**MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC *and* Tiffany Sargent.** Case 32–CA–134057

May 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On May 4, 2015, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed a statement in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

Facts

The Respondent operates a facility that includes a hotel, casino, restaurants, clubs, bars, and a pool, all open to the general public. Charging Party Tiffany Sargent was briefly employed by the Respondent as a "beverage supervisor," a nonsupervisory position, from December 12 through late December 2012. After the conclusion of her employment, Sargent continued to socialize at the Respondent's Lex Nightclub. The Respondent had a longstanding past practice of allowing former employees to patronize its facility and attend social functions, and accordingly did not interfere with her visits. On June 21, 2013, Sargent and another employee, on behalf of themselves and other similarly situated employees, filed a class and collective action against the Respondent for unpaid wages, alleging violations under the Fair Labor Standards Act (FLSA) and Nevada law.[3]

Around the beginning of July 2014, the Respondent denied Sargent access when she attempted to attend an event held at the Lex Nightclub. The Respondent followed up with a letter on July 25, 2014, which stated in relevant part:

> In light of the on-going litigation, we think it appropriate that Ms. Sargent be barred from the premises, absent order of the court. As such, please be advised that effective immediately, the Grand Sierra Resort hereby invokes NRS [Nevada Revised Statute] 207.200 (Unlawful Trespass Upon Land) and hereby revokes any permission to enter the premises . . . . Please advise your client of the trespass warning and kindly provide us with your assurance that absent the written consent of the Grand Sierra Resort, Ms. Sargent will no longer enter the premises.

Discussion

We find that the Respondent violated Section 8(a)(1) of the Act by denying Sargent access to its facility, contrary to its longstanding past practice of granting access to former employees as it would to any other member of the public. In so finding, we agree with the judge that the Respondent expressly retaliated against Sargent for engaging in the protected concerted activity of filing a class and collective action against the Respondent on matters concerning the workplace. The Respondent's exclusion of Sargent, in response to her participation in protected concerted activity, would reasonably tend to chill employees from exercising their Section 7 rights. Upon observing or learning of this targeted action against the lead plaintiff in the FLSA lawsuit, the Respondent's employees reasonably would conclude they, too, might be subject to reprisals and reasonably would be deterred from participating in a work-related lawsuit or other protected concerted activity. See *Schwartz Mfg. Co.*, 289 NLRB 874, 878–879 (1988), enfd. 895 F.2d 415 (7th Cir. 1990).

We are not persuaded by our dissenting colleague's arguments that the Respondent did not violate Section 8(a)(1); our dissenting colleague relies on a series of

[1] We find, in agreement with the judge, that as a former employee of the Respondent involved in a labor dispute relating to her former employment, Tiffany Sargent falls within the Act's broad definition of "employee," which includes applicants for employment, former employees, employees of other employers, and members of the working class, generally. *Briggs Manufacturing Co.*, 75 NLRB 569, 570–571 (1947); see also *Redwood Empire*, *Inc.,* 296 NLRB 369, 391 (1989); *Little Rock Crate & Basket Co*., 227 NLRB 1406, 1406 (1977).

Although the Respondent has excepted to the judge's finding that it independently violated Sec. 8(a)(1) of the Act by sending Sargent's counsel a letter on July 25, 2014 barring her from the property and threatening her with arrest for trespass, the Respondent has not briefed or provided legal support for its exception. Accordingly, we disregard the Respondent's bare exception under Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). In addition, we find the Respondent's initial denial to Sargent of access to the Nightclub in the beginning of July 2014 to be sufficiently distinct in both time and effect from its July 25, 2014 letter to Sargent's attorney for the two events to constitute independent violations.

[2] We shall substitute a new notice to conform to the Board's standard remedial language and the violations found.

[3] The lawsuit included allegations that the Respondent violated federal wage and hour laws by requiring employees to clock out to avoid overtime while continuing to work the job for the Respondent. The number of representative plaintiffs had increased to six by the time the second amended complaint was filed on June 12, 2014.

mischaracterizations of basic labor law principles. First, our colleague argues that, by excluding Sargent from her former place of employment, the Respondent did not "affect[] her wages, hours, or terms and conditions of employment." But the relevant question under Section 8(a)(1) is not whether the Respondent affected Sargent's wages, hours, or terms and conditions of employment, but whether (in the words of the Act) the Respondent has "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in section 7." As explained, the Respondent's actions, taken in response to Sargent's protected lawsuit, would have reasonably tended to interfere with employees' exercise of their statutory rights.

