending investigation with other employees was a violation of Section 8(a)(1) of the Act. The Board clarified that the instruction was coercive, but it did not constitute an orally promulgated rule as the administrative law judge determined in his decision. *Id.* (applying *Food Services of America*, 360 NLRB 1012, 1016 n. 11 (2014)). Accordingly, the Board modified the administrative law judge's order to reflect that a rule was not promulgated, but the instruction was unlawful.

In the instant case, the Administrative Law Judge cites the above-referenced portion of the Board's decision in *Lucky Cab Co.* for the proposition that an unlawful instruction to an employee is sufficient to establish an unlawful rule. The Administrative Law Judge's oversight, however, has no effect on her ultimate conclusion that correctly explains Cibellis' instruction to Justin "not to discuss the February 4 incident and investigatory interview with anyone else" is a violation of Section 8(a)(1) of the Act. (ALJD 10: 19-20); see e.g., *Philips Electronics North America Corp.*, 361 NLRB No. 16, slip op. at 2 (2014) (quoting *Verizon Wireless*, 349 NLRB 640, 658 (2007)).

Accordingly, counsel for the General Counsel respectfully urges the Board to clarify the Administrative Law Judge's findings and conclusions are limited to Cibellis' coercive instruction, not an oral promulgation of an overboard rule.

Respectfully submitted,

/s/ Joseph McGlew-Castaneda

Joseph E. McGlew-Castaneda
Counsel for the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201
(410) 962-2775
(410) 962-2198 (FAX)
joseph.mcglew-castaneda@nlrb.gov

Dated this 20th day of April, 2017.

STATEMENT OF SERVICE

I hereby certify that on April 20, 2017, copies of the Brief of the Counsel for the General Counsel were served by e-mail on the following parties:

Paul Galligan, Esq.
Seyfarth Shaw LLP
620 Eighth Avenue
New York, New York 10018-1405
PGalligan@seyfarth.com

Jonathan Axelrod, Esq.
Beins, Axelrod, P.C.
1030 15th Street, N.W.
Suite 700 East
Washington, D.C. 20005
JAxelrod@beinsaxelrod.com

/s/ Joseph McGlew-Castaneda

Joseph E. McGlew-Castaneda
Counsel for the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201
(410) 962-2775
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