

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALEXANDRIA CARE CENTER, LLC

and

Case 31-CA-140383

ROSALINDA ZUNIGA, an Individual.

**RESPONDENT ALEXANDRIA CARE CENTER, LLC'S REPLY BRIEF TO  
COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF**

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## I.

### **UNDER THE BOARD'S *BOEING COMPANY* STANDARD, RESPONDENT'S EMPLOYMENT DISPUTE RESOLUTION PROGRAM IS LAWFUL**

Respondent Alexandria Care Center, LLC (“Respondent” or “Alexandria”) files this reply brief in response to erroneous assertions made by General Counsel in the Answering Brief, and in support of Respondent’s Exceptions to the Administrative Law Judge’s Decision (ALJD). Although General Counsel concedes the ALJD relied upon a test for determining the lawfulness of workplace rules and policies that was recently overruled by the National Labor Relations Board (NLRB) in *The Boeing Company*, 165 NLRB No. 154 (December 14, 2017), General Counsel misapplies the Board’s new standard and inaccurately concludes that the findings and conclusions of the Administrative Law Judge (ALJ) are nevertheless correctly found under *Boeing Company*. Since Alexandria’s Employment Dispute Resolution (“EDR”) Program preserves rather than interferes with employees’ ability to file a charge with the Board, however, it is lawful under the *Boeing Company* test. For these reasons, the ALJ’s conclusion that Alexandria’s EDR Program violates Section 8(a)(1) of the Act is incorrect and must be overturned.

## II.

### **GENERAL COUNSEL INACCURATELY IMPLEMENTS THE *BOEING COMPANY* STANDARD BY FAILING TO APPLY THE BOARD MAJORITY’S TEST**

Initially, General Counsel acknowledges that the new *Boeing Company* test applies to the sole allegation presently before the Board in this case – namely, that Alexandria’s Employment Dispute Resolution (“EDR”) Program violates Section 8(a)(1) because it interferes with and restricts employees’ right to file a charge. (Answering Br. 2). The Board held in *Boeing Company* that “when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and*

(ii) legitimate justifications associated with the rule. [Emphasis in original.]”<sup>1</sup> *Boeing Company, supra*, 165 NLRB at slip op. p. 3. But, General Counsel’s Answering Brief ignores the Board’s following explanation of how it will apply the balancing process to those two considerations: “We emphasize that *the Board* will conduct this evaluation, consistent with the Board’s ‘duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees, which is consistent with Section 8(a)(1). [Footnotes omitted and emphasis in original.]” *Id.*

Rather, General Counsel erroneously asserts as the position of “the Board” what only then-Member Kaplan views as “the threshold inquiry” of whether a policy interferes with Section 7. (Answering Br. 3). Then-Member Kaplan indicates the question:

. . . 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.’ *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, at 271 (5th Cir. 2017). If that objective employee would not reasonably view a challenged rule as interfering with Sec. 7 rights, then the need for the Board to engage in a balancing test is mooted.

*Boeing Company, supra*, 365 NLRB No. 154, slip op. p. 3, fn. 14. Later in the Board’s decision it is made clear, however, that then-Member Kaplan’s mere refining of the overruled test of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), was not supported by then-Chairman Miscimarra and Member Emanuel. It is indicated:

Member Kaplan . . . would explain further. In his view, the Board’s initial inquiry in any rule maintenance case must focus on whether there is any reasonable tendency for the rule to interfere with employee’s Sec. 7 rights. As with any number of other cases involving whether an employer statement (e.g., alleged threats or

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<sup>1</sup> In *Boeing Company*, the Board used “facially neutral” to describe policies, rules, and handbook provisions that “do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity. 365 NLRB No. 154, slip op. p. 1, fn. 4. Since General Counsel fails to explain any issue taken with Respondent’s contention in its Exception 13 to the ALJD that the EDR Program is “facially neutral” within the meaning ascribed by the Board, General Counsel apparently concedes this point as well.

interrogation) or action (e.g., surveillance) violates Sec. 8(a)(1), the reasonable tendency inquiry focuses on an objective employee in the workplace. *Lutheran Heritage* failed to provide an adequate definition of this objective employee, thus permitting Board members in subsequent decisions to decide the legality of rules as if *they* were the objective employee, focused only on potential interference with Sec. 7 rights. In Member Kaplan’s opinion, the 5th Circuit’s criticism in *T-Mobile*, *supra*, of this aspect of the *Lutheran Heritage* test is just as relevant and important to the application of the new test we announce today. Accordingly, he would expressly adopt that court’s definition of an objective employee as a person ‘aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job,’ *T-Mobile*, *supra*, 865 F.3d at 271. Member Kaplan believes that charging employees, when they interpret work rules, with an awareness of an employer’s legitimate needs for discipline and production in their particular workplace is essential to our new test’s stated goal of assuring adequate consideration of those needs in every instance.<sup>[2]</sup>

*Boeing Company*, *supra*, 165 NLRB No. 154, slip op. p. 16, fn. 80 [emphasis in original].