Second, our dissenting colleague asserts that "the stipulated record provides no support for a finding that MEI's action . . . interfered with *any* NLRA-protected conduct by Sargent or anyone else" and that the Respondent "was *not* motivated by those aspects of the FLSA lawsuit that implicated . . . Section 7 rights." The basic test for an 8(a)(1) violation, however, is whether—regardless of intent—the employer engaged in conduct that reasonably tends to interfere with the free exercise of employee rights under the Act. *Webasto Sunroofs, Inc.,* 342 NLRB 1222, 1223 (2004) (citing *American Freightways Co.,* 124 NLRB 146, 147 (1959)). Accordingly, a finding of restraint or coercion does not depend on the subjective reaction of employees. *Helena Laboratories Corp.*, 228 NLRB 294, 295 (1977). Likewise, the Respondent's motivation is not relevant to our inquiry here.[4]

Third, our dissenting colleague states that "even such a retaliatory motive does not empower the NLRB to defend the interest that Sargent or others may have in pursuing their rights under a different statute." But, as we have explained, our decision is concerned solely with the effectuation of rights under the Act. Sargent's class action wage and hour lawsuit constituted a protected concerted activity, a fact that the Respondent concedes in its brief, and which is well-settled Board law. See, e.g., *Le Madri Restaurant,* 331 NLRB 269, 275 (2000). The Respondent's interference with that activity, via its exclusion of Sargent from the premises "[i]n light of the on-going litigation," necessarily implicated employees' Section 7 rights.

Finally, our colleague accuses the majority of creating a "per se violation of the NLRA whenever any former employee pursuing a non-NLRA employment claim with one or more other employees is denied access to the employer's private property." We announce no such rule. Our holding is based on the unusual facts of this case, where the Respondent expressly retaliated against a former employee when it singled out Sargent precisely because of her protected concerted activity by denying her access to a commercial facility that was entirely open to the public. Had the Respondent barred Sargent from a private workplace, to which it had not granted routine and unfettered access to the public, the legal question before us would surely be different.

In addition, we reject our dissenting colleague's argument that the Respondent had legitimate and specific employer business interests—including the avoidance of potential interactions prohibited by the court and workplace conflict—that were protected by the Nevada trespass law and outweighed its employees' Section 7 rights. Initially, we observe that the judge found that the Nevada trespass law was inapplicable and that Sargent was not a trespasser, and that the Respondent neither excepted to the judge's conclusion nor advanced any specific business justifications for its actions. Accordingly, the Respondent has waived any such argument which only our dissenting colleague has raised. As set forth in Section 102.46(a)(1)(ii) and (f) of the Board's Rules and Regulations, "Any exception . . . not specifically urged will be deemed to have been waived," and "Matters not included in exceptions . . . may not thereafter be urged before the Board, or in any further proceeding."

In any event, we are not persuaded by our colleague's fear that our holding risks compromising the legitimate interests of an employer in the Respondent's position. To the extent such an employer legitimately may be concerned about interactions (prohibited or not) between its officials and a former employee, we see nothing in Section 7, at least not in the circumstances presented here, that would prevent the employer from directing its managers and supervisors not to discuss the lawsuit with the former employee. Further, insofar as our colleague worries that an employee-plaintiff's presence might create conflict at the workplace or disrupt her former employer's operations, nothing in our decision today would preclude an employer from continuing to apply any lawful, uniformly enforced rules designed to protect the safety of its workplace or the continuity of its operations. Cf. *Schwartz Mfg. Co.*, 289 NLRB at 878–879 and fn. 10 (in absence of policy excluding former employees from workplace, employer unlawfully ejected former employees engaged in union activity). As described, however, the Respondent routinely granted former employees access to its premises, and denied Sargent alone such ac-

[4] Contrary to our colleague's assertion, it is also irrelevant that the Respondent did not take action against other employees who were involved in Sargent's lawsuit. Nor is it necessary for Sargent to have visited the Nightclub to further her lawsuit for there to be interference with employees' Sec. 7 rights.

cess based on her protected activity. Section 7 plainly does not permit that.

For all of these reasons, we agree with the judge that the Respondent violated Section 8(a)(1) by barring Sargent from its premises.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC, Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 16, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

I respectfully dissent from my colleagues' finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act). The Respondent, MEI-GSR Holdings, LLC (GSR), operates the Grand Sierra Resort in Reno, Nevada. GSR lawfully terminated the employment of Tiffany Sargent in late December 2012. On or about June 21, 2013, former employee Sargent filed a collective and class action lawsuit against GSR under the Fair Labor Standards Act (FLSA) and Nevada state law. The stipulated record contains no indication that Sargent had any involvement with other GSR employees in relation to the lawsuit. Subsequently, several other current or former employees joined the lawsuit as additional representative plaintiffs.

Sargent's boyfriend worked at the Lex Nightclub, which is located on GSR's premises and is owned and operated by GSR. On various occasions following Sargent's discharge, Sargent visited the Nightclub and attended other events on GSR's premises to "socialize." On July 25, 2014, GSR's counsel in the FLSA lawsuit sent a letter to Sargent's counsel in the FLSA lawsuit that stated:

> [I]t has come to the attention of management of the Grand Sierra Resort that your client, Tiffany Sargent, has been socializing and attending functions at the hotel casino. *In light of the on-going litigation, we think it appropriate that Ms. Sargent be barred from the premises, absent order of the court*. As such, please be advised that effective immediately, the Grand Sierra Resort hereby invokes NRS [Nevada Revised Statute] 207.200 (Unlawful Trespass Upon Land) and hereby revokes any permission to enter the premises. It is certainly not our intention to embarrass Ms. Sargent, and would prefer not to have the trespass warning invoked in person. Please advise your client of the trespass warning and kindly provide us with your assurance that absent the written consent of the Grand Sierra Resort, Ms. Sargent will no longer enter the premises.

