Flex Frac Logistics, LLC, and Silver Eagle Logistics, LLC, Joint Employers *and* Kathy Lopez. Case 16–CA–027978

May 30, 2014

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On January 28, 2013, Administrative Law Judge Margaret G. Brakebusch issued the attached supplemental decision. In the underlying decision, 358 NLRB No. 127 (2012),[1] the National Labor Relations Board affirmed the judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule. The Board, however, remanded the case to the judge for further analysis of her finding that the Respondent's discharge of employee Kathy Lopez pursuant to that confidentiality rule violated Section 8(a)(1). Specifically, the Board instructed the judge to analyze, under *Continental Group*, 357 NLRB No. 39 (2011), whether the conduct for which the Respondent discharged Lopez was protected or otherwise implicated the concerns underlying Section 7, as *Continental Group* holds that discharges pursuant to overly broad rules may be found unlawful only under those circumstances. For the reasons discussed below, we now affirm the judge's supplemental finding that the Respondent's discharge of Lopez was lawful.[2]

I.

The Respondent was in the business of delivering frac sand to client energy companies for use in oil and gas drilling. To make these deliveries, the Respondent used drivers it employed directly, plus drivers employed by trucking companies with which the Respondent contracted. The Respondent was particularly concerned to maintain the confidentiality of the rates it charges its clients. The Respondent generally feared that, armed with the client rates, competitors might underbid it. But in addition, the Respondent wanted to keep the client rates from the trucking companies with which it contracted, lest they discern the margin between the Respondent's revenues and delivery costs and demand more money.

Employee Lopez worked in the Respondent's accounting department alongside about nine other employees. Assigned to accounts payable, Lopez calculated the pay of employee drivers and the amounts owed to the trucking companies. To perform her duties, Lopez did not need to know the price that the Respondent charged the client companies for frac sand deliveries because the amounts paid the employee drivers and trucking companies were not based on the client rates.[3] Nonetheless, as a member of the accounting department, she had access to those rates.

Lopez knew that the Respondent closely guarded its client rates. She had witnessed her accounting supervisor, Trish Villarreal, explaining specifically to another employee that the Respondent's confidentiality rule was implemented so "we wouldn't talk about" client rates. Lopez plainly understood that the admonition also applied to her. Nevertheless, in November 2010, Lopez repeatedly told dispatch employee Frank Gay, a former employee driver, that she thought the Respondent was "screwing [drivers] over" in their pay because the Respondent charged client companies much more for deliveries than it paid drivers.[4] On one occasion, Lopez tried to show Gay a document that showed how much clients paid for deliveries, but Gay refused to look at it.

Gay felt uncomfortable about his conversations with Lopez, so he reported them to his supervisor, Jamie Stingley. Stingley, in turn, informed William Funk, one

[1] Enfd. 746 F.3d 205 (5th Cir. 2014).

[2] The General Counsel filed exceptions to the judge's supplemental decision and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The General Counsel also filed a motion to strike the Respondent's answering brief, which the Board denied by an unpublished Order dated April 25, 2013.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Instead, employee drivers and trucking companies received a percentage of a separate calculation based largely on uniform rates per mile driven and the time that the truck waited to be offloaded. These rates were set in the contracts with the trucking companies and were the same for each contractor. The trucking companies received 80 to 90 percent of the total calculated from the uniform rates, and Respondent's employee drivers received 25 percent.

[4] Lopez believed that it would have been fairer to the drivers to tie their compensation to a percentage of the rate paid by the clients.

of the Respondent's owners, and other high-level managers.

Within the next day or two, Funk received telephone calls from three of the trucking companies that were making deliveries for the Respondent. The companies had heard how much the Respondent charged clients and demanded more money to continue providing services to the Respondent. The companies did not reveal their source, but the Respondent believed, reasonably under the circumstances, that it was Lopez. The Respondent refused to pay more, and all three companies ultimately stopped performing work for it. About a month later, on December 30, 2010, the Respondent discharged Lopez for violating its confidentiality rule by disclosing the Respondent's client rates. We have previously found that the rule was unlawfully overbroad, as it prohibited or could be read to prohibit employees from discussing wages, hours, and other terms and conditions of employment. See 358 NLRB No. 127, slip op. at 3 (2012), enfd. 746 F.3d 205 (5th Cir. 2014).

