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

Advice Memorandum

REVISED DATE: October 30, 2014

TO: George Velastegui, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
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SUBJECT: Grand Sierra Resort & Casino/HG Staffing, LLC
Case 32-CA-134057

The Region submitted this case for advice concerning whether the Employer violated Section 8(a)(1) when it barred the Charging Party, a former employee, from its property because the Charging Party filed and maintained a class action lawsuit against the Employer, and informed (b)(6), (b)(7)(C) (b)(6), (b)(7 that this was the reason for its denial of access. We conclude that the Employer violated Section 8(a)(1) by retaliating in this manner against the Charging Party for engaging in protected concerted activity and interfering with the free exercise of (b)(6), (b)(7)(C) (b)(6), (b)(7 Section 7 rights. Accordingly, the Region should issue complaint, absent settlement.

FACTS

In December 2012, Grand Sierra Resort & Casino ("Employer") hired the Charging Party as a beverage supervisor.[1] The Employer terminated the Charging Party less than a month later, purportedly for refusing to create false underperformance records for cocktail waitresses that the Employer thought were not young and attractive enough. The Charging Party is not challenging the lawfulness of (b)(6), (b)(termination.

On June 21, 2013, the Charging Party, joined by another former employee and a current employee, filed a class action lawsuit against the Employer for alleged wage and hour violations. That lawsuit is still pending.

In January 2014, the Charging Party's (b)(6), (b)(7)(C) began working at Lex Nightclub, which is located on the Employer's premises and is owned and operated by

[1] The parties agree that, despite (b)(6), (b)(title, the Charging Party was not a Section 2(11) supervisor.

the Employer. Between January 2014 and July 2014, the Charging Party visited this nightclub and attended other events on the Employer's premises in order to socialize with (b)(6), (b)(7)(C)[2] All of these visits occurred without incident.

Around the beginning of July 2014, the Employer denied the Charging Party access to its premises when (b)(6), (b)(7)(attempted to attend an event at Lex Nightclub. Later that month, on July 25, the Charging Party's lawyer received a letter from the Employer stating, "[i]n light of the on-going litigation, we think it appropriate that [the Charging Party] be barred from the premises…."[3] There is evidence that the Employer allows other former employees on the property to attend events and socialize.

ACTION

We conclude that the Region should issue a complaint alleging that the Employer violated Section 8(a)(1) by retaliating against the Charging Party for engaging in protected concerted activity and interfering with the free exercise of (b)(6), (b)(Section 7 rights.

As a preliminary matter, we conclude that the Charging Party's participation in a class action lawsuit against the Employer with and on behalf of current and former employees to recover unpaid wages was protected activity under Section 7. First, for the purposes of Section 7, the term "employee" is defined broadly to include, in addition to an employer's current employees, employees of another employer, former employees of a particular employer, applicants for employment, and "members of the working class generally."[4] Second, concerted resorts to judicial or administrative

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[2] The Charging Party claims that if asked by other employees about (b)(6), (b)(class action lawsuit while on the Employer's premises, (b)(6), (b)(would provide information and refer them to (b)(6), (b)(attorney. But that evidence has serious credibility problems. Whether or not (b)(6), (b)(engaged in any such discussions on the Employer's property is not relevant to the unfair labor practice analysis in this case.

[3] At the time of this statement, the Charging Party was not only a former employee of the Employer but was also a current employee of a nearby restaurant.

[4] *Briggs Manufacturing Co.*, 75 NLRB 569, 571 (1947) (employer violated Section 8(a)(4) by refusing to reemploy former employee who was subject of union's Section 8(a)(3) charge); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977) (employer violated Section 8(a)(1) by unlawfully threatening to have a former employee who had been lawfully discharged arrested). *See also Waco, Inc.*, 273 NLRB 746, 749 n. 8 (1984) (employer violated Section 8(a)(1) by surveilling picketers who were former employees that had been lawfully discharged).

forums, including the concerted filing of lawsuits or other complaints, are protected concerted activity.[5] Thus, the Charging Party clearly qualifies as an "employee" for purposes of Section 7, and (b)(6), (b)(participation with other former and current employees in a class action lawsuit against the Employer for wage and hour violations constitutes an exercise of Section 7 rights.