(Emphasis added.) My colleagues, like the judge, find that when GSR barred Sargent from entering its premises, it violated Section 8(a)(1) of the NLRA, which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [NLRA] section 7."[1] I agree with my colleagues' finding that Sargent, though a former employee of GSR, was nonetheless an "employee" as defined in the NLRA.[2] However, I respectfully disagree with their finding that the attorney's letter, sent in connection with Sargent's non-NLRA lawsuit, violated Section 8(a)(1) of the NLRA.[3]

GSR has chosen not to contest that Sargent engaged in "a protected activity."[4] Conduct involving two or more employees is protected under the NLRA if the prerequisites set forth in Section 7 are present—namely, that it constitutes "concerted" activity engaged in for the "pur-

[1] Sec. 7 of the Act states in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by [a union security] agreement . . . ."

[2] See *Briggs Mfg. Co.*, 75 NLRB 569, 570–571 (1947) (holding that "employee" as defined in Sec. 2(3) "covers . . . former employees of a particular employer"); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978).

[3] The judge and my colleagues find that GSR committed *two* violations of Sec. 8(a)(1), one for revoking, as to Sargent, its past practice of allowing former employees access to its "Entertainment Services," and a second for sending Sargent's counsel the July 25 letter barring Sargent from entering GSR's premises. In my view, these are one and the same, and I will treat them as such. Any revocation of a past practice of allowing former employees access to GSR's premises was accomplished by and through the July 25 letter.

[4] Respondent MEI-GSR Holdings, LLC's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, p. 7 ("Respondent does not contest, for purposes of this matter only, that participation in the class action lawsuit constituted engaging in a protected activity.").

pose" of "mutual aid or protection"—although the Act's protection does not attach, in my view, merely because an employee pursues a non-NLRA class or collective action.[5]

Even if Sargent engaged in NLRA-protected conduct, I do not believe the Board can reasonably find that the letter sent from GSR's counsel to Sargent's counsel *in the FLSA lawsuit*, over which the Board has no jurisdiction, constitutes unlawful action by GSR "to interfere with, restrain, or coerce" Sargent in her exercise of NLRA-protected rights in violation of Section 8(a)(1). There is no allegation that excluding Sargent from her *former* place of employment affected her wages, hours, or terms or conditions of employment. There is no allegation that Sargent, when socializing at the Grand Sierra Resort, had been interacting with GSR employees for reasons related to the non-NLRA class action lawsuit. Nor is there evidence that barring Sargent from the premises interfered with her pursuit, or anyone's pursuit, of that lawsuit.

GSR barred Sargent from coming onto its property to "socialize," and GSR's attorney attributed this action to "the on-going [FLSA] litigation." However, I believe it is too far a leap to presume that this action had anything to do with NLRA-protected rights or would be perceived by other employees in that manner.

First, the record establishes that five other employees were pursuing the FLSA lawsuit along with Sargent.[6] All of these employees were engaged in the same "protected" activity. Yet there is no evidence that GSR took any action against or imposed any restraint on any individual other than Sargent. This warrants an inference that GSR was *not* motivated by those aspects of the FLSA lawsuit that implicated NLRA Section 7 rights.

Second, determining whether certain conduct violates Section 8(a)(1) requires the Board to engage in the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 229 (1963).[7] Here, as noted above, the stipulated record provides no support for a finding that GSR's action, which prevented Sargent from continuing to "socialize" on GSR's premises, interfered with *any* NLRA-protected conduct by Sargent or anyone else. Moreover, this case involves GSR's right as a property owner, under Nevada trespass law, to limit access to its premises by a former employee who was a plaintiff in a non-NLRA lawsuit over which the NLRB has no jurisdiction.[8] In this context, the "interest of the employer" predictably encompasses many legitimate considerations, including (i) a desire to avoid inadvertent interactions between GSR officials and Sargent that might bypass their respective counsel handling the non-NLRA litigation, (ii) the possibility that such interactions might contravene court restrictions on communications between GSR and the plaintiffs or class members, and (iii) the risk that Sargent's presence on GSR's premises while the non-NLRA lawsuit was pending might result in conflict or disruption of GSR's operations. To the extent, if any, that GSR's exclusion of Sargent from its premises infringed on rights associated with the FLSA lawsuit, the letter from GSR's attorney indicated that Sargent would be afforded access pursuant to any "order of the court."

