UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

ALEXANDRIA CARE CENTER, LLC

and **Case No. 31-CA-140383**

ROSALINDA ZUNIGA, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Answering Brief in opposition to Respondent's Exceptions to Administrative Law Judge Jeffrey D. Wedekind's Decision in the captioned matter.[1]

I. PROCEDURAL HISTORY

This case was submitted to the Division of Judges, on, September 8, 2017, pursuant to a Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts, based on a *Complaint and Notice of Hearing* issued by the Regional Director for Region 31 on May 29, 2015, (hereinafter "*Complaint*"). The *Complaint* alleges that Respondent Alexandria Care Center, LLC (Alexandria or Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an Employment Dispute Resolution Program (EDR Program) that employees would reasonably construe as precluding them from filing charges with the National Labor Relations Board. Respondent has maintained its EDR Program since at least October 28, 2011.

On December 14, 2017, ALJ Wedekind issued his Decision, which relied on then current Board law to find merit to the alleged violation of Section 8(a)(1) set forth in the *Complaint*. That same day, the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), which changed the applicable legal standard.

[1] Citations are as follows: Administrative Law Judge Decision (ALJD at __); Respondent's Exceptions (R Exception __ at __); Respondent's Brief in Support of Exceptions (R Brief __); Joint Motion to Transfer Proceddings to the Division of Judges and Joint Stipulation of Facts (Jt. Motion __); Joint

II. RESPONDENT'S EXCEPTIONS

Eight of Respondent's exceptions center on the Board's Decision in *The Boeing Company,* (R Exceptions 2, 3, 4, 5, 11, 12, 13, and 14); five concern the ALJ's finding that the Respondent's EDR program ultimately requires resolution of disputes through arbitration, rendering the right to file a board charge futile (R Exceptions 6, 7, 8, 9, and 10); and three concern procedural matters (R Exceptions1, 15, and 16). Respondent filed no exceptions concerning ALJ Wedekind's recitation of facts which are concise and well-supported by record evidence. (ALJD at 1- 5). For the reasons set forth below, Respondent's exceptions should be denied in their entirety.

III. THE ALJ CORRECTLY FOUND THAT RESPONDENT INTERFERED WITH EMPLOYEES' ACCESS TO THE BOARD AND ITS PROCESSES IN VIOLATION OF SECTION 8(A)(1) BY MAINTAINING THE EDR PROGRAM

A. Under the New *Boeing Company* Standard, Respondent's EDR Program Interferes With the Exercise of Section 7 Rights in Violation of Section 8(A)(1) (R Exceptions 2, 3, 4, 5, 11, 12, 13, and 14)

Respondent correctly argues that this case is governed by the Board's recent decision in *The Boeing Co.*, 365 NLRB slip op. at 154 (2017). Because the Board did not announce its new standard in *Boeing* until the same day that ALJ Wedekind issued his decision in the instant matter, the ALJD appropriately relied on the Board's earlier ruling in *U-Haul Co. of California*, 347 NLRB 375 (2006), which reflected then current Board law. As set forth below, even under

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Exhibits (Jt. Exh. __); Exhibits (GC Ex __; or R Ex __); Respondent's Post-Hearing Brief (R Post-Hearing Brief at __).

the new *Boeing* standard, Respondent's EDR Program interferes with the exercise of employee's Section 7 rights in violation of Section 8(a)(1).

In *U-Haul Co. of California*, 347 NLRB 375 (2006), the Board found an employer's arbitration policy, which would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board, violated Section 8(a)(1) of the Act. *Id*. at 376-77. In finding a violation, the Board relied upon the "reasonably construe" test of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *Boeing*, the Board abandoned its "reasonably construe" test and enunciated a new standard for determining when facially neutral rules will violate Section 8(a)(1) of the Act. *The Boeing Co*., 365 NLRB No. 154 (2017). In *Boeing*, the Board held that where a facially neutral rule, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, two things must be evaluated in determining the rule's legality: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with maintenance of the rule. 365 NLRB No. 154, slip op. at 5. Even under this new standard, however, Respondent's EDR Program interferes with employees' right to file charges with the Board and violates Section 8(a)(1) of the Act. Therefore, Respondent's Exceptions centering on the Board's Decision in *The Boeing Company,* (R Exceptions 2, 3, 4, 5, 11, 12, 13, and 14) should be denied in their entirety.

