

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FRESH & EASY NEIGHBORHOOD MARKET, INC.

and

Case No. 28-CA-64411

MARGARET ELIAS, An Individual

William Mabry, Esq., Counsel for the General Counsel.

Joshua Ditelberg, Esq., Seyfarth Shaw, LLP, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on February 23, 2012 in Phoenix, Arizona. The Complaint herein, which issued on November 30, 2011¹, and was based upon an unfair labor practice charge and an amended charge filed on September 13 and November 23 by Margaret Elias, an individual, alleges that since about March 13, the Respondent has maintained in its employee handbook, and on its intranet, overly broad and discriminatory rules regarding solicitation and confidential information. The Complaint also alleges that on about August 31 the Respondent, by Monyia Jackson, its Employee Relations Manager, and an admitted supervisor and agent of the Respondent, promulgated and maintained an overly broad and discriminatory rule prohibiting employees from obtaining statements from their coworkers regarding allegations of sexual harassment; created an impression among its employees that their concerted activities were under surveillance by the Respondent; threatened employees with unspecified reprisals because they engaged in concerted activities; and interrogated its employees about their concerted activities and the concerted activities of other employees, all in violation of Section 8(a)(1) of the Act.

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Facts

There are two distinct allegations herein. It is initially alleged that the Respondent maintains overly broad and discriminatory rules regarding solicitations and confidentiality. The Respondent defends that the confidentiality and solicitation provisions have not been in effect since 2009 and 2011. The other allegation relates to alleged protected concerted activities by Elias and whether the Respondent attempted to unlawfully restrict these activities.

It is alleged that the following rules, maintained in its Employee Handbook², are overly broad and discriminatory:

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2011.

² The front page of the Handbook states: "summary of policies."

(1) Knowing When Solicitation is OK [at page 13]

5

We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of team members during working time for any purpose.

We also prohibit the distribution of literature during working time or on Company premises for any purpose³.... And keep in mind that violations of this policy could lead to disciplinary action.

10

(2) Confidentiality at fresh & easy [at page 19]

KEEP CONFIDENTIAL INFORMATION SECRET!

15

OUR CUSTOMERS, CONTRACTORS, AND VENDORS PUT A LOT OF TRUST IN US. And we trust our team members to keep information they may learn private. When you work at fresh & easy, you may find out private information about our company, other people, or other companies. If you learn confidential information on the job, you can use it for fresh & easy business purposes—and for no other reason.

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WHAT IS CONFIDENTIAL INFORMATION?

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Basically, it's any information that isn't generally available to the public. Check our *Complete Confidentiality Policies and Procedures* for a full definition.

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It is also alleged that since at least on or about March 13, 2011, the Respondent has maintained on its intranet at its facilities across the United States, the following overly-broad and discriminatory rule regarding confidential information:

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What is it?

40

Just so we're all on the same page, here's the Fresh & Easy definition of "confidential information." Confidential information is information generally not known outside of the company and is about Fresh & Easy, its business, or its business or technical information. Here are some examples:

...

45

- Information about our team members;

...

When in doubt, you should treat information that meets this general

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³ This rule was found to violate Section 8(a)(1) of the Act in *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 85 (2011). The confidentiality provision, also alleged herein as unlawful, was not involved in that case.

definition as confidential.

5 Bruce Churley, manager of the facility and Michael Anderson, team leader at the facility, are admitted supervisors and agents of the Respondent. Each of the witnesses at the hearing testified about these provisions, as well as whether they were aware of any change therein. Churley, who has been employed by the Respondent since October 2009, testified that he has never been given a copy of the Respondent's Employee Handbook. If an employee wished to access the Respondent's rules, they can log on to one of the computers at work and access the rules on the intranet, on what is called the portal. When there is a change in the rules, 10 employees are usually notified of the change via "team huddles," where a manager meets with his team to discuss the rule changes. He testified that he does not recall team huddles regarding the Respondent's confidentiality or no distribution rules. Anderson, who has been employed by the Respondent since October 2010, testified that the rules set forth in the Employee Handbook are really summaries of the Respondent's policies, whereas the full and 15 complete policies are set forth on the portal through the Respondent's intranet. He has seen the rules in the Employee Handbook, but he doesn't know if the policies set forth there have changed: "I know you can go to the portal and get more information..." When he is informed of policy changes, he usually notifies the employees of the changes in a huddle, but he has not been notified of any policy changes and does not recall any huddles regarding changes of policy 20 in the Employee Handbook. When employees are hired, they are given new hire CDs, which provide the employees with summaries of its policies, and these new employees are told that they should consult the Respondent's portal for the complete policies.