Under my colleagues' position in this case, it constitutes a per se violation of the NLRA whenever any former employee pursuing a non-NLRA employment claim with one or more other employees is denied access to the employer's private property if other former employees are granted access, even though (i) the former employee has no other right to be on the premises, (ii) the former employee does not seek to engage in NLRA-protected activities on the premises, and (iii) the former employee is not seeking access to the premises for any purpose that relates to the non-NLRA claim. I do not believe that Congress, when enacting the NLRA, intended to guarantee that every former employee would have a right of access to the private property of his or her former em-

[5] The only "protected activity" alleged and found to have occurred in the instant case is Sargent's filing of a class action lawsuit. As I have previously indicated elsewhere, I believe that whether conduct related to a non-NLRA claim, over which the NLRB has no jurisdiction, is protected by Sec. 7 is unaffected by the fact that the claim is filed or pursued as a class or collective action. Rather, the presence or absence of NLRA protection depends on whether the prerequisites set forth in NLRA Section 7 are satisfied. See *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting); *Murphy Oil USA, Inc*., 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). See also *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 11–23 (2014) (Member Miscimarra, dissenting in part). As noted in fn. 4, supra, GSR has chosen not to contest in the instant case that Sargent's participation in the class action lawsuit was "a protected activity."

[6] The Second Amended Collective and Class Action Complaint filed on June 12, 2014 in the FLSA lawsuit shows there were six representative plaintiffs, presumably current or former GSR employees. Stipulated Record, p. 127.

[7] See also *Republic Aviation v. NLRB,* 324 U.S. 793, 797–798 (1945); *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967). Cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13-18 (2015) (Member Miscimarra, dissenting in part).

[8] My colleagues say that the judge found Nevada trespass law inapplicable and that GSR did not except to that finding. However, GSR clearly had rights under Nevada trespass law as a property owner. It is also obvious that neither the Board nor the judge has jurisdiction to address violations of Nevada trespass law, nor would their interpretations of Nevada trespass law be entitled to deference.

ployer whenever he or she joined other employees in a non-NLRA lawsuit against that former employer.[9]

It could be that GSR's action here constituted retaliation for Sargent's pursuit of the FLSA claim. However, even such a retaliatory motive does not empower the NLRB to defend the interest that Sargent or others may have in pursuing their rights under a different statute. As I stated in *Beyoglu*, the FLSA has its own anti-retaliation provision,[10] and we are not permitted to "'tak[e] it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace.'" *Beyoglu*, 362 NLRB No. 152, slip op. at 5 (Member Miscimarra, dissenting) (quoting *Meyers Industries*, 281 NLRB 882, 888 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)).

Accordingly, I respectfully dissent.

Dated, Washington, D.C. May 16, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT bar former employee Tiffany Sargent from our property because she filed and maintained a class action lawsuit against us.

WE WILL NOT advise former employee Tiffany Sargent that we are barring her from our property and issuing her a trespass warning because she filed and maintained a class action lawsuit against us.

WE WILL NOT maintain any policy that discriminates or retaliates against any current or former employee for filing or maintaining a class action employment-related lawsuit of any kind in any administrative or judicial forum.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL grant former employee Tiffany Sargent access to our property on the same basis that we grant access to all of our other former employees, and WE WILL rescind our July 25, 2014 letter barring her from our property and threatening her with arrest for trespass.

MEI-GSR HOLDING, LLC D/B/A GRAND SIERRA RESORT & CASINO/HG STAFFING, LLC

The Board's decision can be found at www.nlrb.gov/case/32–CA–134057 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[9] In my view, my colleagues are unconvincing in their efforts to disclaim the creation of blanket right, under the NLRA, affording to former employees a right to access their former employer's private property if they have joined other employees in a non-NLRA lawsuit against that employer. In this regard, my colleagues state their holding is limited to the unusual facts of this case; they distinguish GSR's property, which is open to the public, from a workplace to which access is more limited; and they assert that "the legal question before us would surely be different" if Sargent had been barred from a more private type of workplace. However, based on the rationale utilized by my colleagues in this case, the distinctions they draw are without a difference. Even though GSR's property is open to customers and patrons, GSR has no lesser right to control access to their property, as a property owner, than would be vested in the owner of other private property used for a different type of business purpose. In fact, the reasoning utilized by my colleagues does not have any limiting principle that would permit other types of private property owners to selectively deny access to those former employees who participate in non-NLRA lawsuits that, according to my colleagues, constitute protected concerted activity within the meaning of our statute.

[10] See 29 U.S.C. § 215(a)(3) (making it unlawful "to discharge *or in any other manner discriminate* against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA) (emphasis added).

*Noah J. Garber, Esq.,* for the General Counsel.
*H. Stan Johnson, Esq. (Cohen/Johnson LLC.),* for the Respondent.
*Mark R. Thierman, Esq. (Thierman Law Firm P.C.),* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case is before me on the parties' February 20, 2015 joint motion to waive the hearing and to submit case on joint stipulation of facts pursuant to Section 102.35(a)(9) of the National Labor Relations Board's (NLRB's or the Board's) Rules and Regulations, as amended. I granted the joint motion with its stipulated record and Joint Exhibits 1–7 on February 23, 2015.

### Stipulated Issues

Charging Party, Tiffany Sargent (Sargent or Charging Party) filed the initial charge on August 4, 2014[1] and the General Counsel issued his complaint on November 24. (Stip. Record at pp. 1–92.) The complaint alleges that Respondent, MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC (Respondent or the Company), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying the Charging Party access to Respondent's hotel and casino facility in Reno, Nevada, due to her filing of a collective and class action lawsuit against Respondent which conduct allegedly interferes with, restrains, and coerces employees in the exercise of their rights as guaranteed in Section 7 of the Act.