1. <u>Employees Would Reasonably Interpret Respondent's EDR Program to Interfere with Their NLRA Right to File Charges with the Board</u>

Here, when reasonably interpreted, the language at issue in the EDR Program interferes with employees' right to file charges with the Board. As the Board noted, the "reasonably interpreted" analysis should be determined by reference to the perspective of an objectively reasonable employee "who is aware of his legal rights but who also interprets work rules as they

apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *Boeing Company*, 365 NLRB No. 156 at fn. 14.

In the instant case, the EDR Program uses broad language to convey that virtually all claims arising out of the employment relationship are subject to mandatory arbitration. It applies to "among other things, claims related to discipline, discrimination, fair treatment, harassment, termination and other legally protected rights." It also covers, "**all employment-related disputes** between you and all of our other employees, managers and affiliates both in their individual and representative capacitates . . ." (Joint Exh. 13 at p. 2 (emphasis added)).

Further, the EDR Program contains confusing "savings clause" language. The "savings clause" language, which states that employees "retain the right to pursue employment disputes before federal or state administrative agencies" and that "[t]he EDR Program does not constitute a waiver of your rights under the National Labor Relations Act," nevertheless creates further uncertainty in reasonable employees' minds as to whether they could pursue a charge with the NLRB since the statement regarding not waiving rights under the Act is immediately followed by language reserving to Respondent the right "**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."** (Jt. Exh. 13 at p. 3 (emphasis added)). The proximity of the provision that reserves the right of the Petitioner to seek dismissal of any lawsuit filed under the National Labor Relations Act, to the "saving clause" is contradictory and confusing.[2]

The "savings clause" language is confusing because it both recognizes employees' rights protected by the NLRA, but nevertheless reserves to Respondent the right to seek dismissal of

[2] It is the view of the Counsel for General Counsel that absent the language regarding retaining the right to enforce the EDR by filing for dismissal of lawsuits under the NLRA, the other provisions of the

any charge filed with the Board based on the EDR Program. The provision in Respondent's EDR Program that addresses filing charges with federal administrative agencies is similar to language in *Professional Janitorial Service of Houston*, which the Board read as suggesting that employees may be required to arbitrate their statutory claim even if they were to file charges with the Board. 363 NLRB No. 35, slip op. at 1-2 (2015). In this case, that suggestion is buttressed because the statement concerning filing charges with federal agencies is immediately preceded by the language allowing the Respondent to seek dismissal of any charge filed with the Board. Accordingly, as a whole, the EDR Program would reasonably be read by employees to restrict their statutory right of access to the Board in violation of Section 8(a)(1) of the Act.[3]

The language in the EDR Program is broad, confusing, and unclear – making it a certainty that an objectively reasonable employee would interpret the EDR Program to preclude the filing of unfair labor practice charges with the Board. Therefore Respondent's five exceptions concerning the ALJ's finding that the Respondent's EDR program ultimately requires resolution of disputes through arbitration, rendering the right to file a board charge futile (R Exceptions 6, 7, 8, 9, and 10) should be denied in their entirety.

2. <u>Respondent's Asserted Business Justification of More Efficient and Cost-Effective Resolution of Disputes Does Not Outweigh the Interference with Employees' Fundamental Right to File Charges with the Board</u>

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savings clause would have served to adequately safeguard employee access to the Board and its processes.