II.

In her supplemental decision, the judge found the Respondent's discharge of Lopez did not violate the Act. We agree. In *Continental Group*, 357 NLRB No. 39 (2011), the Board clarified that discipline pursuant to an unlawfully overbroad rule is unlawful only if the employee "violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7." Id., slip op. at 4. In this case, even though that second condition may have been met, we sustain the discipline for the following reasons.

There is no dispute that the Respondent has a legitimate business interest in keeping its client rates confidential, as borne out by the particular facts of this case. Indeed, the Respondent's business did suffer as a result of the disclosure of the client rates.[5] The record establishes that Lopez was aware of this confidentiality interest, that she nonetheless used her position to access the client rates, and that she attempted to disclose them to Gay. The Respondent reasonably believed that Lopez also disclosed those rates to the trucking companies that contracted with the Respondent.[6]

In these circumstances, applying *Continental Group*, we find that the Respondent acted lawfully in discharging Lopez. Although Lopez' conduct arguably implicated concerns underlying the Section 7 rights of others, based on the credited testimony, her deliberate betrayal of the Respondent's strong, expressly articulated confidentiality interest and the evident harm she caused were plainly and overtly the reasons the Respondent discharged her. We are satisfied that, to the extent other employees were aware of the events at all, they would understand that the Respondent had discharged Lopez on account of her gross misconduct, not because of the Respondent's application of its overbroad rule, and that any chilling impact on the exercise of their Section 7 rights would be minimal. See *Cook County College Teachers Union, Local 1600*, 331 NLRB 118, 120–122 (2000) (finding unprotected the leaking of a private directory of management's home addresses to the union where the employer had a clear need to keep addresses private, and had consistently maintained and applied a policy of confidentiality). In other words, Lopez was not discharged for discussing wages or other terms and conditions of employment, nor would her discharge have been perceived as such. In these circumstances, the Respondent's reliance on the confidentiality rule in discharging Lopez would not reasonably tend to chill other employees' exercise of their Section 7 rights.

For all of those reasons, we affirm the judge's finding that her discharge was lawful. See *Food Services of America, Inc.*, 360 NLRB No. 123 (2014) (despite the arguable connection between an employee's conduct and Section 7 rights, the employer's reliance on an overbroad confidentiality rule in discharging the employee for egregious conduct would not chill employees in the exercise of their Section 7 rights and thus did not run afoul of *Continental Group*).[7]

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[5] The judge found that the Respondent established, as an affirmative defense under *Continental Group*, that Lopez' conduct actually interfered with the Respondent's operations. We find it unnecessary to pass on that finding because we agree, for the other reasons discussed in this decision, that the Respondent lawfully discharged Lopez. Nevertheless, to avoid any confusion the judge's decision may otherwise create about the requirements of that affirmative defense, we note that *Continental Group* makes clear that where, as here, an employer provides the employee with a reason for his or her discipline or discharge, "the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule." 357 NLRB No. 39, slip op. at 4.

[6] Lopez denied disclosing the client rates, and there is no proof that she actually did so. Whether she did or not is irrelevant for purposes of this decision, however, because the Respondent reasonably believed that she did, and that belief is sufficient to support her discharge. Cf. *Chinese Daily News*, 346 NLRB 906, 909, 945–946 (2006) (finding that an employer proved that it would have discharged an employee even in the absence of protected conduct where it proved that it discharged him because it reasonably believed that he had stolen its property), enfd. 224 Fed.Appx. 6 (D.C. Cir. 2007). For the sake of brevity, we shall refer to Lopez' disclosures as though they actually took place.

We agree with the judge, for the reasons she stated, including her implicit credibility findings, that Lopez' discussing accounting-department wages with employee Catherine Chambers was not a reason for Lopez' termination.

[7] Member Miscimarra agrees with his colleagues that Lopez' conduct was not protected under Sec. 7 of the Act, and that the Respondent

ORDER

The recommended Order of the administrative law judge is adopted and the remainder of the complaint severed by the Board's Order in 358 NLRB No. 127 (2012)[8] is dismissed.