25 Victoria Giro, who was employed by the Respondent from April 2010 to December, testified that she is not familiar with the Employee Handbook because she accessed the information from the portal. Employees can learn of policy changes through huddles or through the portal or, if they have a question about policies, they can ask their manager. She has never had a huddle concerning the Respondent's no distribution rule or its confidentiality rule. Krista Yates, who has been employed by the Respondent for two and a half years, testified that the 30 employees are notified of changes in policy through printouts or, more commonly, "updates are online." She does not remember receiving notification of changes in the Respondent's distribution rule, or confidentiality rule, or of having a huddle about a change in these rules. She also testified that the full and complete list of Respondent's rules, and any changes in these rules, are on the portal, which can be accessed at any time at any of the Respondent's stores.

35 Elias testified that she was given a copy of the Employee Handbook in January containing the rules alleged above as unlawful. Since that time she has not been notified that there has been a change in the distribution/solicitation policy or in the confidentiality policy, nor has she participated in a huddle where she was informed of changes in its policies. She 40 understood that a full listing of the Respondent's policies was available online, although, "I don't know how to get to them on the portal." As to whether she knew that if she had a question, or needed a clarification, about a policy, she could call the Respondent's HR hotline, she testified that she tried calling a few times, but could never get through to them. Jackson, a/k/a "MJ", testified that new employees are given the Respondent's New Employee CD, which contains 45 the Employee Handbook Summary of Policies, and they are told by their manager that if they want to access the complete and current rules, they do that through the portal on the Respondent's intranet. In addition, employees with questions about Respondent's policies can contact the Employee Relations Manager, Jackson, directly, or call the HR Service Center; both telephone numbers should be listed in the break room. She testified further that the solicitation 50 policy and the privacy policy were changed in 2009, and the confidentiality policy was changed in January 2011. She identified exhibits that effected the changes in these policies, including a memo, "District Message" from HR entitled: "Solicitation and Distribution- Policy Clarification,"

dated September 2, 2009, stating:

5 We would like to inform our team members on the recent updates we have made to our Solicitation and Distribution Policy. Key changes that are important for you to know include

We have changed the language to clarify our policy and how we apply it. It is important for you to note that distribution of any material is prohibited during working time.

10 Fresh&easy also prohibits the distribution of literature at any time in any work area for any purpose.

Working time includes that of the employee doing the soliciting and distributing and the employee to whom the soliciting and distributing is directed.

15 Working time does not include meal periods, break periods, or any other unspecified periods during the workday when employees are properly not engaged in performing work tasks.

20 To all Store Managers: Please ensure that the updated policies (attached) are posted on your notice board and the key messages covered in your Team Huddles. Additionally, please let your teams know that the Complete policy has been updated for their review online on the fresh&easy intranet.

25 Once again, as with any policy or process, it is important that you consult with your area Employee Relations Manager and your District Manager. They are here to support you and provide you with builds to help manage issues and concerns fairly and consistently.

30 Please ensure that your teams follow the process of signing the below acknowledgement that they re aware of the policy change and have been briefed.

Thank you gain for providing your team the information they need to do their job!

35 Jackson testified that the store managers were to read this to employees during huddles. She also identified a memo dated January 2011 entitled “Solicitation and Distribution Policy” as the Respondent’s policy currently in effect. It states, *inter alia*:

40 We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation (solicitation can be any written or verbal request asking for donations, help or support for any cause) for any purpose in any selling areas of the facility during business hours or in working areas when associates are on working time. “Working time” refers to the time of the workday when you are expected to be performing your job duties. If you’re a fresh&easy team member, don’t solicit when you are supposed to be working and don’t solicit someone else who is supposed to be working.

