United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1237 **September Term, 2018**

FILED ON: DECEMBER 7, 2018

MEK ARDEN, LLC, D/B/A ARDEN POST ACUTE REHAB,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015,
INTERVENOR

Consolidated with 17-1260

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON and PILLARD, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("NLRB" or "Board") and was briefed by counsel. It is

ORDERED and **ADJUDGED** that the petition for review is hereby denied, and the Board's cross-application for enforcement is granted.

The petition for review in this case was filed by MEK Arden, LLC ("Arden" or the "Company"), a long-term care and rehabilitation facility in Sacramento, California. Arden challenges a Decision and Order issued by the National Labor Relations Board ("NLRB" or "Board"), holding that the Company committed violations of section 8(a)(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1), during the period before a Board-conducted secret-ballot election among a unit of Arden employees. *MEK Arden, LLC*, 365 NLRB No. 109

(July 25, 2017). Section 8(a)(1) of the Act "enforces section 7 rights by making it an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of [those] rights.'" *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 914 n.3 (D.C. Cir. 2004) (quoting 29 U.S.C. § 158(a)(1)). Section 7 "protects the rights of employees in collective bargaining, 'including their right to strike, their right to picket, and their right to join or not to join a union.'" *Wash. Serv. Contractors Coal. v. District of Columbia*, 54 F.3d 811, 816 (D.C. Cir. 1995) (quoting *Babler Bros. v. Roberts*, 995 F.2d 911, 914 (9th Cir. 1993)).

I. Background

The events leading to the action before the Board occurred in 2015. A group of Arden's nursing assistants contacted Service Employees International Union, Local 2015 (the "Union") seeking union representation for Arden employees. Two nurses, Marlene Anderson and Camila Holcomb, served as leaders during the unionization efforts. On June 25, 2015, the Union filed an election petition "seeking to represent CNAs, RNAs, cooks, dietary aides, dishwashers, maintenance, laundry, housekeeping, activity assistants, medical records assistants, and social services assistants employed by Arden." Br. of Petitioner 4–5. The Union and Arden participated in a month-long campaign and, ultimately, the Union lost a secret-ballot election by four votes. The Union filed objections to the election and alleged that Arden engaged in numerous unfair labor practices in the weeks leading up to the vote. After investigation, the Board's General Counsel issued a consolidated complaint. The complaint alleged unlawful activities by several Arden officials, including: Markus Mettler (CEO), Juanita Harmon (plant operations manager), Rita Hernandez (marketing director), and Mary Perez (administrator).

Following a hearing, an Administrative Law Judge ("ALJ") found that Arden had violated the Act by (1) directing employees not to visit areas of the facility to which they were not assigned, (2) directing employees not to wear union scrubs, (3) creating the impression that employees' union or protected activities were under surveillance, (4) directing employees to wear attire associated with Arden's anti-union campaign, and (5) prohibiting the posting of union literature and removing such postings. Br. of Respondent 3–4. The ALJ also reviewed the Union's election objections and concluded that six objections should be sustained in whole or in part. Arden filed exceptions with the Board, and the General Counsel filed cross-exceptions. After reviewing the matter, the Board issued its Decision and Order, largely adopting the ALJ's recommended findings and conclusions. In addition, the Board also found a sixth violation – that Arden had unlawfully solicited employee grievances.

The Board's Order set aside the election results and remanded the matter to the Regional Director for Region 20 to conduct a new election. This portion of the Board's Order is not before the Court. *See Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 267 (D.C. Cir. 1993) ("It is well settled that the Board's direction of a new election is not a final order reviewable under either section 10(e) or section 10(f) of the NLRA."). However, Arden properly petitioned for review of the Board's Decision and Order holding that the company committed unfair labor practices in violation of section 8(a)(1) of the Act, and the Board cross-petitioned for enforcement. The Union intervened on behalf of the Board.

After Arden petitioned for review in this court, the Board issued a decision in *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017), which overruled part of the Board's analytical framework for determining the validity of work rules as set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). *Boeing*, 365 NLRB No. 154, 2017 WL 6403495, at *8–15. In its decision in this case, the Board had applied the *Lutheran Heritage* framework in finding two unfair labor practices. Arden filed a motion with this court to remand the case to the Board to take account of the alleged intervening change in Board law. The Board opposed the motion. We directed the parties to address the remand issue in their briefs.