Dated, Washington, D.C. May 30, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Linda M. Reeder, Esq., for the Acting General Counsel.
Scott Hayes, Esq., of Dallas, Texas, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was originally tried in Fort Worth, Texas, on October 13, 2011, and I issued a decision in this matter on February 6, 2012. The underlying complaint in this matter alleged that Flex Frac Logistics LLC and Silver Eagle Logistics, LLC (Respondent) maintained a written rule prohibiting employees' disclosure of confidential information. The complaint further alleged that on or about December 30, 2010, Respondent promulgated and thereafter maintained a rule prohibiting employees from discussing employee wages. Finally, the complaint alleged that on December 30, 2010, Respondent unlawfully terminated Kathy Lopez (Lopez) because she violated these rules.

In my initial decision, I found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating and maintaining an overly broad confidentiality rule that employees could reasonably understand to prohibit them from discussing their wages and other terms and conditions of employment. Additionally, I found that Respondent terminated Lopez pursuant to the unlawful confidentiality rule. On September 11, 2012, the National Labor Relation Board (the Board) issued its decision in this matter. The Board affirmed my decision in part, finding that the Respondent promulgated and maintained an overly broad and ambiguous confidentiality rule that prohibits or may reasonably be read to prohibit employees from discussing wages or other terms and conditions of employment. The Board remanded the case to me with respect to the issue of Lopez' alleged unlawful termination. The Board directed me to issue a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Specifically, the Board directed that I explain whether Lopez' discussions constituted protected activity and, if not, whether those discussions otherwise implicated the concerns underlying Section 7.

Having concluded my consideration of this matter and after considering the supplemental briefs filed by the Acting General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICE

A. Background

For purposes of this proceeding, Flex Frac Logistics and Silver Eagle Logistics function as a joint employer and William Funk (Funk) oversees the entire operation. In its business operation of delivering frac sand to oil and gas well sites, Respondent employs approximately 100 company drivers. Respondent also contracts with approximately 100 nonemployees who are identified in the record as vendors, leased drivers, or independent contractors. For uniformity, these drivers are referenced herein as contract drivers.

Respondent contracts with its customers to haul loads of frac[1] sand for a specific rate. Respondent asserts that in submitting a bid to the customer, it considers the costs for the ground crew, the costs for the load-out crew, and the costs incurred in using the company driver or a contract driver. Respondent asserts that the contract rates with its various customers are confidential and are not disclosed to the contract drivers.

Respondent's individual contracts with the contract drivers provide that the drivers will be paid a specific mileage rate for the line haul to Respondent's customer, as well as any additional pay for their "waiting time" or for "deadhead" miles. The total amount paid using this rate may also be reduced if the contract driver generates additional charges such as the driver's use of Respondent's U.S. Department of Transportation (DOT) authority or if the contract driver uses Respondent's insurance.

At the time of her December 2010 termination, Lopez worked in accounts payable. The accounting department employees prepare the invoices for Respondent's customers in addition to processing the pay for the company drivers and the contract drivers. Lopez' job required that she obtain haul tickets from the drivers, input the drivers' data, and prepare the drivers' pay at the end of each week.

B. The Confidentiality Agreement

There is no dispute that Respondent promulgated a confiden-

lawfully terminated her employment because of that conduct. He would find the unprotected nature of Lopez' conduct renders her employment termination lawful, without regard to the applicability of a potentially unlawful overbroad policy or rule. In this regard, Member Miscimarra would not apply or rely on *Continental Group*, 357 NLRB No. 39 (2011). Finally, because the Board finds that Lopez was lawfully discharged regardless of the legality of Respondent's confidentiality rule, he expresses no opinion as to the merits of the Board's prior decision finding the rule unlawful.

[8] Enfd. 746 F.3d 205 (5th Cir. 2014).

[1] Although the parties provided no specific definition of frac sand for the record, it appears to be an additive or proponent used in the drilling process for oil and gas wells.

tiality rule in May 2010 and that Lopez was terminated pursuant to this rule. In its September 2012 decision, the Board noted that the following rule is broadly written with sweeping, nonexhaustive categories that encompass nearly any information related to the Respondent.

