

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

ALEXANDRIA CARE CENTER, LLC

and

Case 31–CA–140383

ROSALINDA ZUNIGA, an Individual

Joelle Mervin & Steven Wyllie, Esqs.,
for the General Counsel.
Gordon A. Letter, Esq. (Littler Mendelson, PC),
for the Respondent Company

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving employer mandatory arbitration provisions. The Respondent Company, a California skilled nursing facility, has maintained such provisions in its Employment Dispute Resolution (EDR) Program since at least October 2011, and has required its unrepresented employees, including Charging Party Zuniga, to sign and become bound by it as a condition of employment.¹ The General Counsel alleges that, by doing so, the Company has violated Section 8(a)(1) of the National Labor Relations Act because the provisions would reasonably be read by employees as prohibiting or restricting their right to file unfair labor practice charges with the Board.²

In relevant part, the EDR Program states as follows:

Introduction

.....

Our Employment Dispute Resolution (EDR) Program provides a process and the resources for finding solutions to employment-related disputes. . . . [T]he EDR Program incorporates four steps: (1) Open Door, (2) Facilitation, (3) Mediation and (4) Arbitration. If the parties cannot mutually resolve the dispute in the first

¹ There is also no dispute, and the record establishes, that the Board has jurisdiction.

² On June 2, 2017, the General Counsel and the Company filed a joint motion requesting that this issue be decided based on an attached stipulated record. (According to the motion, Charging Party Zuniga is not participating in this proceeding.) The motion was granted on September 8, and the General Counsel and the Company subsequently filed briefs on November 3. The case was originally assigned to another administrative law judge, but was reassigned on December 7.

three steps, you and we have agreed to submit the dispute to an outside, impartial arbitrator and to accept the decision of the arbitrator as final and binding.

....

5 Your decision to apply for, accept or continue employment with the Company or, as applicable, accept bonus or other discretionary payments or awards in conjunction with your employment, constitutes your agreement to be bound by the EDR Program. Likewise, we agree to be bound by the EDR Program in return for your agreement to be bound. This mutual agreement means that both you and
10 we are bound to use the EDR Program as the only means of resolving employment-related disputes on issues covered by the EDR Program. However, no remedies that otherwise would be available to you or us in a court of law for claims or disputes that you or we may have against one another will be forfeited by virtue of the agreement to use and be bound by the EDR Program.

15

....

Employment Dispute Resolution

20 • *Provides four steps for resolving work-related disputes.*

....

Effective Date, Duration and Impact of the EDR Program Upon Your Employment

25

The EDR Program is the process for resolving most work-related disputes between you and us, including, but not limited to, disputes concerning legally protected rights such as freedom from discrimination, retaliation or harassment. It remains effective for the entire length of your employment and continues in effect
30 should your employment end. For job applicants, the EDR Program remains effective during and after the application process. All employees and job applicants must use the EDR Program as the sole means of resolution of disputes covered by the EDR Program.

35

....

Employees Covered by the EDR Program

40 The EDR Program covers all management and non-union employees, as well as all job applicants. The EDR Program does not apply to employees who are covered by a collective-bargaining agreement.

Covered Disputes

45 The EDR Program covers disputes arising out of or relating to your employment with [] us (including your application for employment), except as expressly set

forth below. Disputes covered under the EDR Program pertain to, among other things, claims related to discipline, discrimination, fair treatment, harassment, termination and other legally protected rights. The EDR Program also covers all employment-related disputes between you and all of our other employees, managers and affiliates, both in their individual and representative capacities, and as a result all employment-related disputes between you and any of those persons and/or entities must be resolved through the EDR Program if and to the extent that the dispute would be required to be resolved through the EDR Program if it were between you and us.

Disputes not covered under the EDR Program are claims for or related to workers’ compensation (this does not apply to Texas Occupational Injury), unemployment benefits, health, welfare and retirement benefits and claims by us for injunctive relief to protect trade secrets and confidential information, and any other claims that, under applicable state or federal statutory law (including regulations promulgated thereunder) and/or case law, expressly cannot be subject to arbitration or similar alternative dispute resolution procedures (however, you and we may nonetheless voluntarily choose to resolve those claims under the EDR Program). The EDR Program does not constitute a waiver of your rights under the National Labor Relations Act, but [] we may seek to enforce the EDR Program (including its class and collective action provisions) and seek dismissal of any lawsuit filed under the National Labor Relations Act.

You retain the right to pursue employment disputes before federal or state administrative agencies. Nothing in the EDR Program prevents you from filing a claim with a federal or state administrative agency or from cooperating in a federal or state agency investigation.

.....

Frequently Asked Questions

- Q. Will I be able to go to the Equal Employment Opportunity Commission (EEOC) or the appropriate state Human Rights Commission with this program in effect?
- A. Yes. You are still free to consult the appropriate state Human Rights Commission, the EEOC, or any other regulatory body regarding your workplace problem as provided under “Covered Disputes” above. We have designed the EDR Program to help employees resolve their concerns and disputes fairly and quickly and hope that the EDR Program will resolve all disputes to everyone’s satisfaction. However, we respect every employee’s personal right to utilize government programs in instances where the employee has a legal right to do so.