We also prohibit the distribution of literature during working time or at any time in a work area for any purpose.

50 “Working time” refers to that portion of any work day during which the employee soliciting or distributing and/or the employee being solicited/receiving distributions is supposed to be performing any actual job duties. It does not include other, duty-free

periods of time, such as lunch or break periods, or before or after both employees' work.

5 "Working areas" refers to areas of fresh&easy property where employees normally perform work, or where work is in fact being performed. It does not include, e.g., employee break rooms.

We also do not allow anyone who is not a fresh&easy team member to solicit or distribute literature on any property that we own, lease or use. And keep in mind that violations of this policy could lead to discipline- they could even cost you your job.

10 She testified that this was to advise the managers of the policy change and was available on the Respondent's portal as of September 2009. Jackson also identified a "Summary Version Confidential Information" and a "Complete Version Confidential Information," which were sent to all of its managers. Each one states it is "Version 1-11" and refers to the Respondent's
 15 Confidential Information Policy stating, basically, that it is information not generally known or accessible to the public and includes all information obtained by employees while at work and that the Respondent "expects" this information to be kept confidential. It also states:

What is confidential information?

20 Basically, it's any information that isn't generally available to the public. (It does not include sharing information about your own wages, hours, compensation, or working conditions with others if you decide to do so.) Check out the Complete Confidential Information Policies and Procedures for a full definition.

25 Jackson testified that these confidentiality rules have been in effect since January 2011. On cross examination, she testified that although managers are supposed to post these changes on the bulletin board and to have team huddles and to distribute these new rules to all employees, the Respondent does not require its managers to record these team huddles and the distribution
 30 of these rules to all employees.

The other allegation herein relates principally to Elias, who has been employed by the Respondent for over a year and a half as a customer assistant; Churley is her supervisor. On
 35 about August 24, she asked Churley if she could participate in TIPS training, which is related to the sale of alcoholic beverages in the store, and he told her to write a note on the white board in the employee break room to remind him of her request. As per his request, she wrote a note on the white board referring to the TIPS training that they had discussed. When she went to the employee break room on the following day, she saw that her note on the white board had been altered in that the word "TIPS" had been changed to "TITS," and a peanut or a worm was drawn
 40 on the board. She testified that she tried not to let it bother her, but soon changed her mind and told Anderson that she wanted to file a harassment claim, but "he didn't say anything." Because electronic equipment is not allowed, she could not take a picture of the altered white board, so she copied on a piece of paper what was on the board and made a "statement." She testified that she added on this document; "Someone changed the Board to "TITS" instead of TIPS and
 45 put a worm pissing on my name. I take this as sexual harassment. This has been on the Board since I got here at 2PM⁴." She then asked Anderson to sign the statement: "He just signed it. He didn't even read it, He didn't even ask me. He just signed it." She testified that she did not threaten or attempt to intimidate him into signing the statement. Yates was standing next to

50 ⁴ Anderson, Yates and Giro testified that when Elias asked them to sign her statement, only the words from the white board were on the statement, not any comment of hers.

Anderson and she asked Yates if she wanted to sign as a witness: “I said you don’t have to...if you want to, you could, just to what you observed on the board. And so, she signed it.” She testified that she did not threaten or scream at Yates. Later that day she saw Giro and she explained the situation to Giro in the same tone of voice and she signed it. Neither Anderson, Yates nor Giro said that they did not want to sign the statement; “they just asked what it was.” She also testified that the sole purpose of it was to be a witness statement; it was neither a petition nor a joint complaint of everybody signing, and she did not make any change to the statement after they signed it. On August 26, Churley told her that the situation had been reported to Jackson. On cross examination, Elias was asked if she expected that Jackson would conduct an investigation:

A Well, at first, I understood that there was going to be an investigation. I honestly don’t know the procedures...

15 Q What was your expectation?

A My expectation was to report it.

20 Q Did you expect that there would then be an investigation?

A I didn’t really have any expectations beyond reporting it.