> Employees deal with and have access to information that must stay within the Organization. Confidential information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics, LLC organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

The Board determined that Respondent's rule as written is overly broad and ambiguous and prohibits or may reasonably be read to prohibit employees from discussing wages or other terms and conditions of employment and thus it is violative of the National Labor Relations Act (the Act.)

C. Respondent's Asserted Basis for Terminating Lopez

Funk testified that Lopez was terminated after he learned that she disclosed to employee Frank Gay (Gay) and others the differential between the amount that Respondent charged its customers and the amount that Respondent paid to the contract drivers. Funk explained that his concern had not been the fact that she disclosed the rates paid to the contract drivers or the amount of pay given to the company drivers. He clarified that the amounts paid to company drivers are often made public as a means of building morale and encouraging drivers. Funk asserted that the line haul rates that are paid to the company drivers are public knowledge. He also explained that the contract rates paid to the contract drivers are all the same. He confirmed that his concern had been that Lopez had disclosed the contract rates paid to Respondent by its customers or more specifically that she had disclosed Respondent's profit margin. Funk contends that Lopez was not terminated because she discussed wages.

Funk credibly testified that when he personally spoke with Gay, he learned that Lopez had offered to show Gay documents that would show the difference between the amounts that Respondent was charging its customers versus the amount Respondent contracted to pay the drivers. Chief Financial Officer John Wilkinson also testified that when he spoke with Gay, Gay told him that in a conversation with Lopez, she explained to him how customers were billed.

Funk also recalled that in addition to his conversation with Gay, he received phone calls from three contractors who gave him information that was similar to what Gay told him. The contractors told him that they knew what Respondent had charged the customer for work they had done and they wanted more money to make those hauls. Funk could recall the names of two of the contractors but could not recall the name of the third contractor. He confirmed, however, that all three of the contractors stopped providing services to Respondent after these conversations.

Funk explained that based on the investigation, he concluded that information about Respondent's contractual rates with its customers was "out on the streets." He further explained that this kind of disclosure of information not only affects Respondent's dealings with its contractors, but it also gives his competitors a "leg up." If his competitors know what he is charging his customers, they can adjust their bids accordingly. Based on this investigation, Lopez was terminated.

D. Employee Testimony Corroborating Respondent's Basis for Terminating Lopez

Although Gay appeared at the hearing pursuant to the Acting General Counsel's subpoena, he did so without meeting or speaking with the Board attorney to prepare for hearing. I find his testimony credible. At the end of October 2010, or at the beginning of November 2010, Gay changed from his job as a truckdriver to a job in dispatch. Gay testified that shortly after he took the job in dispatch, he had a conversation with Lopez. Lopez began the conversation by asking Gay what he had made during November as a truckdriver. He told Lopez that as a company driver he was paid 25 percent of what Respondent made for the truck's delivery. Lopez told him that he was being "screwed over" by Respondent because Respondent was not paying him the correct amount. She told him that he had received 25 percent of $700 and he should have received 25 percent of $1100. Lopez further explained that because she worked in accounting and billed Respondent's customers, she could show him where he was being cheated out of the percentage for the $1100. Gay testified that he had a "couple" more conversations with Lopez in which she provided similar information. Gay recalled that in one of the conversations with Lopez, she had documents in her hand and wanted to show him what a customer actually paid Respondent.

Gay recalled that after his first conversation with Lopez, he did all that he could to avoid her because in his opinion "she just spewed a lot of venom through the whole dispatch." He explained that because her comments seemed to have a negative effect on the people working in dispatch, he and a fellow employee asked the dispatch supervisor to keep Lopez out of the dispatch area. Gay also recalled telling Wilkinson that Lopez came into dispatch "spewing a lot of venom and badmouthing the company." As an example of the badmouthing, he told Wilkinson that Lopez had informed him that Respondent was not paying the company drivers their percentage of the total amount that Respondent made from the truck delivery.

Lopez recalled having only one conversation with Frank Gay when she was in the dispatch office in early November. Although she acknowledged that the conversation involved some discussion about what Respondent paid the contract drivers, she denied that she offered to show him what Respondent received from its customers and she denied taking any document with her to dispatch to show Gay what Respondent's customers were paying.