The General Counsel contends that the Company’s unrepresented employees would reasonably conclude that the foregoing provisions preclude them from filing unfair labor practice charges with the Board because: (1) the first paragraph under “covered disputes” states that the EDR Program covers “among other things, claims related to discipline, discrimination, fair treatment, harassment, termination and other legally protected rights” and “all employment-related disputes between” employees and other employees, managers and affiliates; and (2) although the subsequent two paragraphs state that the EDR Program “does not constitute a waiver” of employee rights under the National Labor Relations Act, and that employees “retain the right to pursue employment disputes before” and to “fil[e] a claim with,” federal or state administrative agencies, the Company reserves the right to “seek to enforce the EDR Program . . . and seek dismissal of any lawsuit filed under the National Labor Relations Act.” The General Counsel argues that employees would reasonably conclude from these provisions that filing unfair labor practice charges with the Board would be futile because the Company could seek to have them dismissed pursuant to the mandatory dispute resolution provisions of the EDR Program.

The General Counsel’s argument is generally supported by Board precedent. See *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 2–3 (2016); *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 1–2 (2016); and *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35, slip op. at 3 (2015) (mandatory arbitration provisions are unlawful if employees would reasonably conclude from the language that filing a charge with the Board would be futile because the charge would ultimately have to be arbitrated). Further, the Company fails to offer any real or genuine response to it. The Company argues that the provisions “merely convey the thought that if [the Company] is sued, it will try to prevail in the case.” However, this argument mischaracterizes the plain language of the provisions. The provisions do not indicate that the Company could seek dismissal on the merits; rather, they indicate that it could seek dismissal pursuant to the mandatory dispute resolution provisions of the EDR Program. And if the Company itself, as the author of the EDR Program, believes the provisions afford it a right to have any unfair labor practice charges dismissed, certainly employees would reasonably interpret them the same way.³

The Company also argues that Zuniga’s unfair labor practice charges in this case, which she filed in October 2014 and February 2015 notwithstanding her previous agreement to be bound by the EDR Program, show that employees would not reasonably construe the provisions to prohibit or restrict filing charges. However, the “reasonably construe” test is an objective one; whether a particular employee was actually restrained from filing charges is irrelevant. See, e.g.,

³ The Company does not argue that the word “lawsuit” was intended, or would reasonably be construed by employees, to mean something other than an unfair labor practice charge filed with the Board. Indeed, the Company’s brief concedes that employees “are likely to understand ‘lawsuit’ in its general meaning of going to a government office and filing a complaint.”

Conagra Foods, Inc., 361 NLRB 944, 960 (2014), *enfd.* in relevant part 813 F.3d 1079, 1090–1091 (8th Cir. 2016).⁴

5 Finally, the Company also argues that Zuniga’s charges are barred by Section 10(b) of the Act because they were not filed and served within 6 months of either the date she signed the EDR Program in October 2011 or the date she was terminated in December 2012. However, this argument is meritless as well. The Board has consistently held that the maintenance of an unlawful workplace rule or policy is a continuing violation. See *Bloomington’s, Inc.*, 363 NLRB No. 172, slip op. at 1 n. 1 (2016); and cases cited there.

10 Accordingly, the Company violated Section 8(a)(1) of the Act by maintaining the EDR Program, as alleged.

15 ORDER⁵

The Respondent, Alexandria Care Center, LLC, Los Angeles, California, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board.

25 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

30 (a) Rescind its Employment Dispute Resolution (EDR) Program or revise it to make clear to employees that it does not bar or restrict them from filing charges with the National Labor Relations Board.

35 (b) Notify all current and former employees who were required to sign or otherwise become bound to the EDR Program that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

⁴ The Company alternatively argues that the “reasonably construe” test should be abandoned for the reasons set forth in the dissenting opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7 (2016). However, administrative law judges must follow current Board precedent unless and until it is rejected by the Supreme Court. *Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 n. 4 (2017).

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (c) Within 14 days after service by the Region, post the attached notice marked
“Appendix” at its facility in Los Angeles, California and all other facilities where the EDR
Program is or has been maintained in effect.⁶ Copies of the notice, on forms provided by the
Regional Director for Region 31, after being signed by the Respondent’s authorized
representative, shall be posted by the Respondent and maintained for 60 consecutive days in
conspicuous places including all places where notices to employees are customarily posted. In
addition to physical posting of paper notices, the notices shall be distributed electronically, such
as by email, posting on an intranet or an internet site, and/or other electronic means, if the
Respondent customarily communicates with its employees by such means. Reasonable steps
10 shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by
any other material. In the event that, during the pendency of this proceeding, Respondent has
gone out of business or closed the facilities where the EDRP has been unlawfully maintained,
Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and
former employees employed by Respondent at any time since August 24, 2014.

15 (d) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region attesting to the
steps that the Respondent has taken to comply.

20 Dated, Washington, D.C., December 14, 2017

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Jeffrey D. Wedekind
Administrative Law Judge

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Employment Dispute Resolution (EDR) Program or revise it to make clear that it does not bar or restrict you from filing charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the EDR Program that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

ALEXANDRIA CARE CENTER, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/31-CA-140383 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (310) 307-7302.