[3] Respondent's reliance on Board Member Miscimarra's dissent in *Addeco USA Inc.*, 364 NLRB No. 9 (2016) for the proposition that this language does not interfere with filing charges with the Board is misplaced. The language at issue in *Adecco* simply stated that the employer there could seek dismissal of class or representative actions pursuant to the terms of the arbitration agreement, despite employees Section 7 right to particpate in class actions. This would not be reasonbly interpreted as applying to charges filed with the NLRB. In contrast, the language in the EDR Program gives the employer the right to seek to dismiss "any lawsuit" filed under the NLRA.

Under *Boeing*, when a reasonably interpreted rule interferes with the exercise of Section 7 rights, we turn to balancing (i) the nature and extent of the potential impact on those Section 7 rights versus (ii) the legitimate justifications associated with the language at issue. *Boeing*, 365 NLRB No. 164, slip op. at 11. The Board will balance these interests, focusing on the perspective of employees, when determining whether a facially neutral rule will violate Section 8(a)(1) of the Act. *Id*.

The Board delineated three categories of employment rules: Category 1 includes rules that are lawful to maintain because they do not prohibit or interfere with NLRA rights, or the potential interference is outweighed by justifications for the rule; Category 2 includes rules that warrant individualized scrutiny as to whether any interference with NLRA rights would be outweighed by legitimate justifications; and Category 3 includes rules that would be unlawful to maintain because they would prohibit or limit NLRA-protected conduct and the impact on NLRA rights is not outweighed by justifications for the rule. *The Boeing Company*, 365 NLRB No. 154, slip op. pp. 3-4 and 15.

In determining the nature and extent of the potential impact on NLRA rights, the Board in *Boeing* explained that more weight is to be given to NLRA protected activities deemed central to the Act as opposed to other more peripheral rights. 365 NLRB No. 154, slip op. at 11. Employees' right to file unfair labor practice charges with the Board is a fundamental and essential component of the NLRA. As the Supreme Court has explained, filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7 and, therefore, "it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges." *NLRB v. Scrivener,* 405 U.S. 117, 121-122 (1972). Likewise, the Board has consistently held that "[p]reserving and

protecting access to the Board is a fundamental goal of the Act…" *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4 (2015). As such, because employees would reasonably interpret the broad language of the EDR Program as prohibiting them from filing charges with the Board, the potential adverse impact on NLRA-protected rights is substantial.

In evaluating any purported justifications for employer rules, the Board will likewise distinguish between "substantial justifications – those that have direct, immediate relevance to employees or the business—and others that may be regarded as having more peripheral importance." *Boeing*, 365 NLRB No. 164, slip op. at 11. While Respondent asserts that the EDR Program is justified because private dispute resolution provides for "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" (R Brief at 15), it provides no justification for the inclusion of a provision that employees would reasonably interpret as interfering with their right to access the Board and its processes. The interference with filing claims with the Board has no direct and immediate relevance to Respondent's employees or their conduct on the job. Nor does the rule relate to Respondent's day-to-day business operations.

Based on the foregoing, interference with employees' right to file charges with the Board, like prohibitions on discussing wages or benefits, should be analyzed under Category 3 as enunciated in *Boeing*, and be found to be unlawful. *Boeing, supra*, slip op at 11. Assuming *arguendo* that the Category 2 "individualized scrutiny" standard should be applied here, the EDR Program is still unlawful because the fundamental right to file charges with the Board outweighs Respondent's asserted justification of more efficient and cost-effective dispute resolution.

IV. CONCLUSION

Based on all the forgoing, the record evidence supports the conclusions of law that Respondent violated Section 8(a)(1). Even under the *Boeing* standard, Respondent's EDR Program interferes with employees' right to file charges with the Board and violates Section 8(a)(1) of the Act. 365 NLRB No. 164, slip op. at 11. Thus, Respondent's exceptions should be rejected in their entirety.

Dated at Los Angeles, California, this 28th day of February, 2018.

/s/Jake Yocham
Jake Yocham
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Re: Alexandria Care Center LLC
Case Number: 31-CA-140383

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE* was served on the 28th day of February, 2018

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