II. ANALYSIS AND CONCLUSIONS

A. Respondent's Basis for Terminating Lopez

As I noted in my initial decision, Respondent acknowledges that Lopez was terminated pursuant to the confidentiality agreement that she signed in May 2010. Respondent contends, however, that it terminated her because she disclosed Respondent's contract rates with its customers; information that Respondent considered to be confidential. As I have previously noted, I find that the total record evidence supports Respondent's assertion.

Funk credibly testified that based on information that he received, it was his understanding that Lopez told employee Frank Gay and others the amount that Respondent was charging its customers versus the amount that Respondent paid its drivers. Funk also testified that there was no prohibition in employees talking about what they were paid by Respondent. He testified without contradiction that Respondent often made drivers' pay public in order to motivate the drivers in their work. Gay also testified that although truckdrivers did not know how much Respondent received from their customers, it was not uncommon for them to discuss their own pay. In my initial decision I found that Respondent promulgated and maintained an overly broad confidentiality rule that employees could reasonably understand to prohibit them from discussing their wages and other terms and conditions of employment. The record does not, however, reflect that Respondent has threatened or disciplined employees for discussing their wages and terms and conditions of employment. This finding is supported by the testimony of both Frank Gay and employee Catherine Chambers.

Furthermore, Lopez is the only employee who testified that Respondent restricted employees in discussing wages. Lopez testified that when she was terminated, Wilkinson told her that she was terminated because she discussed wages and talked about drivers' pay. I don't find Lopez' testimony to be credible in this regard. Aside from the fact that Lopez' alleged account of this conversation is self-serving, her account of this conversation conflicts with her other testimony.

Lopez asserts that when she was first given the confidentiality agreement to sign in May 2010, former office manager, Patricia Villarreal, told her that the reason for the document was to keep employees from talking about the costs and the price that Respondent was receiving from its customers. Lopez then appeared to bolster Villarreal's alleged statement by including "and wages and things like that." Lopez contends that she spoke with Gay about drivers' pay and that she also spoke with employee Catherine Chambers about the pay for accounting employees. Had Villarreal actually warned Lopez that she was prohibited from discussing wages under the confidentiality agreement, it is unlikely that she would have freely engaged in such conversations with either Gay or Chambers. Additionally, Lopez testified that as early as August 2010, she was involved in a discussion with Owner Virginia Moore, Supervisor Villarreal, and three other employees. During the conversation, Lopez and the other employees questioned why the contract drivers were getting raises and the company drivers were not. Lopez recalled that she and the other employees stated that they thought that it was unfair for the company drivers to receive one rate and the contract drivers another rate. Moore responded to the employees' comments by simply stating that Respondent was not going to change the rates as suggested by Lopez and the other employees. Lopez admitted that neither Moore nor anyone else told her that the wage information that she was discussing was confidential. There is no evidence that any action was taken against Lopez or any of the other employees who participated in the conversation for their having openly discussed the wages of the truckdrivers. Thus, I do not credit Lopez' testimony that she was told that she was terminated for discussing employees' wages or that she was ever told that the confidentiality agreement prohibited the discussion of wages.

Furthermore, I do not credit Lopez' testimony concerning her conversation with Gay. She denied that she offered to show Gay records of what Respondent received from its customers. Her version of the conversation was in total contrast with Gay's testimony. I found Gay's testimony to be straightforward and unembellished. There was nothing in the record to indicate that he fabricated or exaggerated his testimony or that he would have had a reason to do so. The total record evidence supports a finding that during her conversations with Gay, Lopez disclosed information about Respondent's contracts with its customers and that Gay shared this disclosure with Funk and the other managers.[2]

As I noted in my initial decision, the only other evidence that would otherwise support a finding that Lopez was terminated for discussing employee wages is the language that Office Manager Susie Kellum included in Lopez' termination notice. When Kellum prepared the termination notice, she included the following language:

> Kathy told one of our dispatch employees that we paid our drivers one rate and our customers another. She also discussed what people make in the accounting office to other employees that are or were looking for raises.