The Respondent filed a timely answer to the complaint on December 5 denying all material allegations and setting forth affirmative defenses. (GC Exh. 1(e); Stip. Record at pp. 94–99.)

The parties stipulated to the following issues to be resolved:

1. Did Respondent retaliate against Sargent in violation of Section 8(a)(1) of the Act by denying her access to its facility for engaging in protected concerted activity?
2. Does Nevada Revised Statute Section 207.200 privilege Respondent to deny Sargent access to its facility discriminatorily based on Section 7 activity?
3. Did Respondent independently violate Section 8(a)(1) of the Act by sending Sargent's counsel the July 25, 2014 letter marked for the record as Joint Exhibit 3 which advises Sargent's counsel that:

> "it has come to the attention of management of the [Respondent] Grand Sierra Resort that your client, Tiffany Sargent, has been socializing and attending functions at the hotel casino. In light of the on-going litigation, we think it appropriate that Ms. Sargent be barred from the premises, absent order of the court. As such, please be advised that effective immediately, the [Respondent] Grand Sierra Resort hereby invokes NRS [Nevada Revised Statute] 207.200 (Unlawful Trespass Upon Land) and hereby revokes any permission to enter the premises. It is certainly not our intention to embarrass Ms. Sargent, and would prefer not to have the trespass warning invoked in person. Please advise your client of the trespass warning and kindly provide us with your assurance that absent the written consent of the [Respondent] Grand Sierra Resort, Ms. Sargent will no longer enter the premises"?

### FINDINGS OF FACTS

On the joint stipulation of facts submitted by the parties, the joint exhibits attached to the joint stipulation and after considering the closing brief of the General Counsel timely filed on March 30, 2015, as well as the joinder pleading filed by counsel for the Charging Party[2], and the 3 statements of position filed earlier as joint exhibits 5, 6, and 7, by the General Counsel, Charging Party, and the Respondent, respectively, I make the following findings:

#### I. JURISDICTION

The parties stipulate and I find that at all material times, Respondent has been a corporation with an office and place of business located in Reno, Nevada (Respondent's Facility), and has been engaged in the operation of a hotel and casino providing food, lodging, and gaming services to the general public. The parties also stipulate and I further find that in conduction its operations during the 12-month period ending October 31, Respondent derived gross revenues in excess of $500,000. It is further stipulated and I also find that in conducting its operations during the 12-month period ending October 31, Respondent purchased and received at its facility, goods valued in excess of $50,000 directly from points outside the State of Nevada. All parties stipulate and I further find that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stipulations (Stips.) 2(a)-(c) and 3.)

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### *A. Statement of Stipulated Facts*

The parties further stipulated to the following statement of facts:

> 1. Respondent's Facility contains, amongst other things, a hotel, restaurants, lounges, clubs, bars, a pool, performance venues, and gaming services, and hosts other social functions (collectively Respondent's Entertainment Services). Respondent's Entertainment Services are open to the general public. Respondent has a long-standing past practice under which former employees are allowed access to Respondent's Facility to patronize Respondent's restaurants and casino and to participate at other social functions at Respondent's facility and to otherwise participate in Respondent's Entertainment Services (the Access Policy). Respondent does not have a policy or practice of barring former employees from patronizing its Entertainment Services. Former employees are permitted to patronize Respondent's Entertainment Services. Pursuant to Nevada Revised Statute Section 207.200, "Unlawful trespass upon land; warning against trespassing," and Nevada Revised Statute Section 463.4076, "Admission of patrons to gaming salon: Conditions; restrictions; resolution of disputes," Respondent retains the right to remove individuals

[1] All dates are in 2014 unless otherwise indicated.

[2] Respondent did not timely file a posthearing brief.

from its Facility provided that such restriction is not based on the basis of the race, color, religion, national origin, ancestry, physical disability or sex of the patron. (Stip. 4(a)–(f).)

2. On December 12, 2012, Respondent hired Sargent as a beverage supervisor in its beverage service department until her termination in about late December 2012. Sargent is not challenging the lawfulness of her termination in this proceeding. Despite her job title, Sargent was not a supervisor within the meaning of Section 2(11) of the Act. (Stip. 5(a)-(c).)

3. On or about June 21, 2013, Ms. Sargent filed on behalf of herself and other similarly situated current and former employees of Respondent, a collective and class action complaint in the Second Judicial District Court for the State of Nevada. The collective and class action complaint described above was later removed in June 2014 to the United States District Court for the District of Nevada in the matter of *Tiffany Sargent et al. v. HG Staffing, LLC, MEI-GSR Holdings LLC d/b/a Grand Sierra Resort,* Case No. 3:13-CV-453-LRH-WGC. (the Class Action Lawsuit[3]) (Stip. 6(a)-(b); Jt. Exhibits 1 and 2.)

In January 2014, Sargent's boyfriend began working at Lex Nightclub, which is located on the Respondent's premises and is owned and operated by Respondent. On various occasions between late December 2012 and July 2014, when Sargent was no longer employed by Respondent, Sargent visited Lex Nightclub and attended other events on Respondent's premises in order to socialize. All of these visits occurred without incident or interference by Respondent. (Stip. 7(a)–(c).)