But, as described above, the full Board majority instead adopted a *balancing* test in *Boeing Company* under which the Board weighs the nature and extent of any adverse impact on Section 7 rights against potential justifications for the policy or rule, and evaluates which outweighs the other in determining whether the policy or rule violates the NLRA. 365 NLRB No. 154, slip op. pp. 3 and 14. This balancing test is what must be applied to determine whether Respondent’s EDR Program interferes with employees’ right to file a charge with the Board.

### III.

#### THE EDR PROGRAM IS REASONABLY INTERPRETED UNDER *BOEING COMPANY* AS PROTECTING EMPLOYEES’ RIGHT TO FILE A CHARGE

The Board further held in *Boeing Company* that “when a facially neutral rule, reasonably interpreted, would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board’s

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<sup>2</sup> To the extent then-Member Kaplan indicates the test should derive from *T-Mobile*, the Circuit Court expressly stated there that it was applying the *Lutheran Heritage* test, including whether a reasonable employee reading the rule would construe it to prohibit conduct protected by the NLRA. 865 F.3d 265, 270-271 (5th Cir. 2017) [“In order to determine whether a workplace rule violates Section 8(a)(1), this Court applies the two-part *Lutheran Heritage* framework.”].

inquiry into maintenance of the rule comes to an end. [Footnote omitted and emphasis in original.]” *Boeing Company, supra*, 365 NLRB No. 154, slip op. p. 16. Alexandria contends, contrary to General Counsel’s assertion in the Answering Brief,<sup>3</sup> that reasonable interpretation of the EDR Program provisions indicates it protects rather than interferes with employees’ right to file charges with the Board.

After pointing out that the EDR Program is couched in broad language conveying that “virtually all claims arising out of the employment relationship are subject to mandatory arbitration,” General Counsel asserts that the language in the EDR Program stating that “[t]he EDR Program does not constitute a waiver of your rights under the National Labor Relations Act” and that employees “retain the right to pursue employment disputes before federal or state administrative agencies” (Jt. Ex. 13, 3rd page; ALJD 3:19-20, 24-25), is somehow “confusing” and “uncertain.” (Answering Br. 4). In fact, however, these terms of the EDR Program are crystal clear. Contrary to the allegations of the Consolidated Complaint, the findings of the ALJ, and the arguments of counsel for the General Counsel, these provisions communicate to employees that their right to file a charge with the Board is preserved by Alexandria’s EDR Program. Further, the next statement in the EDR Program – “Nothing in the EDR Program prevents you from filing a claim with a federal or state administrative agency” (Jt. Ex. 13, 3rd page; ALJD 3:25-26) – specifically indicates the lack of any interference of the EDR Program with the right to file an NLRB unfair labor practice charge.

Counsel for the General Counsel nevertheless argues that a phrase amidst these terms of the EDR Program – “but the [sic] 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” (Jt. Ex. 13, 3rd page; ALJD 3:20-22) – creates purported confusion and uncertainty about the right to file a Board charge in “reasonable employees’ minds.” (Answering Br. 4). But, this assertion ignores the reasonable interpretation that such language in the EDR

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<sup>3</sup> General Counsel states: “Here, when reasonably interpreted, the language at issue in the EDR Program interferes with employees’ right to file charges with the Board.” (Answering Br. 3).

Program communicates Respondent's right to defend against a Board charge filed by an employee, whether on the substantive merits or by asserting the EDR Program as a procedural defense. Moreover, regardless of Alexandria's right to respond to an employee's unfair labor practice charge, the NLRB, acting through the Regional Director in whose Region such charge is filed, has the authority to investigate that charge and reject any defense raised by Respondent if the Regional Director deems it appropriate. See NLRB Rules and Regulations, Sections 101.2 ("Initiation of unfair labor practice cases") and 101.4 ("Investigation of charges"). Thus, based upon the EDR Program as it must be reasonably interpreted by the Board, the provisions of the EDR Program are neither contradictory nor confusing with respect to employees' right to file charges with the Board.