II. Standard of Review

The Board's decision must be upheld "unless, upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012). We will reverse a judgment of the Board "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal quotation marks omitted) (quoting *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993)). In evaluating the record, we "accept all credibility determinations made by the ALJ and adopted by the Board unless those determinations are 'patently insupportable.'" *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (quoting *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000)).

III. Analysis

For the reasons explained below, we find no merit in Arden's claims and, therefore, reject the motion to remand the case, deny Arden's petition for review, and grant the Board's cross-petition for enforcement.

A. The Company's Motion to Remand the Case

An employer's work rule is unlawful under the Act if it explicitly restricts activities protected by Section 7. *Lutheran Heritage*, 343 NLRB at 646. In the past, the Board has held that an employer's work rule will be found to violate the Act even if the rule does not explicitly restrict protected activity if: "(1) employees would *reasonably construe* the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647 (emphasis added). *Boeing* overruled the *Lutheran Heritage* "reasonably construe" prong and announced a new test to replace it. *Boeing*, 365 NLRB No. 154, 2017 WL 6403495, at **2, 4. The Board also found it "appropriate to apply the standard . . . retroactively [to *Boeing*] and to all other pending cases." *Id.* at *18. *Boeing*, however, did not alter the second or third prongs of *Lutheran Heritage*. *See id.* at **1–2, 1 n.4, 17. Therefore, the Board is correct in pointing out that,

> [b]ecause the *Boeing* test does not apply to rules that—as here—were promulgated in response to protected activity, or have been applied to restrict protected activity, there is no basis for remanding to the Board for reconsideration [of] the violations based on Mek Arden's directives prohibiting employees from visiting certain areas of the facility and from wearing union scrubs. Rather, because the Board found that Mek Arden promulgated each of those directives in response to protected activity, and applied one (the instruction not to visit unassigned areas) to restrict protected activity, the Board's Order is supported on grounds that are independent of the *Lutheran Heritage* "reasonably construe" standard overruled by *Boeing*.

Br. of Respondent 51. Moreover, the Board has confirmed that the second and third prongs of *Lutheran Heritage* remain completely undisturbed. *See* Peter B. Robb, Nat'l Labor Relations Bd., Memo. GC 18-04, Guidance on Handbook Rules Post-Boeing (2018) ("Rules that specifically ban protected concerted activity, or that are promulgated directly in response to organizing or other protected concerted activity, remain unlawful."). We therefore deny Arden's motion for remand.

B. Violations of Section 8(a)(1)

1. Solicitation of grievances and implied promise to remedy them

Markus Mettler conceded at trial that he approached Marlene Anderson, asked how things were going, and stated that he would "look into" her complaints. J.A. 188–91, 196. Moreover, the conversation took place on the same day that Anderson and other Union advocates delivered the election petition to management. It is well understood that "implicit or explicit promises to correct grievances may violate section 8(a)(1) because 'the combined program of inquiry and correction' suggests that 'union representation [is] unnecessary.'" *Traction Wholesale*, 216 F.3d at 103 (quoting *Reliance Elec. Co.*, 191 NLRB 44, 46, 1971 WL 31749 (June 11, 1971), *enforced*, 457 F.2d 503 (6th Cir. 1972)). "An employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period." *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010). As the Board concluded, the record is devoid of any evidence that Mettler routinely engaged with employees to solicit their concerns or complaints. *See* J.A. 302 n.6. The Board's finding that Mettler initiated this conversation primarily to discourage support for unionization efforts is supported by substantial evidence. Therefore, we have no grounds to second guess the Board's determination.

2. Rule prohibiting visits to other facility areas

The Board credited testimony from two Certified Nursing Assistants who stated that Mary Perez announced a new rule restricting nurses from visiting other areas of Arden's facility for any non-work-related reason. The Board found that "there is no doubt that this rule was implemented in response to the union campaign, having been announced only a few days after the election petition was handed to Perez." J.A. 315. Indeed, the election petition was delivered on June 24 and Perez's announcement took place on or about June 29. In light of this evidence, the adoption of the rule plainly violated the second and third prongs of *Lutheran Heritage* because, as the Board

found, it was adopted in response to union activity and it was in fact applied to restrict union activity. *See Lutheran Heritage*, 343 NLRB at 647. The Board's judgment is unassailable.