About the beginning of July 2014, Respondent denied Sargent access to its premises when she attempted to attend an event at Lex Nightclub. (Stip. 8.)

About July 25, 2014, Respondent, acting through its legal counsel, Benjamin Vega, sent a letter to Sargent's legal counsel of record revoking any permission for Sargent to enter Respondent's facility under the Access Policy, advising Sargent that she was being issued a trespass warning, and that she was henceforth barred from accessing Respondent's facility because of the on-going litigation—the Class Action Lawsuit. Since about July 2014, Respondent has denied Sargent access to Respondent's facility. At the time that Respondent denied Sargent access to its facility, Sargent was not only a former employee of Respondent but was also a current employee of the Lucky Beaver, Bar & Burger located in Reno, Nevada. The events/grounds that led to Respondent's decision to terminate Sargent are unrelated to Respondent's decision to bar Sargent from the facility. (Stip. 9(a)–(d); Jt. Exhs. 3 and 4.)

### *B. The Positions of the Parties*

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by: (1) discriminatorily barring Charging Party Sargent from accessing Respondent's facility beginning in July 2014, in retaliation for her filing the Class Action Lawsuit against Respondent for alleged wage and hour violations and thereby participating in protected concerted activity; and (2) Respondent issuing to Sargent its July 25, 2014 trespass warning to her that threatened initiating trespass charges against Sargent if she attempted access to Respondent's facility. (Jt. Exh. 5 and GC Br.)

The Charging Party joins in the General Counsel's contentions and adds that Sargent is being denied access to Respondent's public areas such as restaurants, bars, and nightclub solely because she was the leader of a group of employees seeking redress through the Class Action Lawsuit alleging inadequate wages and unlawful working conditions and that Respondent acted unlawfully by discriminating against Sargent as a union advocate solely because of her advocacy of Section 7 rights which both chills the Section 7 rights of current employees and violates the facial neutrality rule of *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956). (Jt. Exh. 6.)

The Respondent contends that Sargent left her brief employment with Respondent in December 2012, purportedly more than 6 months before she filed the June 2013 Class Action Lawsuit, and that Sargent lacks standing and protection under Sections 7 and 8 of the Act because she is a nonemployee under the Act when the Respondent took away her right to enter onto its private property in July 2014 to "socialize" with friends. (Jt. Exhs. 4 and 7.)

## III. DISCUSSION, ANALYSIS, AND CONCLUSIONS

The General Counsel contends that by issuing the July 25, 2014 letter to Charging Party Sargent which revoked the Access Policy and denies her access to Respondent's facility because Sargent participated in protected concerted activity by filing the Class Action Lawsuit, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. (GC Exh.1(c); Stip. Record at pp. 86–87.)

### *A. Sargent is an "Employee" Protected Under the Act*

The Respondent argues that Sargent lacks standing to file the underlying charge as she was not an employee of Respondent at the time of the alleged unlawful conduct when Respondent issued its July 25, 2014 letter to Sargent. As a result, Respondent further argues that Sargent is not entitled to protection under the Act. (Jt. Exh. 7 at 159–160.)

The fact that Sargent was no longer employed by the Respondent when it issued the July 25, 2014 letter does not strip Sargent of her Section 7 rights and protection under the Act. Employees are not protected merely for activity within the scope of their employment relationship, but may engage in other activities for mutual aid or protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The Act provides in Section 2(3) that "[t]he term 'employee' shall include any employee, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute" *Waco, Inc*., 273 NLRB 746, 747 fn. 8. (1984). Sargent's employment at Respondent ceased in December 2012, but her

[3] I take administrative notice that the Class Action Lawsuit contains allegations by Sargent and other plaintiffs against Respondent that involve the terms and conditions of her earlier employment at Respondent including allegations that Respondent violated federal wage and hours laws by requiring its employees to clock out to illegally avoid overtime while, at the same time, continuing to work the job for Respondent. Jt. Exhs. 1–2.

Class Action Lawsuit remains in connection with her former employment. The Class Action Lawsuit is also the sole reason given by Respondent for enacting its no access rule against only Sargent.

Thus, the Board has long held that the term "employee" means members of the working class generally, including former employees of a particular employer, who are entitled to the full protection of the Act. *Redwood Empire, Inc*., 296 NLRB 369, 391 (1989); *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977); *Briggs Mfg. Co*., 75 NLRB 569 (1947); and *Oak Apparel, Inc*., 218 NLRB 701 (1975). Moreover, the Act does not limit who may file a charge. See Section 10 of the Act; and *NLRB v. Indiana & Michigan Electric Co*., 318 U.S. 9, 17 (1943). Nor does Section 102.9 of the Board's Rules which provides that a charge may be filed by "any person."

Here, I find that Sargent is an employee protected under the Act and remained so on and after the time she filed her charge in this case in August 2014. Sargent remains Respondent's former employee and her Class Action Lawsuit is connected with this action given Respondent's stated reason for barring only Sargent's continued access to its facility despite Respondent's past practice of allowing access to all former employees and the general public.