Kellum testified that she had only been employed with Respondent for 4 days when she first spoke with Funk about his terminating Lopez. Funk told here that he wanted Lopez "gone now." She recalled that Funk's concern was that Lopez was discussing Respondent's contracts with its customers. Although he wanted to terminate Lopez, he was also leaving for a business trip and he wanted management to get additional information before Lopez was terminated. Kellum recalled that in a later conversation, Funk told her that he would wait to fire Lopez after the holidays as he didn't want to terminate her before Christmas.

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[2] Because Gay had been a company driver before he transferred into dispatch, it is apparent that in her discussions with Gay, Lopez primarily focused on Respondent's contracts with its customers as related to what Respondent paid its company drivers. The fact that her discussion included a reference to what Respondent paid its own employees does not establish that Lopez was disciplined for protected activity. Gay's testimony that Lopez talked with him about the contract amounts that Respondent received from its customers coupled with the telephone calls from contractors mirroring Gay's testimony provided the basis for Lopez' termination.

Kellum testified that although she included the reference to Lopez' accounting department wage discussions in the termination notice, Funk had spoken with her only about terminating Lopez for her discussions concerning the difference in what the contractors were paid versus what Respondent's customers pay She testified that although she knew that it is important to write the correct reason for an employee's termination on the discipline notice, she had only terminated one other employee in her career prior to Lopez. She testified that in her previous jobs, the confidentiality agreements had always prohibited discussing internal company matters. She explained that "in her mind," this would also include wages. Because she knew that Lopez had discussed wages in the accounting department and because she personally didn't think that wages should be discussed, she added both reasons to the termination notice. She admitted, however, that Funk made the decision to terminate Lopez and he had never expressed any concern about Lopez discussing wages with other employees.

The overall record reflects that Kellum did not make the decision to terminate Lopez. It is obvious that in her zeal as a new manager to prepare a comprehensive termination notice, she drafted what she thought would be a proper basis for a termination. It is apparent, however, that she took such an action on her own initiative. Based on the entire record, it is apparent that Respondent terminated Lopez because of her disclosure of confidential information about the contract rates paid to Respondent by its customers and not because of any discussions that Lopez may have had about accounting employees' wages or for any other discussions about wages.

B. The Confidentiality Agreement and Whether Lopez Engaged in Protected Activity

Referencing its previous decisions in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), and *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), the Board has found that Respondent violated Section 8(a)(1) by its maintenance of an overly broad confidentiality rule. Although Respondent contends that it never intended its confidentiality rule to prohibit its employees from discussing wages, the Board finds that the context of the overall confidentiality rule does nothing to remove employees' reasonable impression that they would face termination if they were to discuss their wages with anyone outside the Company.

As I stated in my initial decision, I have no doubt that Respondent's confidentiality agreement was likely written to prohibit confidential disclosures of matters other than wages or other terms and conditions of employment, even though Respondent did not limit the prohibition to only those confidential matters that did not involve wages and other terms and conditions of employment. Respondent has never disputed the fact that Lopez was terminated for violating a portion of its confidentiality rule. Just as I noted in my initial decision, I find that Respondent terminated Lopez because Respondent believed that she had disclosed confidential customer information and not because she discussed employee wages.

C. Prevailing Legal Authority

With respect to discipline imposed under an unlawful confidentiality rule, the Board in previous decisions applied the standard set forth in *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); finding that discipline imposed by an employer pursuant to an unlawfully overbroad work rule is, in itself, also unlawful. In its more recent decision in *Continental Group,* 357 NLRB No. 39, slip op. at 2 (2011), the Board limited the application of *Double Eagle*. Specifically, the Board clarified that the *Double Eagle* rule provides that discipline imposed pursuant to an unlawfully overbroad rule violates the Act when the employee has engaged in protected conduct or has engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Furthermore, an employer will avoid discipline imposed pursuant to an overly broad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operation. 357 NLRB No. 39, slip op. at 5.

D. Whether Lopez Engaged in Protected Activity

As set forth above, I do not find that Respondent terminated Lopez because she discussed wages with other employees, but because Respondent believed that she disclosed confidential information about its contracts with customers. The Board has directed me to explain whether Lopez' discussions constituted protected activity and, if not, whether those discussions otherwise implicated the concerns underlying Section 7.