Q Did you want there to be an investigation?

25 A I didn’t want people to write things like that on the board.

Q Did you want there to be an investigation?

30 A I don’t know, I don’t know...that wasn’t my purpose, no. My purpose was to report it.

Q What did you expect would happen after it was reported.

A That management would do what they were supposed to do.

35 Q Which would be to conduct an investigation, correct?

A If that’s what they do, I don’t know. I’m not versed on it.

40 Churley testified that on August 26, he had a discussion with Elias about her request to participate in the options training program, where the company trains people who have shown the ability to lead and are motivated to become team leaders. Churley told her that he didn’t feel that she was ready for the program, and that she had some skills that needed further development. Elias became “very angry, yelling,” saying that she felt that she deserved to be in the program and that his predecessor had promised her the position; Giro testified that she overheard Elias yelling at Churley about the Options program. Later that day Churley received a call from Anderson saying that Elias wanted to file a sexual harassment complaint because of the alteration of her note on the white board, and Churley told him to take a picture of the altered note. When he returned to the store he met with Elias and again told her that he was not ready to put her in the options program, and she started yelling again and said that she was too upset to work and wanted to go home, and he told her to go home. He saw the picture of the whiteboard, which stated: “Bruce, Could you please add 4 hours for city meeting. Could you please sign me up for TITS 9/10/11? Maggie Thank You.” There was a picture drawn next to her

name which resembles something urinating. As there is a video camera in the break room, Churley then viewed the video and saw that it was employee Gary Hamner who altered the message on the board, and he reported this to Jackson, and told her that Elias was upset about the situation. He then met with Anderson who told him that Elias obtained statements from him and others at the store, and that she was “very insistent that they sign.” Anderson said that he signed her statement as well, but he felt forced to do so. Churley also spoke to Yates and Giro, who both said that they didn’t want to sign Elias’ statement, but they felt forced to do so, and signed so that the situation would calm down. About a week later, Jackson called the store and told Churley that she wanted to speak to Elias, and he gave Elias the phone and told her that Jackson wanted to speak to her. On August 27, Churley sent an email to Jeff Lang, the district manager, and Jackson, discussing the incident. He stated that Anderson, Yates and Giro were “confronted” by Elias, who “demanded” that they sign the witness statement involving the white board alteration, and that Yates and Giro felt intimidated into signing something that they did not wish to be a part of. The email continued that later that evening Elias approached him and wanted to continue discussing the options program, and he repeated that he was not ready to include her in the program. She began raising her voice until he was finally able to end the conversation by telling her that she could go home.

Anderson testified that on about August 26, Elias asked him to come into the break room to see what somebody had written over her message on the white board and said that she wanted to file a sexual harassment charge and wanted the HR telephone number. Anderson replied, “What for? I don’t know where this is coming from” and Elias asked, “What’s wrong with you?” and “stormed out of the room angrily.” Anderson then called Churley, told him of what occurred and that Elias wanted to file a sexual harassment complaint, and Churley told him to take a picture of the message on the white board. Later that evening, Elias approached him with a drawing that she made of the whiteboard, and asked him to sign it. The document contained only the two sentences that Elias had initially written on the board, with the alteration and the picture next to it. There was nothing else on the paper when she showed it to him. He testified that he told her that he didn’t need to sign the statement because he would not lie about what was on the board, but Elias was very angry and loud, and told him that he had to sign the document, and he signed it with the hope that if he did so she would calm down and not cause a scene in the store. On about August 30, Jackson called him and said that she wanted a statement from him, Yates and Hamner.