### *B. Sargent's Filing of the Class Action Lawsuit is a Protected Concerted Activity*

The General Counsel further contends that Sargent participated in protected concerted activity by filing the Class Action Lawsuit in June 2013. (GC Br. at 8–9; and Jt. Exh. 5 at 2–3.)

Section 8(a)(1) provides, inter alia, that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 right to engage in concerted activities for their mutual aid and protection. Concerted activities include employee efforts to improve working conditions outside the immediate employer-employee relationship by joining together in concerted legal action regarding wages, hours, and working conditions.[4]

The concept of "mutual aid or protection" focuses on the goal of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, restrain, coerce, or retaliate against employees because they engage in protected concerted activities.

The Supreme Court has made clear that Section 7 protects employees "when they seek to improve working conditions through resort to administrative or judicial forums . . . ." *Murphy Oil USA*, 361 NLRB No. 72, slip op. at 1 fn. 4 (2014) (citing *Eastex, Inc. v. NLRB*, supra at 566.) Moreover, the filing of a civil complaint by employees against their employer in a judicial forum has similarly been afforded the protection of Section 7 unless prompted by malice or bad faith. *Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); see also *Mojave Electric Cooperative, Inc*., 206 F.3d 1183 (D.C. Cir. 2000) (Employees filed petition with court seeking injunction against employer's harassment deemed protected concerted activity under Section 7 of Act); *Host International*, *Inc.,* 290 NLRB 442, 443 (1988) (Board found employer's conduct unlawful under Section 8(a)(1) and (4) of the Act and that the employer's real motive in refusing to hire two former employees was to retaliate against their previous protected concerted activities in filing a lawsuit against employer); *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975)(Same).

Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op.at 6 (2014). The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Id. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1133 (2014).

Here, I find that Sargent's filing and maintenance of the Class Action Lawsuit was a protected concerted activity under the Act. Respondent provided no evidence showing that the Class Action Lawsuit was prompted even in part by malice or bad faith.

### *C. The Respondent Violated Section 8(a)(1) by Retaliating Against Sargent by Revoking its Past Practice Access Policy as Applied to Sargent Alone in Response to Her Participation in the Class Action Lawsuit*

Sargent does not contend that she was unlawfully discharged by Respondent. Instead, she maintains that during her employment with Respondent in December 2012, the terms and conditions of her employment show that Respondent acted in violation of federal wage and hour laws against Sargent and other plaintiff employees leading to the filing of the Class Action Lawsuit containing these allegations against Respondent. As a result of her participation in the Class Action Lawsuit, Respondent revoked, only as to Sargent, its past practice of allowing former employees access to its Entertainment Services under the Access Policy to its facility by issuing the July 25, 2014 trespass warning letter which admits to Sargent that the Access Policy was revoked solely because of Sargent's ongoing Class Action Lawsuit. (Jt. Exh. 3.) There is no dispute that prior to Sargent's Class Action Lawsuit and Respondent's July 2014 warning letter, all former employees, off-duty employees, and members of the general public, including Sargent, were all encouraged and invited to utilize the Entertainment Services, to frequent the facility's restaurants and bars, and to view the various shows.

The Respondent argues that Sargent was a nonemployee of Respondent when the Class Action Lawsuit was filed and when the Access Policy was revoked and therefore Sargent is a nonemployee within the meaning of *NLRB v. Babcock & Wilcox,* 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992). Under this standard, the Respondent argues,

[4] See, e.g., *Brady v. National Football League,* 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Cooperative, Inc. v. NLRB,* 206 F.3d 1183, 1188 (D.C. Cir. 2000); see generally *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565–566 (1978).

the General Counsel has not sustained its ''heavy'' burden of demonstrating that Sargent was ''beyond the reach'' of non-trespassory methods of communicating with Respondent's employees. *Lechmere*, 502 U.S. at 540. Respondent concludes that, therefore, the General Counsel has not established a violation of Section 8(a)(1).

I reject Respondent's argument. There is no evidence that Sargent entered Respondent's premises, admittedly open to the public, for any purpose other than socializing. Here the stipulated facts do not show that the Charging Party intended or was exercising any Section 7 rights, organizational activities or other union activities while patronizing the facility. These facts indicate she sought access to socialize and patronize the night club where her boyfriend works. (Stip. Facts Nos. 7(a)-(c) and 8.)

Both before and during the time that Sargent sought to regain access to Respondent's facility and the Entertainment Services, the Respondent allowed other former employees and the general public uninterrupted access to the same Entertainment Services at its facility. Beginning in July 2014, however, the Respondent has denied Sargent the use of the same premises for Sargent's own enjoyment solely because of her protected concerted activity.

Thus there can be no doubt that Respondent's no-access rule is an unreasonable and discriminatory restriction on the access of Sargent as the only former employee or member of the general public prohibited from entering the facility solely because she participated in a protected concerted activity in the form of filing the Class Action Lawsuit.[5] As a result, I find that Respondent's no access rule is unlawful under Section 8(a)(1) of the Act. Moreover, in answer to the issue presented here, I further find that Respondent retaliated against Sargent in violation of Section 8(a)(1) of the Act by denying her access to its facility for engaging in protected concerted activity.