To the extent General Counsel relies upon *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35 (2015), in contending that the EDR Program interferes with the right to file a Board charge, and asserts the Arbitration Policy in that case involves similar language (Answering Br. 5), the argument is misplaced. In truth, the language in *Professional Janitorial Service* is materially distinguishable from the provisions of Alexandria's EDR Program.

The Arbitration Policy in *Professional Janitorial Service* provided in an "Application and Coverage" section that: "The only disputes or claims not covered by this policy are those described below in the Exclusions and Restrictions section." *Id.* at slip op. p. 1. That referenced exclusions section provided:

*Excluded Issues:* . . . In addition, any non-waivable statutory claims, which may include wage claims within the jurisdiction of a local or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you use arbitration to resolve them. **However, if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action.** [Highlight added.]

*Professional Janitorial Service*, *supra*, 363 NLRB No. 35, slip op. pp. 1-2. Further, on the final page above the line for an employee's signature, the Arbitration Policy included the following language:

**Agreement to Arbitrate:**

I . . . agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with PJS. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against PJS or any affiliated entities, and each of their employees, officers, directors or agents . . . .

*Professional Janitorial Service*, *supra*, 363 NLRB No. 35, at slip op. p. 2 (emphasis in original).

In applying the *Lutheran Heritage* “reasonably construe” standard in *Professional Janitorial Service*, Board Members Pearce and McFerran observed that the provision on the final page of the Arbitration Policy obligates an employee to submit any claim to final and binding arbitration “without indicating any exceptions to this broad requirement.” *Id.* They further noted that the language in the exclusion provision, quoted above, indicates only that the excluded non-waivable statutory claims “*may* include . . . charges before . . . the National Labor Relations Board,” which they indicated informed employees only “that such a dispute might be exempt, if it constitutes a ‘non-waivable statutory claim’” and that this “language describes only a limited exclusion of indeterminate scope.” *Id.* Finally, these Board Members concluded, based upon the provisions on the final page of the Arbitration Policy, that: “Employees, particularly those unfamiliar with the Board’s procedures, would reasonably read this language to state that even if access to the Board is permitted initially, their unfair labor practice charge can be resolved only through arbitration under the Respondent’s policy.” *Id.* at slip op. p. 3.

Then-Member Miscimarra agreed in a partial concurrence in *Professional Janitorial Service* that the Arbitration Policy interfered with the filing and resolution of Board charges, but he relied upon the following differing rationale:

Unlike my colleagues, I believe the policy’s definition of excluded claims makes reasonably clear that NLRB charges are not subject

to the policy's mandatory arbitration requirements. However, this exclusion is contradicted by unqualified language, appearing over the employee's signature line in the 'Agreement to Arbitrate,' that states signatory employees have 'reviewed and understand [the policy] and agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to [their] employment or the termination of [their] employment' (emphasis added). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007).[<sup>4</sup>]

*Professional Janitorial Services*, *supra*, 363 NLRB No. 35, slip op. p. 5, fn. 7. And, implicit within this restriction to final and binding arbitration is the circumstance, addressed in the above-quoted exclusion language of the Arbitration Policy, in which the Board completes processing of a charge by making a determination against the employer, but the employee must still use arbitration to further pursue the employee's legal rights, which contradicts the opportunity to file and process a charge with the Board. See *id.* at slip op. p. 2.

Since the EDR Program does not impose any obligation upon employees who file Board charges to use arbitration even if the NLRB makes a merit determination against Respondent, it is materially distinguishable from the Arbitration Policy in *Professional Janitorial Services*, and does not contradict the express opportunity for employees to file charges with the Board. As a result, *Professional Janitorial Services* does not support finding a violation in the present case.<sup>5</sup>

#### IV.

#### GENERAL COUNSEL FURTHER ERRS IN CLASSIFYING THE EDR PROGRAM AS A BOEING COMPANY CATEGORY 3 RATHER THAN CATEGORY 1 POLICY

In *Boeing Company*, the Board established three categories of policies, rules, and

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<sup>4</sup> In relation to the citation to *U-Haul Company*, it is noted that unlike the express protection in Alexandria's EDR Program of the right to file a Board charge, the arbitration agreement in *U-Haul Company* made no mention whatsoever of the NLRB. *U-Haul Company*, *supra*, 347 NLRB 375, 381 (Chairman Battista dissenting in part) [noting that U-Haul's arbitration policy does "not even mention the NLRB"].