Giro, who was employed by the Respondent from April 2010 to December, testified that Elias was upset about the alteration on the whiteboard, and Giro told her that although she hadn’t noticed the wording, she agreed that it was inappropriate, but “I don’t think it would have been a big deal if it happened to me, but no, I wouldn’t have liked it. But I did feel like management should’ve been notified so that they could see who did that and take necessary...disciplinary action.” Elias asked her to sign a paper that duplicated what was written on the white board, but she never told Giro that she wanted to file a complaint about it. She testified that, although Elias did not “force” or “threaten” her to sign the statement, the discussion with Elias was “very heated” and “uncomfortable,” and she signed because the discussion was taking place in front of the customers and “I wanted to get out of there.” Her purpose in signing the statement was to be a witness as to what was on the white board; she did not view it as a complaint or a petition to the company. On the following day she told Churley that although the change on the whiteboard was inappropriate, she felt intimidated into signing the statement, and that Elias should have given him an opportunity to handle the situation, rather than making it into such a “big issue.”

Yates testified that on about August 26, Elias asked her to sign a statement stating only what was on the whiteboard. Before Elias asked her to sign the statement, she saw Elias asking

Anderson to sign: "He was backed into a corner and she was in his face." She was "kind of yelling" and "agitated." Shortly thereafter, Elias asked her to sign the statement, and she said that she was not comfortable being a witness to it, and did not want to sign it. Elias returned later and again asked her to sign, but, again, Yates said that she did not feel comfortable signing it. She eventually signed the statement because: "I was kind of freaked out. She'd been in my face, she was getting more aggravated, more hostile. I felt bullied...I figured the fastest way to diffuse the escalating situation was to sign and deal with it later." On the following day she called the Respondent's "hotline" to the HR department, filed a complaint against Elias for "bullying" her into signing the statement, and told Jackson about her confrontation with Elias the prior day and, at Jackson's request, she prepared an affidavit setting forth what occurred between she and Elias. A few days later, Churley asked her if there was anything that she wanted to talk to him about and she said that there was. He asked her about the document that she signed for Elias and whether there was space on that document for Elias to write something else, and Yates said that there was.

As stated above, on about August 31 Churley handed Elias a phone and said that Jackson wanted to speak to her; he told her to take the phone into the break room. She testified that Jackson began the conversation by asking if she knew Hamner, and she said she did, that she works with him. Jackson said that Hamner had filed a complaint against her alleging that on August 26, upon arriving at work, she said, "Fuck you" to him. Elias said that it was a lie, that she would not use profanity to anyone, and Jackson said that his claim was under investigation. Elias then said that she should view the videotape and she could see that she never said it, and Jackson said, "Don't tell me how to do my job, and I would not be able to see what words were said." Elias told her that, at least, she could see that she did not say anything to Hamner. Jackson then told her that she was wrong in getting statements from employees, that it violated company policy, and Elias responded that she didn't get statements, that she just asked the employees to sign what was on the white board. Jackson then asked Elias to prepare two statements for her: one in response to the complaint that she cursed at Hamner, and the other in regard to her complaint. She only submitted one affidavit, a statement that she submitted that is contained in a September 3 email to Jackson, relating solely to her complaint. On October 13, she received an email from Jackson on the subject of: "sexual based harassment 8/26/2011," stating:

We are reporting on our investigation of the allegations you raised in your August 26 complaint regarding the white communications board. Our investigation has included reviewing the information provided by you, conducting employee interviews, and reviewing other available information.

Based upon our investigation, we have concluded that inappropriate conduct did occur. As a result, we have taken corrective action that we expect will prevent any further inappropriate conduct. If our expectation proves wrong, it is especially important that you notify us of that immediately. As in this case, we will investigate any additional concerns in a prompt and thorough manner.

The Company is committed to protecting you from retaliation as a result of your report and our investigation. We have informed the person in question and others that any retaliation is absolutely prohibited. Please call immediately if you feel that you are being subjected to retaliation in any form.