3. Directive not to wear union scrubs

The Company concedes that Mary Perez had a conversation with employees as they attempted to distribute purple scrubs, which employees wore to indicate support for the Union. Br. of Petitioner 31–32. The Board found that Perez instructed employees not to wear union scrubs. This rule contravened *Lutheran Heritage*'s second and third prongs because it was announced in response to union activity and was applied to restrict section 7 activity. Arden's suggestion that any violation was *"de minimis*" is without merit. Perez never retracted or corrected her instruction. And she made her comments during the height of a hotly contested campaign for union representation. The Board is in the best position to assess the effects of such employer conduct. *See Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991) ("[E]specially when there is ample evidence of antiunion animus behind the contested action, we accord the Board a wide measure of discretion."). Because the finding is supported by substantial evidence, we will not second guess the Board's judgment.

4. Instruction to janitor about union scrubs

The Board credited testimony from Camila Holcomb stating that she witnessed Juanita Harmon, an Arden manager, tell a janitor to take off his scrubs, which had been given to him by the Union. Employers violate section 8(a)(1) when they prohibit employees from wearing union insignia, unless there are "special circumstances" justifying the employer's action. *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999); *see also P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007) (explaining that special circumstances are those that "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image") (citation omitted). Arden does not claim that there were special circumstances justifying Harmon's order. In addition, the Company is wrong in suggesting that Holcomb was not unlawfully coerced because she merely witnessed, and was not directly subject to, Harmon's intimidating conduct. *See* Br. of Petitioner 33. A witness to an unfair labor practice can be "coerced," within the meaning of the Act, when she overhears offending comments made to a different employee. *See, e.g.*, *Williams Motor Transfer, Inc.*, 284 NLRB 1496, 1498–99 (1987).

5. Creation of impression of surveillance

The Company concedes that Rita Hernandez told Danielle Dangerfield, a nursing assistant, that cameras in the Arden facility were operational and voice-activated. *See* Br. of Petitioner 14. The Board also credited testimony from Dangerfield that Hernandez told her "to be careful" because cameras were "monitoring employee conversations." J.A. 317. "The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance." *Flamingo Las Vegas Operating Co., LLC v. NLRB*, No. 15-1024, 2016 WL 3887170, at *3 (D.C. Cir. June 10, 2016) (quoting *Mountaineer Steel, Inc.*, 326 NLRB

787, 787 (1998), *enforced sub nom.*, *NLRB v. Mountaineer Steel, Inc.*, 8 F. App'x 180 (4th Cir. 2001)). Although Hernandez later learned that she was mistaken about the cameras, it was not unreasonable for the Board to conclude that employees would take seriously such intimidating statements made by a company manager.

6. Discriminatory enforcement of posting rule

Finally, it is undisputed that Arden had a rule prohibiting employees from posting any non-work-related materials in the break room. It is also undisputed that selective enforcement of such rules is a violation of section 8(a)(1). *See Healthbridge Mgmt. v. NLRB*, 798 F.3d 1059, 1073 (D.C. Cir. 2015) ("[O]nce an employer permits employees access to a bulletin board, the union's right to post takes on the protection of section 7 of the Act.") (citation omitted). Here, the Board found that Arden enforced this rule in a discriminatory manner. Several of Arden's witnesses admitted to removing any fliers from the bulletin board that expressed support for the Union. And the Board credited testimony from several witnesses who explained that Arden had permitted numerous other non-work-related postings during the same time period when Union postings were banned. Arden has failed to undermine the Board's credibility determinations. And the Company is mistaken in its claim that it never received fair notice of this charge. The Board correctly found that Arden's attorneys vigorously cross-examined witnesses about postings they had seen in the break room, thus making it clear that the posting rule was fully litigated during the unfair labor practice hearings. *See Bellagio v. NLRB*, 854 F.3d 703, 712–13 (D.C. Cir. 2017).

IV. Conclusion

We find no merit in the Company's claims. The Board's Decision and Order are supported by substantial evidence, sound credibility determinations, reasoned decision-making, and proper application of the law. Therefore, we reject the motion to remand the case, deny the petition for review, and grant the Board's cross-petition for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or hearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk