

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**FOOD SERVICES OF AMERICA, INC.,
a subsidiary of SERVICES GROUP OF
AMERICA, INC.**

and

Case 28-CA-063052

PAUL LOUIS CARRINGTON, an Individual

ACTING GENERAL COUNSEL'S REPLY BRIEF

Counsel for the Acting General Counsel (General Counsel) submits the following Reply Brief. For the reasons described below, the matters asserted by Respondent in its Answering Brief are without merit, and the Board should grant the Acting General Counsel's Cross-Exceptions.

I. RESPONDENT'S OVERLY-BROAD AND DISCRIMINATORY RULES VIOLATE SECTION 8(a)(1)

A. Respondent's Rule Prohibiting Employees From Disclosing Employees' Cell-Phone Numbers

Respondent admits, via a sworn and subscribed affidavit from Senior Vice-President and Chief Merchandising Officer Scott Bixby (Bixby), that employee cell phone numbers are equally as confidential as Respondent's vendors' names, which employees are prohibited from disclosing.¹ Indeed, Respondent's confidentiality rules in its Confidentiality and Non-Disclosure Agreement (Confidentiality Agreement) and FSA & You: Associate Handbook for Regular Non-Union Associates (Handbook) -- which the ALJ found to violate the Act -- state

¹ Respondent attached Bixby's affidavit to its Motion to Exempt From Disclosure or for Protective Order (Motion) (SX 3) in an effort to excuse itself from fully complying with General Counsel's subpoena duces tecum and allow Respondent to redact certain alleged "confidential" and "proprietary" information contained in the subpoenaed documents, including the cell phone numbers of Respondent's employees (SX 3, page 1).

that vendors' names are confidential information, to which employees are forbidden from disclosing.

In defending Respondent's contention that "employee cell phone numbers" (as well as the other subpoenaed information, including Respondent's vendors' names) are confidential information, Bixby stated:

This information in the documents [Respondent] seeks to protect have great potential economic value, are closely guarded, and are not shared with persons outside of the company. In the hands of a competitor, the information located therein could severely undermine planning, marketing, promotion, and future sales. Due to their commercially sensitive nature if this information were to be publicly displayed it would cause irreparable damage to [Respondent] not only economically but also it's (sic) vital relationships with its vendors and customers.

(SX 3, Exhibit A, page 4)

Notwithstanding Bixby's admission and the ALJ's finding that Respondent's confidentiality rules violate the Act, the ALJ concluded that "Respondent does not have a policy regarding the disclosure of personal cell phone numbers[.]" and "there was no other evidence" to support such a finding. (ALJD 13:25-31) It is respectfully submitted that the ALJ appears to have simply overlooked the conclusive evidence establishing that Respondent considers its unlawful, overly-broad and discriminatory confidentiality rule as encompassing the release of employee cell phone numbers. See, *Costco Wholesale Corp.*, JD(NY)-30-10, slip op. at 20 (2010) (rule defining as "confidential" employee names, addresses, phone numbers and e-mail addresses, a violation).

B. Respondent's Rule Prohibiting Employees from Providing Personal References to Other Employees

The ALJ found that, on March 7, 2012, Elba Rubio (Rubio) e-mailed several employee employed by either Respondent or another subsidiary of Service Group of America,

Inc. Rubio's e-mail stated she was seeking references from them because she was fired on March 4 "for blowing the whistle on manager abuse in January, no further reasoning provided." (ALJD 11:36-41; 13:35-43; GCX 8)

The ALJ also found that three of the Rubio's colleagues agreed to be references for her and that Respondent, upon learning of Rubio's e-mail, blocked all future e-mails from Rubio to employees of Respondent or other subsidiary of Service Group of America, Inc. (ALJD 11:51-52; 13:40-43) Senior Vice-President of Associate Services Steve Manuszak (Manuszak) admitted that he ordered the blocking of Rubio's future incoming e-mails -- hours before Respondent realized that Paul Carrington (Carrington) forwarded about 300 e-mails to himself and Rubio -- because Respondent has a policy forbidding employees from giving references regarding their coworkers.(Tr. 56:3-58:6)

Overly-broad rules that prohibit employees from discussing their terms and conditions of employment violate the Act even when they are not enforced. See *Tele Tech Holdings*, 333 NLRB 402, 403 (2001); *Grand View Health Care Center*, 332 NLRB 347, 348 (2000). Despite well-established hornbook case law, the ALJ erred by finding that Respondent's rule did not violate the Act because there was no testimony that any employee was aware of such restriction, and none of the employees who agreed to give a reference to Rubio were disciplined (ALJD 14:1-3) This oversimplification by the ALJ ignores aforementioned Board precedent.

C. Respondent's No Solicitation Rule in Its Handbook

The Handbook's rule on solicitation prohibits employees from soliciting in work areas during non-working hours:

Solicitation by outsiders is prohibited on Company premises at any time in the interest of safety and to avoid disruption of our operations. Inform your

Department Manager or Branch President immediately if you see such activity.

Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

(GCX 2, page 24) (Emphasis added.)

The ALJ interprets the rule to prohibit employee solicitation in non-working areas **only** when the employee is working. (ALJD 5:19-25) The ALJ's interpretation of this rule is flawed because the rule clearly prohibits solicitation in nonworking areas, period. Employees have the statutory right to engage in solicitations for a union in both work areas and nonwork areas during their nonworking time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Thus, Respondent cannot forbid its employees from soliciting in nonworking areas, even during working time.

D. Respondent's Confidentiality Rules Convey Threats of Unspecified Reprisals

While the ALJ readily found that Respondent's confidentiality policies in its Handbook and its Confidentiality Agreement violate the Act (ALJD 4:30-51; Amended Complaint paragraphs 4(a) and 4(b)(3)), he failed to address the allegation that such rules also threaten its employees with unspecified reprisals if they engaged in protected conduct which would fall under the broad reach of the rules. Provisions in Respondent's Handbook and Confidentiality Agreement inform employees that noncompliance will result either in adverse employment action² or legal action.³

² In Respondent's Handbook, the confidentiality provision threatens employees with discipline, including termination, for the "[u]nauthorized disclosure of information about our Company." (GCX 2, pg. 18)

³ The Confidentiality Agreement authorizes Respondent to seek all "legal or equitable remedies[.]" including preliminary and permanent injunctive relief. (GCX14)

Because Respondent has presented no legitimate argument to refute the threatening language in its confidentiality policies, Respondent expends four pages in its Answering Brief arguing its confidentiality policies don't violate the Act. However, Respondent failed to timely file Exceptions to the ALJ's findings that Respondent's confidentiality policies violate Section 8(a)(1). Thus, the Board should ignore any contentions Respondent raises in its Answering Brief.

II. RESPONDENT, BY BIXBY ON MARCH 4, 2011 VIOLATED SECTION 8(a)(1)

A. Respondent Created Impression of Unlawful Surveillance

The ALJ found that Bixby informed Carrington, during their meeting on March 4, that Respondent fired Rubio and that his name had come up in connection with Rubio and her "disruption." (ALJD 9:40-41; 9:46-48) This "disruption" was the fact that Rubio and co-employee Michelle Aparicio (Aparicio), via Instant Messaging, sought to catch supervisor Merissa Hamilton (Hamilton) engaging in racial or ethnic discrimination. This statement made clear to Carrington that Respondent was aware of his concerted activities with Rubio, and that Respondent became so aware as a result of its observations of Rubio's protected conduct. Even Respondent acknowledges, in its Answering Brief, that Bixby's testimony reflects that Carrington's name appeared in the instant messaging conversation between Rubio and Aparicio. (Answering Brief, p. 26)

Under these circumstances, it is not only reasonable that Carrington would conclude that his contacts with Rubio and other employees were being monitored, such a conclusion would be the only reasonable conclusion. *Conley Trucking*, 349 NLRB No. 30 (2007), quoting *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000). Thus, the ALJ erred by finding that there was "no evidence" that Respondent, through Bixby, created an impression among its employees that their concerted activities were under surveillance. (ALJD 12:50-13:2.)

B. Respondent Violated the Act by Interrogating Its Employees

The record reflects, with regard to Bixby's meeting with Carrington: (1) that it occurred against the background of great hostility toward Rubio's Section 7 activities, for which she was terminated; (2) that the information Bixby sought specifically related to Carrington's Section 7 activities, i.e., his name being associated with Rubio's "disruption;" (3) that the questioner was a high-ranking supervisor; (4) that Carrington was alone with Bixby when the questioning took place; and (5) the questioning was performed in a manner designed to intimidate.

An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), *enfd.* in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-93 (1990). Relevant factors include (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. *Bourne v. NLRB*, 332 F.2d 47 (3d Cir. 1964).

Notwithstanding Respondent's torturous linguistic analysis of the word "interrogate," the irrefutable facts demonstrate that Bixby's statement to Carrington that his name had come up in connection with Rubio's "disruptions" would reasonably tend to elicit, and call for, a response from the employee regarding his concerted activities, a salient point the Board has recognized in finding that an interrogation occurred. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 16, (2011), *enfd.* 2012 WL 1372162 (D.C. Cir. Apr. 20, 2012); *Aladdin Gaming, LLC*, 345 NLRB 585, 595 (2005).

C. Respondent Threatened Its Employees and Prohibited Them From Talking to Each Other

The ALJ found that Bixby told Carrington that he had a future with Respondent if he stopped talking to Rubio and learned how to work with supervisor Hamilton. (ALJD 9:41-44) The ALJ found that Bixby offered Carrington some “free advice” -- he could get involved in all the positive things at work, or go in a different path, namely, “participat[ing] in activities like Ms. Rubio’s issues of the recent week or so.” Bixby concluded the meeting with a warning to Carrington, i.e., that on Monday, March 7, Carrington had to decide whether he wanted to perpetuate the disruption or come in with a clean slate and focus on his work. (ALJD 10:1-5)

Respondent’s sole defense that Bixby’s statements did not violate the Act is to attack Carrington’s credibility and his version of events of the meeting. But the ALJ rejected that argument. The ALJ credited Carrington’s version, and discredited Bixby’s account, of their meeting on March 4. The ALJ found Bixby’s testimony “unconvincing[]” and “sounded more like something that was prepared for trial rather than a spontaneous discussion with Carrington about his relationship with Rubio.” (ALJD 12:43-46)

Given the credited version of events, the Board should overrule the ALJ’s finding that Respondent’s conduct did not threaten its employees, nor prohibited its employees from speaking to each other.

III. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING RUBIO

The ALJ failed to recognize that the General Counsel’s *prima facie* case relies not simply on the protected conduct related to Respondent’s alleged religious discrimination in the workplace, but also Rubio’s concerted February 25 instant messages with Aparicio -- the conduct Respondent views as a “disruption.” Even Respondent acknowledges that

Rubio's action is "imbued with a 'concerted' element[.]" (Answering Brief, p. 33) Rubio's discussion with Aparicio in the instant message about supervisor Hamilton's discriminatory behavior constitutes concerted activity. See *Senior Citizens Coordinating Council*, 330 NLRB 1100 (2000) (employee complaints about a supervisor constitute concerted activity).

Having established that Rubio's February 25 instant message constitutes protected concerted activity, the remaining elements of the General Counsel's *prima facie* case are well established in the record: (1) the ALJ found Aparicio forwarded the February 25 instant message to Hamilton, who in turn, forwarded it on March 3 to Director of Quality Assurance and Supplier Information Jeff Chester (ALJD 8:52-9:9); (2) the next day, Respondent discharged Rubio; and (3) the ALJ, quoting Manuszak, found Rubio was "'being manipulative and vindictive to Hamilton by trying to catch her doing something wrong[.]'" (ALJD 9:24-26)

For the first time, Respondent argues in its Answering Brief that its defense for terminating Rubio on March 4, 2011, was her receipt of 300 e-mails from Carrington on March 5 and 6, which amounted to violations of federal and state laws. However the ALJ made no finding that Rubio's (or Carrington's) conduct by forwarding e-mails of purportedly "confidential" and "proprietary" information violated any federal or state law.

IV. RESPONDENT VIOLATED SECTION 8(a)(1) BY DISCHARGING CARRINGTON.

Respondent would have the Board believe that Carrington's action in forwarding e-mails to himself and Rubio "put them in the same category as they would have been in had they backed a truck up to the entrance to where FSA's offices are located and helped themselves to several hundred thousands of dollars of office equipment." (Answering Brief, p.

36) Such hyperbole was never found by the ALJ, nor was Carrington's sending of e-mails found to have violated federal or state laws.

Rather, the ALJ properly found that on March 4, 2011 -- the day that Respondent terminated Rubio -- Carrington and Rubio discussed that Carrington would forward to Rubio e-mails reflecting the following work-related issues which Rubio had discussed with co-employees, and her complaints to Respondent: (1) supervisor Hamilton's religious and national origin discrimination; (2) Rubio's increased workload because of her complaints; and (3) Respondent's favorable treatment of Aparicio. (ALJD 10:8-16) The ALJ further found that Carrington believed he needed to send himself these e-mails, too, because he "was concerned about his job security after his March 4 discussion with Bixby about his connection to Rubio and he thought that emails praising his work performance would be helpful to him in case his job status was affected." (ALJD 10:16-19)

Carrington's actions in sending e-mails to himself and Rubio were protected and concerted activities under the Act. The record shows that General Counsel established that Respondent had knowledge of Carrington forwarding the e-mails to in and Rubio, and that Respondent discharged Carrington for such actions. The evidence of animus is palpable -- not only as a result of Bixby's March 4 meeting with Carrington, during which he threatened and interrogated Carrington about his concerted conduct with Rubio -- and as is evidenced by Respondent's admission that it discharged Carrington because he sent such emails.

Moreover, the record shows that Respondent has failed to establish its proffered *Wright Line* defense that Carrington sent "confidential" and "proprietary" information in the e-mails. In fact, such a defense is a ruse. The record reflects -- especially through the testimony of Respondent's witnesses -- that Respondent never inspected nor thoroughly read the e-mails to

decipher whether “confidential” or “proprietary” information was contained in the e-mails before it discharged Carrington.

V. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) by maintaining overly-broad and discriminatory rules; by threatening employees with unspecified reprisals if they engage in concerted activities; by creating the impression of unlawful surveillance; by interrogating employees about their concerted activities; by orally promulgating a rule prohibiting employees from talking to each other; and by discharging Rubio and Carrington because of their protected concerted activities.

Dated at Phoenix, Arizona, this 3rd day of July 2012.

Respectfully submitted,

/s/ Chris J. Doyle

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in FOOD SERVICES OF AMERICA, INC., a subsidiary of SERVICES GROUP OF AMERICA, INC., Case 28-CA-063052, was served by E-Gov, E-Filing, and E-Mail, on this 3rd day of July 2012, on the following:

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