Jackson testified that she was copied on the August 27 email from Churley to Lang reciting the events of the prior day, including the incidents where Elias got Anderson, Yates and Giro to sign her statement. She learned from Churley, that Yates, Anderson and Hamner would

all be working on August 30, which would be the first time that they would be available for interviews. On August 29, she received a complaint from Yates regarding Elias' actions toward her when she requested that Yates sign her statement. She initially interviewed Yates, who told her that Elias was yelling and screaming at her to sign the statement, even though she did not want to participate in it, and she said there was room on the paper for Elias to add something if she wished to do so. Jackson's investigation did not find that Elias threatened Yates. Jackson then interviewed Anderson who told her that Elias demanded that he sign the paper, and he did so only because she was getting louder in her demands and he was concerned that the situation would escalate further. She also spoke to Hamner, whose complaint was found to be without merit, and who was disciplined for altering the words on the board. Giro was on vacation and was unavailable. She next spoke to Elias, first about Hamner's complaint, and then about hers. She asked Elias why she felt that she had to obtain the signatures of the employees to her statement and she said that it was for her own protection. Jackson then testified:

I asked her not to obtain any further statements so that I could conduct the investigation. And I told her that she could talk to the employees and ask them to be witnesses for her, but in relation to this investigation, to allow me to complete it.

As to the reason for this request, she testified: "Because she made the employees uncomfortable." She did not tell Elias that she had violated any company policy, she did not restrict her right to bring harassment complaints in the future, and Elias was not disciplined, or threatened with discipline, for any of her actions involving the altered whiteboard.

III. Analysis

It is initially alleged that the Respondent's solicitation rule (also referred to as the distribution rule), as well as its confidentiality rule, are overly broad, discriminatory, and violate Section 8(a)(1) of the Act. The Respondent defends that even if they did violate the Act (and the Board has found that the prior solicitation rule did violate Section 8(a)(1) of the Act, and that the revision of the rule was not adequately disseminated to the employees) these rules have been rescinded and new (and lawful) rules have been instituted in their place in September 2009 and January 2011. Jackson identified the memo to district managers dated September 2, 2009, that was to be read to employees in team huddles, as well as the Respondent's new Solicitation and Distribution Policy, as set forth in a memo dated January 2011 that was available to all employees on the Respondent's portal. I found Jackson to be a credible and believable witness, and credit her testimony that the September 2009 memo was to be read to the employees, and the new solicitation rule was posted on the Respondent's portal. I also find that by defining "working time" the Respondent corrected the problem with its prior rule, and that this new rule is a lawful one. However, although Jackson testified that this new rule was to be read to the employees at team huddles, this, apparently, was not done, at least at the facility involved herein. There was no testimony that any of the employees, Churley or Anderson was specifically made aware of the changes in these rules in 2009 and 2011, and they all testified that they could not recall any team huddle where the employees were notified of the change in the solicitation rule. Although I have credited Jackson's testimony that the rule has been changed, and that the new rule does not violate the Act, I find that the Respondent's failure to notify its employees of the change violated Section 8(a)(1) of the Act.

I also credit Jackson's testimony that the Respondent changed its confidentiality rule in January 2011. Although the witnesses also testified that they do not recall any team huddles where they were told about this change, I need not decide that because I find that the Respondent's rule change did not fully correct the problem with the rule. While prohibiting sharing of information not generally available to the public, it excepts "sharing information about

your own wages, hours, compensation, or working conditions with others if you decide to do so.” While, initially, appearing to be a satisfactory change, and one that would allow employees to fully participate in protected concerted activities, a fuller review reveals a significant shortcoming. For employees to be able to truly discuss terms and conditions of employment, they must be able to fully discuss not only their terms and conditions of employment, but the terms of employment of their fellow employees, even those who don’t wish to personally discuss it, and Respondent’s revised rule appears to prohibit this full discussion, while allowing the employees to discuss their terms of employment. I therefore find that this rule could inhibit employees in the exercise of their Section 7 rights, and therefore violates Section 8(a)(1) of the Act. *Labinal, Inc.*, 340 NLRB 203, 210 (2003); *NLS Group*, 352 NLRB 744, 755 (2008).

