

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 21, 2017

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Doctor's Associates, Inc. d/b/a Subway
Case 28-CA-196084

506-6090-4500
512-5098

This case was submitted for advice as to whether a Franchisor, in the absence of a joint employer relationship with its franchisees' employees, violated the Act by recommending that its franchisees promulgate and maintain overly-broad and discriminatory online and social media rules, under the theory articulated in *Dews Construction Corp.*¹ We conclude that the Franchisor cannot be held liable because it did not require its franchisees to adopt the unlawful rules.

FACTS

Doctor's Associates, Inc. d/b/a Subway Restaurants (Subway) franchises over 26,000 Subway-branded restaurants in the United States. Subway does not operate any of the restaurants directly, and the Region has concluded that Subway is not a joint employer of its franchisees' employees.²

Subway has created an Online and Social Media Policy, which it has made available on its intranet system for its franchisees to download. The Region has concluded that the current version of the policy, which became effective January 3, 2017, as well as a prior version, are overly broad and discriminatory.³

¹ 231 NLRB 182, 183 n.4 (1977), *enforced mem.*, 578 F.2d 1374 (3d Cir. 1978) (an employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affect the working conditions of the latter's employees because of the union activities of said employees).

² The Region did not submit the joint employer question for advice.

³ The Region did not submit this question for advice.

In separate postings on its intranet system, Subway recommended to its franchisees that they require their employees to read and sign the policy. In this regard, a posting dated February 27, 2014 was titled: “Consider Having Employees Sign the New Online and Social Media Policy.” This posting also stated, *inter alia*, that Subway “recommend[s] that you have current and future employees read and sign” the policy. Another posting, date unknown, stated, *inter alia*, that Subway “encourage[s] you to have your employees . . . read and sign” the policy. A third posting, date unknown, stated, *inter alia*, “We recommend that you review and consider havinge [sic] current and future employees read and sign the new” policy.

Subway asserts that it has never required franchisees to adopt either version of the policy; it merely posted recommendations that franchisees were free to follow or disregard. Consistent with that assertion, the Region has obtained personnel documents that Subway provides to its franchisees, including job descriptions and disciplinary action forms, that include disclaimers stating that the documents are made available as a courtesy and that their use is not mandatory. To further support its contention that use of the Online and Social Media Policy is voluntary, Subway states that, of its over 26,000 franchisees, only 67 downloaded the pre-January 3, 2017 policy from its intranet site and only 183 downloaded the post-January 3 policy. Subway asserts that it does not track which of its franchisees may have downloaded those policies and that, consequently, the above figures may include duplicative downloads by the same franchisee.

ACTION

We conclude that Subway is not liable for its franchisees’ maintenance of the Online and Social Media Policies under *Dews Construction* because Subway did not direct its franchisees to adopt the policies. Accordingly, the charge against Subway should be dismissed, absent withdrawal.

Under *Dews Construction Corp.*,⁴ when one employer directs another employer “with whom it has business dealings” to discharge, discipline, or otherwise affect the working conditions of employees because of their union or other protected activities, both employers are jointly and severally liable for the statutory violation. This rule

⁴ 231 NLRB at 182 n.4 (finding that general contractor and subcontractor both violated the Act when general contractor caused subcontractor to transfer employee because of union activity).

applies even if the employers are separate employers.⁵ Under this theory, the Board has held liable a contractor who provided security services and its customer when the customer requested and caused the contractor to unlawfully discharge its employee;⁶ a general contractor and subcontractor when the subcontractor discharged an employee, and refused to hire other employees who were on strike elsewhere, in response to the general contractor's instruction that it wanted "no strikers on its premises";⁷ and a holding company that caused its subsidiary to unlawfully discharge employees via a sham closing and reopening of a facility.⁸

Here, under the *Dews* analysis, we conclude that we would be unable to prove that Subway *directed* its franchisees to adopt the unlawful Online and Social Media Policies. Thus, Subway's intranet postings only "recommend[ed]," "encourage[d]," or asked franchisees to "consider" adopting the policies at their restaurants. Additionally, there is no indication that, notwithstanding the above language, Subway actually directed franchisees to adopt the policies. This is borne out by the evidence that, at most, only 250 of Subway's over 26,000 franchisees (less than one percent) downloaded one of the policies. Moreover, Subway does not track which franchisees have downloaded the policies, and there is no evidence that Subway has punished any of the thousands of franchisees who did not adopt either policy.⁹

⁵ *Id.* at 182-83; see also *Black Magic Resources*, 312 NLRB 667, 668 (1993) (finding two separate employers—a contractor and its customer—jointly and severally liable where customer caused contractor to discharge employees for engaging in protected grievance filing).

⁶ *Tracer Protection Services*, 328 NLRB 734, 735, 742 (1999).

⁷ *Georgia-Pacific Corp.*, 221 NLRB 982, 984-86 (1975).

⁸ *Esmark Inc.*, 315 NLRB 763, 769-70 (1994).

⁹ (b)(5)

(b)(5)

(b)(5). The Region already entered an informal settlement with one franchisee regarding this policy, (b)(5)

(b)(5)

Accordingly, the charge against Subway should be dismissed, absent withdrawal.

/s/
J.L.S.

ADV.28-CA-196084.Response.subway (b)(6), (b)(7)(C)