Respondent argues that the record demonstrates that Lopez was terminated for disclosing Respondent's confidential information related to the rates that Respondent charged its customers, thus harming Respondent's competitiveness in its industry. Respondent argues that pursuant to the limitations to the *Double Eagle* rule, as set forth in *Continental Group*, supra, Respondent's termination of Lopez did not violate the Act.

In her brief, counsel for the Acting General Counsel[3] asserts that Lopez engaged in protected activity and thus her termination is violative of the Act. I have considered the General Counsel's arguments as addressed below. I do not, however, find that Lopez was terminated for engaging in protected activity or for conduct that otherwise implicates the concerns underlying Section 7 of the Act.[4]

Counsel for the General Counsel asserts that during Lopez' discussions with both Gay and Chambers, she discussed wages and these discussions were known to Respondent. Specifically, counsel for the General Counsel references Gay's testimony when he recalled that Lopez mentioned that her husband was an

[3] For purposes of brevity, the Acting General Counsel is referenced as the General Counsel.

[4] Counsel for the General Counsel submits that Lopez engaged in protected activity; Respondent knew that she was engaged in protected concerted activity; Respondent had animus to the activity; and the protected activity was a motivating factor in Respondent's termination decision. Counsel argues that Lopez' termination was thus violative under *Wright Line*, 251 NLRB 1093 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Having found that Lopez was not terminated for protected activity, I do not find that Lopez' termination is violative under *Wright Line*.

employee driver when she talked about the disparity in what Respondent received from its customers and what it paid to the drivers. Counsel submits that even if Gay did not want to hear what Lopez said about wages, her conduct was nonetheless protected activity. I have no doubt that Lopez discussed wages and pay with Gay and Chambers. The overall record, however, does not reflect that it was these wage discussions that triggered Respondent's decision to terminate Lopez. Lopez' own testimony reflects that she and other employees participated in an open and vigorous discussion about wages with one of Respondent's owners more than 4 months before her discharge without any repercussions or adverse consequences. Admittedly, Lopez and the other employees challenged the owner about why Respondent gave raises to the contract drivers and not to the company drivers and voiced their concerns that the contract drivers and company drivers were paid different rates. No action, however, was taken against either Lopez or the other employees. Furthermore, despite the language of the overly broad confidentiality rule, there is no evidence that any employee has been disciplined for discussing wages.

Counsel for the General Counsel also asserts that even if Lopez disclosed information and discussed pay with the contract drivers, she was still engaged in protected activity. Counsel cites the Board's decisions in *Plumbers Local 412*, 328 NLRB 1079, 1082 (1999), and *Washington State Service Employees,* 188 NLRB 957, 958 (1971), for the proposition that an employee can engage in concerted protected activity with employees of other employers. Counsel thus argues that even if the contract drivers were not Respondent's employees, they were nevertheless employees of other employers and her discussions with them constituted protected activity.

Although the Board has found that concerted activity need not be among employees of the same employer to qualify for protection under the Act, I don't find these cases to support a finding that Lopez engaged in protected concerted activity. First of all, the circumstances in *Washington State Service Employees,* supra, are distinguishable from those in the instant case. In *Washington State Service Employees*, an employee was found to have engaged in protected concerted activity when she participated in a demonstration with employees of other employers and members of civil rights groups for the purpose of furthering the employment opportunities of minority groups by other employers. There was no evidence that any other employees of her employer participated in the demonstration. Lopez' conduct is totally dissimilar to that of the employee engaged in protected concerted activity in *Washington State Service Employees.*

Plumbers Local 412, supra, involved the actions of a journeyman pipefitter who became employed by the union as a clerical employee. Because she was no longer covered by a collective-bargaining agreement, she was not eligible for a particular pension plan. She discovered, however, that the clerical employees of the joint apprenticeship training committee (JATC) were covered by the particular pension plan that she wanted. The employee complained to her fellow employees, as well as to the clerical employees of JATC about the fact that she could not participate in the pension plan. The General Counsel alleged that the employee's conversations with the clerical employees of JATC about wages and pension constituted concerted activity, despite the fact that these employees worked for a different employer. The Board, however, affirmed Administrative Law Judge Mary Miller Cracraft in dismissing the complaint. In finding no merit to the complaint allegations, Judge Cracraft applied the standard used by the Board and the courts in determining whether an employee has engaged in "concerted" activity and looked to whether the employee acted with or on the authority of other employees and not solely on her own behalf. The judge quoted the court's explanation in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), that was adopted by the Board in *Meyers Industries (Meyers II*), 281 NLRB 882, 887 (1986), enfd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action, or that it had some relation to group action in the interest of the employees.