The remaining allegations relate to the white board alteration on August 26, and the resulting telephone conversation between Jackson and Elias on August 31. It is alleged that in that conversation, Jackson orally promulgated and maintained an overly broad and discriminatory rule prohibiting employees from obtaining statements from coworkers regarding sexual harassment allegations, created an impression among its employees that their concerted activities were under surveillance by the Respondent, threatened employees with unspecified reprisals because they engaged in concerted activities with other employees, and interrogated its employees about their concerted activities and those of their fellow employees. There is a major credibility conflict between Elias, and Anderson, Yates and Giro. Elias testified that they did not need any encouragement to sign her statement; they signed it without complaint and, for Anderson, without even reading it. The testimony of Anderson, Yates and Giro is substantially different. Anderson testified that Elias was very loud and angry when he initially refused to sign, and he signed the statement only to calm her down and prevent the situation in the store from escalating. Giro likewise testified that Elias’ requests to her were very heated and uncomfortable, and she also signed because their discussion was taking place in front of customers and she wanted to end it. Yates testified that she saw Elias yelling and backing Anderson into a corner when she asked him to sign the statement, and that she was “in his face.” She was getting aggravated and hostile when she asked Yates to sign, and was in her face as well. Yates was “freaked out” and signed because she felt that was the fastest way to end “the escalating situation.” This is not a difficult determination. Anderson, Giro and Yates all appeared to be testifying in a honest and truthful manner and had no reason to lie about the situation. In addition, their testimony is supported by the credible testimony of Churley and Giro that when he told Elias that he didn’t feel that she was ready for the options training program, she became angry and yelled at him. Clearly, Elias was an easily excitable person when something unpleasant occurred, or when others did not accede to her requests, and her reaction to Anderson, Giro and Yates was very similar to her earlier reaction that day to Churley. In addition, I found that, at times, Elias was evasive in her testimony in response to questions from counsel for the Respondent and, finally, I find it highly unlikely that Anderson, an admitted supervisor, would sign her statement without reading it. Further, based upon their testimony, I find that when they signed her statement, it set forth solely the wording on the white board on August 26 and that after obtaining their signatures Elias added additional comments to the statement. I therefore discredit Elias in this regard, and credit the testimony of Anderson, Giro and Yates rather than her testimony.

On August 31, Jackson called Elias while she was at the store. Prior to this call, she saw the email from Churley to Lang discussing what occurred when Elias asked Anderson, Giro and Yates to sign her statement, she received a complaint from Yates about the incident with her, and she interviewed Anderson, Yates and Hamner; Giro was on vacation. Jackson testified that she told Elias not to obtain any further statements so that she, Jackson, could conduct the investigation, although she could talk to the employees about the incident and ask them to be witnesses for her, but to allow her to complete the investigation. She said this because Elias

made the employees uncomfortable. Elias testified that Jackson told her that she was wrong in obtaining statements from employees, that it violated company policy, and asked her to prepare two statements for her: one regarding Hamner's complaint about her, and the other regarding her complaint. Without much difficulty, I credit Jackson's testimony as it comports with the evidence herein and is more reasonable and believable than Elias' testimony. At the conclusion of her investigation Jackson determined that inappropriate action did occur (for which Hamner was disciplined) and if there was any further inappropriate conduct or retaliation, Elias was to report it immediately to the company.

In my view, Jackson's request to Elias not to take any further statements from employees was a reasonable one, and not an unlawful one. Obviously, a bare statement to an employee not to take statements from fellow employees in support of her/his position on a work related issue, could violate Section 8(a)(1) of the Act. However, I cannot look at the statement in isolation; I must look at the surrounding facts as well. "In determining whether an employer's statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances." *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003)⁵. As obnoxious and puerile as the alteration on the white board was, it appears that the other employees either didn't notice the change or didn't take offense at it. Elias' outrage at the alteration was personal and was not shared by the other employees. When she asked Anderson, Giro and Yates to sign her statement, none of them wished to do so and each of them signed only because Elias was loud and angry, and to calm her down and prevent a further commotion in the store. Not only was Elias' attempt to get Anderson, Giro and Yates to sign her statement annoying to them, it was disruptive to the store's operation. In *Five Star Transportation, Inc.*, 349 NLRB 42, 43 (2007), citing *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) and *Salisbury Hotel, Inc.*, 283 NLRB 685 (1987), the Board stated that concerted activities within the meaning of the Act encompasses conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Holling Press*, 343 NLRB 301, 302 (2004), the Board stated: "In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" Further, in language that could apply to the facts herein, the Board stated that the Charging Party's "goal was a purely individual one. In addition, there is no evidence that any other employee had similar problems- real or perceived- with a co-worker or a supervisor." I find that Elias was not engaged in concerted activities for the purpose of the employees' mutual aid and protection at that time. The Respondent already had a copy of her statement and further statements would not add anything to the investigation. I therefore find that Jackson's request to Elias not to take any further statements from employees so that she (Jackson) could conduct the investigation was not meant to deprive her of her right to engage in concerted activities, as Jackson told her that she could speak to employees about the subject. Rather it was an attempt to prevent further disruptions at the store. I note that the Respondent did not take any action against Elias as a result of her actions herein. In fact, at the conclusion of Jackson's investigation, it was found that Hamner's complaint had no merit, and he was disciplined for his alteration of the white board, and was warned about any future retaliation. I therefore recommend that this allegation Paragraph 4(d)(1) be dismissed.