### *D. Nevada Trespass State Law is Inapplicable Unnecessary*

I have found that Sargent was not a trespasser. Respondent's property is open to the public. Sargent entered the property for socializing. Any defense based on state trespass law must, accordingly fail. The sole stated reason for invoking the trespass law was Sargent's protected, concerted activity of filing a class action lawsuit. On its face, this constitutes an admission that Sargent was not a "trespasser" as such. Thus I find the Nevada Trespass law inapplicable.

### *E. Respondent's July 25 Letter Threat to Sargent Was Another 8(a)(1) Violation*

The final issue to decide here is whether Respondent independently violated Section 8(a)(1) of the Act by sending Sargent' s counsel the July 25 trespass threat letter.

"[T]he test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive" *NLRB v. Illinois Tool Works,* 153 F.2d 811, 814 (C.A. 7, 1946). Rather, the test is whether the employer's conduct and words reasonably tend to interfere with the exercise of employee rights. Id*;* see also *Munro Enterprises, Inc.,* 210 NLRB 403 (1974). Consequently, even were Respondent's action to revoke Sargent's access rights to the facility not to have been actually designed by Respondent so that the new rule would interfere with, restrain, and coerce Respondent's employees, if they reasonably tended to do so, Respondent violated Section 8(a)(1) of the Act. See *American Lumber Sales, Inc.*, 229 NLRB 414, 416 (1977).

It does not take more than surface thinking to understand Respondent's July 25 trespass warning threat was unlawful to other litigants in the Class Action Lawsuit, Sargent herself, or other Respondent employees or former employees who might also suffer from Respondent's no access rule directed at them if someone filed an employment-related action against Respondent like Sargent. I find that Respondent's no-access rule in direct response to the Class Action Lawsuit matter would chill the exercise of other employees' Sections 7 rights including the right to file a Federal labor matter against Respondent. As a result, it is a separate violation under Section 8(a)(1) of the Act for Respondent to threaten to arrest Sargent by issuing its July 25, 2014 trespass warning letter especially after it refused to revoke it once the General Counsel filed the complaint in this case.

## CONCLUSIONS OF LAW

(1) The Respondent, MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC, (collectively Respondent or the Company), is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by revoking her right to access Respondent's premises under the same Access Policy enjoyed by other former employees and the general public in retaliation for her protected concerted activity.

(3) The Respondent violated Section 8(a)(1) of the Act by sending Sargent a letter barring her from its premises and threatening to invoke a trespass warning in person in retaliation for her protected concerted activity.

(4) Respondent's conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent is required to notify Sargent that the July 25, 2014 letter has been rescinded and Sargent is once again granted access to Respondent's facility on the same basis that Respondent grants access to other former employees under its Access Policy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[5] As the Board held in *Harco Trucking*, 344 NLRB supra at 482–483, it is unlawful to deny someone employment due to the filing of an employment-related lawsuit. In *Harco Trucking*, the wronged individuals were former employees like Charging Party Sargent here. Similarly, I further find that it is unlawful to enact a no-access rule that denies access to a former employee for the sole reason that the individual filed an employment–related lawsuit against the property owner Respondent.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

## ORDER

The Respondent, MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any provision of its no-access policy that bars former employee Tiffany Sargent from access to Respondent's facility in retaliation against former employee Tiffany Sargent's filing or maintain her class action employment-related lawsuit against Respondent.

(b) Issuing any form of communication that threatens any former employee, including Tiffany Sargent, with a trespass arrest for participating or maintaining a class action employment-related lawsuit of any kind in any administrative or judicial forum.

(c) Maintaining any policy that discriminates or retaliates against any current or former employee for filing or maintaining a class action employment-related lawsuit of any kind in any administrative or judicial forum.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Remove its no-access policy toward former employee Tiffany Sargent and immediately allow her access to Respondent's facility on the same basis that Respondent grants access to other former employees under its Access Policy.

(b) Rescind the July 25, 2014 letter threatening Tiffany Sargent with arrest for trespass and notify Sargent of the rescission once the letter is rescinded.

(c) Within 14 days after service by the Region, post at its facility located in Reno, Nevada copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the posted hard copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent have gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 4, 2015

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT bar former employee Tiffany Sargent from our property because she filed and maintained a class action lawsuit against us.

WE WILL NOT advise former employee Tiffany Sargent that we are barring her from our property because she filed and maintained a class action lawsuit against us.

WE WILL NOT maintain any policy that discriminates or retaliates against any former employee for filing or maintaining a class action employment-related lawsuit of any kind in any administrative or judicial forum.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind our July 25, 2014 letter barring former employee Tiffany Sargent from our property and grant her access to our property on the same basis that we grant access to all other former employees.

MEI-GSR HOLDINGS, LLC D/B/A GRAND SIERRA RESORT & CASINO/HG STAFFING, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32–CA–134057 or by using the QR code below. Alternatively, you can obtain a copy of the

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.