Judge Cracraft also noted that the Board further adopted *Mushroom Transportation Co*. in *Daily Park Nursing Home*, 287 NLRB 710, 710–711 (1987), in finding that "activity that is 'mere talk' must be looking toward action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representatives to protect or improve his status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more likely then to be mere griping."

Lopez' disclosure of Respondent's customer contract information can be easily analyzed by this same standard set forth by the Board and the court in determining whether conduct constitutes protect concerted activity. Applying such standard, it is apparent that Lopez' conduct does not rise to the level of protected concerted activity. First of all, there is no record evidence to substantiate that Lopez' disclosure was made to an "employee" or "employees" of other employers as counsel for the General Counsel asserts. Although Respondent was contacted by three contractors about Respondent's customer contracts, there is no record evidence to establish that these individuals were not independent contractors or employers. There is no evidence to show that Lopez sought out "employees" of other employers who contracted with Respondent to deliver Respondent's product.

Furthermore, using the Board and the court's analysis discussed by Judge Cracraft and affirmed by the Board in *Plumbers Local 412*, supra, there is no evidence that by disclosing customer information to the contract drivers who were not employees of Respondent, Lopez sought to induce these nonemployees to initiate or prepare for group action or that it had some relation to group activity in the interest of employees. Her disclosure was more akin to what was found to be "mere griping" as discussed by the Board in *Daily Park Nursing Home*. *Daily Park Nursing Home*, supra at 710–711.

Citing *Continental Group,* 357 NLRB No. 39, slip op at 4

(2011), counsel for the General Counsel also contends that Respondent has not sufficiently shown that Lopez' conduct actually interfered with its operations and that the interference, rather than the violation of the rule, was the basis for the discipline. The record, however, reflects that Respondent has not only shown the interference with its operations, but the resulting damage as well. Funk credibly testified that his decision to terminate Lopez occurred after he received separate telephone calls from three of the vendor contractors, confirming that they had information that was similar to what Lopez told Gay. All three of the contractors ceased providing services to Respondent after these conversations.

Counsel for the General Counsel also urges that Lopez' conduct implicates the concerns underlying Section 7 of the Act, and accordingly, her conduct violates Section 8(a)(1) as envisioned by the Board in its *Continental Group* decision. Id. As discussed above, there is no dispute that during the course of conversations with Gay, Chambers, and other employees, Lopez discussed wages and employee pay. Furthermore, there is no question that Respondent knew of some of these discussions and comments. Lopez testified that more than 4 months before her discharge, she engaged in such a discussion with one of Respondent's owners. She did so, however, without any discipline or consequences. As discussed in my initial decision, it was only when Respondent believed that she had disclosed confidential information about its contracts with its customers that Respondent disciplined Lopez. Accordingly, her conduct does not implicate the concerns underlying Section 7 rights and Respondent did not violate Section 8(a)(1) of the Act in terminating Lopez.

Inasmuch as the Board has found that Respondent violated the Act by its promulgation and maintenance of an overly broad confidentiality rule, my findings and conclusions are limited to the issues delineated in the Board's remand order.

CONCLUSIONS OF LAW

The record does not support a finding that Respondent terminated Kathy Lopez in violation of Section 8(a)(1) of the Act.

Accordingly, on the basis of the foregoing findings and conclusions, and on the entire record, I recommend issuance of the following[5]

RECOMMENDED ORDER

It is hereby recommended that the remainder of the complaint covered by the Board's remand Order in 358 NLRB No. 127 (2012), be, and is dismissed.

Dated, Washington, D.C. January 28, 2013.

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[5] 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.