The remaining allegations also relate to Jackson's telephone conversation with Elias on August 31. Stated simply, I can find no merit to any of these allegations and recommend that they (Paragraph 4(d)(2)(3) and (4)) be dismissed as well.

⁵ See *Caesar's Palace*, 336 NLRB 271 (2001) and *Phoenix Transit System*, 337 NLRB 510 (2002), cited in Respondent and General Counsel's briefs.

Conclusions of Law

5 1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

10 2. The Respondent violated Section 8(1)(1) of the Act by maintaining an overly broad and discriminatory confidentiality rule in its employee handbook, on its portal, and on its New Employee CDs.

3. The Respondent violated Section 8(a)(1) of the Act by failing to properly notify all of its employees of the change in its solicitation/distribution rule since about 2009.

15 4. The Respondent did not violate the Act as further alleged in the Complaint.

The Remedy

20 Having found that the confidentiality provision contained in the employee handbook and the portal violates the Act, I recommend that the Respondent be ordered to rescind this provision and to notify all employees electronically that this provision has been rescinded and will no longer be a part of the employee handbook, the new employee CD, or the Respondent’s portal. Although I have found that the Respondent changed its solicitation and distribution policy to a lawful policy, I have also found that the employees were not adequately informed of this change. I therefore recommend that the Respondent be ordered to notify all of its employees, 25 electronically, of the change and to specifically note the change on its portal. I also recommend that Respondent be ordered to post the Board notice at each of its store locations.

30 Upon the foregoing findings of fact, conclusions of law and on the entire record, I hereby issue the following recommended⁶

ORDER

35 The Respondent, Fresh & Easy Neighborhood Market, Inc., its officers, agents successors and assigns, shall:

1. Cease and desist from:

40 (a) Promulgating, maintaining or enforcing the confidentiality provision contained in its Employee Handbook, its portal, and the New Employee CDs, given to new employees.

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

45 2. Take the following affirmative action necessary to effectuate the policies of the Act:

50 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 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.

(a) Rescind the confidentiality provision contained in its Employee Handbook, its portal and also contained on its New Employee CD, and notify all of its employees, electronically, that this has been done, and that this provision will no longer be enforced.

5 (b) Notify all employees electronically that its solicitation and distribution policy and rules was changed in 2009, and notify them of the changes.

10 (c) Within 14 days after service by the Region, post at all of its stores, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 28, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent
15 has gone out of business or closed any of its stores, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 2011⁸

20 (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 Respondent has taken to comply.

IT IS FURTHER ORDERED that the remaining allegations contained in the Complaint be dismissed.

25 **Dated, Washington, D.C. April 23, 2012**

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Joel P. Biblowitz
Administrative Law Judge

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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."

⁸ See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145 (2011).

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 maintain in our employee handbook, on our intranet site or on our New Employee CD, a confidentiality rule that prohibits you from discussing the terms and conditions of employment of other employees without their consent.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights guaranteed you by Federal labor law.

WE WILL rescind our confidentiality rule and inform all of our employees, electronically, that this has been done, and **WE WILL** notify all of our employees, electronically, that we changed our solicitation and distribution rule in 2009, and **WE WILL** tell them what the new rule is.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.