Denial of Access to the Premises

Although the Charging Party is an "employee" for Section 7 purposes, (b)(6), (b)(is no longer an employee of the Employer, and therefore *Lechmere* arguably applies.[6] Yet, even under *Lechmere*, an employer may not deny access discriminatorily based on Section 7 activity.[7] Similarly, an employer can deny off-duty employees access to the work areas of its premises only if such access is denied to all off-duty employees and

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[5] *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 566 (1978) (concerted "resort to administrative and judicial forums" is Section 7 protected activity); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2, 5 and cases cited therein (Oct. 28, 2014) (an employer violates Section 8(a)(1) when it requires employees to agree to resolve all employment-related claims through individual arbitration because such agreements require employees to give up their Section 7 right to concertedly pursue joint, class, or collective claims if and as available); *Franklin Iron & Metal Corp.*, 315 NLRB 819, 823 (1994) (concerted filing of individual wage discrimination complaints was protected activity), *enforced,* 83 F.3d 156 (6th Cir. 1996).

[6] *See Lechmere, Inc. v. NLRB,* 502 U.S. 527, 533 (1992).

[7] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (employer may validly "post his property" against union organizers if the union has reasonable alternative means of reaching employees "and if the employer's notice or order does not discriminate against the union by allowing other distribution"); *Lechmere, Inc. v. NLRB*, 502 U.S. at 535 (organizer can gain access if union can demonstrate that no other reasonable means of communicating its message exists "or that the employer's access rules discriminate against union solicitation.").

not just those engaged in Section 7 activity.[8] Basically, an employer cannot exercise its legitimate property rights by "drawing a distinction along Section 7 lines."[9]

Applying these principles, the Charging Party has no right under the Act to socialize at the Employer's casino and nightclubs. However, the Employer apparently allows other former employees on the property and, as the Employer's own letter indicates, the only reason the Employer denied the Charging Party access to its premises was because [redacted] is engaged in Section 7 activity in the form of a class action lawsuit. In so doing, the Employer violated Section 8(a)(1) by denying access to its premises on a discriminatory basis drawn along Section 7 lines and in retaliation for Section 7 activity.

Employer's Coercive Statement

An employer violates Section 8(a)(1) when it engages "in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."[10] An employer tends to interfere with the exercise of employee rights when it makes a statement attributing an adverse action to employees' protected concerted activity, even when that adverse action has no relationship to any terms and conditions of employment.[11] Thus, the Employer's statement in its letter to the

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[8] *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976) (an off-duty employee no-access rule is lawful provided it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.")

[9] *Cf. Register Guard*, 351 NLRB 1110, 1110, 1118 (2007) (employer lawfully permitted email use for personal solicitations but not for organizational solicitations), *enforced in part,* 571 F.3d 53 (D.C. Cir. 2009).

[10] *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959) (announcing a change in overtime policy during the course of an organizing campaign violated Section 8(a)(1)).

[11] *Success Village Apartments, Inc.*, 350 NLRB 908, 911 (2007) (employer's statement to an employee that it did not want "union people" to live on its premises violated Section 8(a)(1) even though it did not pertain to a term or condition of employment and the employer's policy restricting employees from living on its premises was otherwise lawful). *See also Owens Corning Fiberglas Co.*, 236 NLRB 479, 480 (1978) (employer that violated Section 8(a)(3) for terminating a union officer also independently violated Section 8(a)(1) because it made statements attributing the termination to the employee's union leadership role).

Charging Party's lawyer that it was barring the Charging Party from its premises because of (b)(6), (b)(7 class action lawsuit against the Employer violated Section 8(a)(1) by attributing an adverse action to the Charging Party's protected concerted activity.

Accordingly, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1), based on its denial of access and its coercive statement explaining why it was denying the Charging Party access.

/s/
B.J.K.

H:ADV.32-CA-134057.Response.GrandSierra2.(b)(6), (b)(7