<sup>5</sup> General Counsel is also mistaken in disputing Respondent's reliance upon then-Member Miscimarra's dissent in *Adecco USA, Inc.*, 364 NLRB No. 9, slip op. pp. 8-9 (2016). Similar to the instant case, the Dispute Resolution and Arbitration Agreement ("Agreement") in that case indicated that while an employee would not be retaliated against or disciplined for exercising the Section 7 right to file a charge, the company could lawfully seek enforcement of the Agreement and seek dismissal of the claims. *Id.* at slip op. p. 1.

handbook provisions, which “represent a classification of *results* from the Board’s application of the new test,” and which “are not part of the test itself.”<sup>6</sup> 365 NLRB No. 154, slip op. p. 4 [emphasis in original]; see also slip op. p. 15. General Counsel initially argues that since Respondent’s EDR Program purportedly interferes with employees’ right to file charges with the Board, it “should be analyzed under Category 3 as enunciated in *Boeing*, and be found to be unlawful. [Citation omitted.]” (Answering Br. 7). But, since the EDR Program does not prohibit or limit Section 7 conduct – in contrast to the Board’s example of a Category 3 rule that prohibits employees from discussing wages or benefits with one another - it is inconceivable the Board would classify Respondent’s EDR Program in Category 3. Instead, it should be classified as a Category 1 policy because it expressly provides: “[t]he EDR Program does not constitute a waiver of your rights under the National Labor Relations Act;” “[y]ou retain the right to pursue employment disputes before federal or state administrative agencies;” and “[n]othing 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.” (Jt. Ex. 13, 3rd page; ALJD 3:19-20, 24-27).

## V.

### **THE EDR PROGRAM IS ALTERNATIVELY LAWFUL UNDER CATEGORY 1 BECAUSE ITS BUSINESS JUSTIFICATIONS OUTWEIGH ITS POTENTIAL ADVERSE IMPACT ON SECTION 7 RIGHTS**

General Counsel asserts in the alternative that “[a]ssuming *arguendo* that the Category 2 ‘individualized scrutiny’ standard should be applied here, the EDR Program is still unlawful.” In response, Alexandria contends in the alternative that the justifications for the EDR Program

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<sup>6</sup> The three categories are defined in the Board’s decision with some examples. *Boeing Company, supra*, 365 NLRB No. 54, slip op. pp. 3-4 and 15.

outweigh its potential adverse impact on the right to file a Board charge, and that the EDR Program is lawful under what the Board identifies as the second “subpart” of Category 1. *Boeing Company, supra*, 365 NLRB No. 154, slip op. p. 4. The EDR Program does not contain any language restricting employees’ access to the Board and its processes. While the EDR Program provides for employment-related disputes to be resolved through the dispute resolution procedure, it carves out an express exception for claims asserting rights under the NLRA. Under reasonable interpretation, this language conveys an exception for Section 7 claims. No arbitration agreement can prevent an employee from filing an unfair labor practice charge with the Board, and not only is there nothing in Alexandria’s EDR Program prohibiting employees from doing so, but the EDR Program expressly acknowledges employees’ right to file such a charge. There is also no evidence that Alexandria took any threatening or disciplinary action against Zuniga to prevent her from exercising her right to file a charge. The EDR provisions merely indicate it could seek dismissal on the merits of a charge filed by an employee. Thus, under the new balancing test of *Boeing Company*, Alexandria submits that the risk of its EDR Program intruding on NLRA rights is comparatively slight, and that the legitimate justifications for the dispute resolution program - lower costs, greater efficiency and speed, the ability to choose expert adjudicators to resolve specialized disputes, and avoiding the risk of devastating “in terrorem” settlements - should prevail. For these reasons, even if the Board considers the balancing process of the *Boeing Company* standard to be necessary in this case, Alexandria’s EDR Program is a lawful policy under Category 1.

## VI.

### CONCLUSION

Based upon all the foregoing, the ALJ’s application of the *Lutheran Heritage* “reasonably construe” test did not apply the proper standard adopted by the Board in *Boeing Company*, and

the ALJD failed to either reasonably interpret the facially neutral EDR program, or afford weight to the justifications for Alexandria's EDR Program. Further, Alexandria's EDR Program expressly preserves the right for its employees to file charges with the Board and, therefore, is lawful under the Act. For all the above reasons, there is merit to Respondent's Exceptions to the ALJD, and the ALJ's conclusion that the EDR Program violates Section 8(a)(1) of the Act is erroneous and must be overturned. As a result, the Board should reverse the ALJ's findings and conclusions of law, and dismiss the allegations.

Dated: March 14, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 14th day of March 2018, I e-filed the Respondent Alexandria Care Center, LLC's Reply Brief to Counsel for the General Counsel's Answering Brief with the Office of the Executive Secretary of the National Labor Relations Board on the NLRB's E-Filing system, and served a copy of this Reply Brief by electronic mail upon the following:

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