

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH OFFICE**

SECURITY WALLS, LLC

and

Case 28-CA-22483

ORLANDO FRANCO, an Individual

**GENERAL COUNSEL'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

**TO: The Honorable Margaret G. Brakebusch
Administrative Law Judge**

Respectfully submitted,

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I. OVERVIEW

This case involves violations of Section 8(a)(1) of the National Labor Relations Act (the Act) committed by Security Walls, LLC (Respondent) in its effort to thwart, and it retaliation for, its employees’ protected concerted activities. Specifically, on February 24, 2009,¹ Respondent discharged Security Police Officer (SPO) Orlando Franco (Franco), and on February 27, issued Official Warnings for Misconduct to SPOs Jeff Ortega (Ortega) and Royal Jacobs (Jacobs), because of their concerted activity, including their conduct in protest of Respondent’s practice of offering hours of work at straight pay to part-time employees, including SPO Julie Ruiz (Ruiz), before offering such hours at overtime pay to full-time SPOs. In addition, at all material times, Respondent has maintained unlawful, overly-broad confidentiality provisions in its Employee Handbook and in its Restrictive Covenants Policy in violation of the Act.

II. FACTS

A. Background

Respondent is a Tennessee corporation with an office and facility in Carlsbad, New

¹ All further dates are in 2009, unless otherwise noted.

Mexico, where it provides contract security at the Waste Isolation Pilot Program (WIPP) site. (GCX 1)² Respondent has had the contract to provide security at WIPP since April 1, 2008. Prior to that time, such services were provided by Santa Fe Protective Services (Santa Fe).

When Santa Fe had the contract, SPOs received a \$2.00 per hour increase when they received their Q-clearance, which permits the SPO to handle classified information belonging to the Department of Energy as well as carry a sidearm. (TR 45:6-13, 190; 191) Unlike Santa Fe, Respondent has not maintained such a policy. (TR 45:14-17, 197:11-23) A number of SPOs who were originally hired by Santa Fe but did not receive their Q-clearance until after Respondent took over the contract were unhappy and complained about not receiving the \$2.00 per hour increase from Respondent. (TR 45:14-25, 46:1-2)

B. Franco's Concerted Complaints About the \$2.00 Q-Clearance Disparity Among SPOs

When Respondent took over the contract in April 2008, Respondent's owner Juanita Walls (Walls) held a meeting with the SPOs to discuss Respondent's employee benefits. During this meeting, Franco asked whether the pay for SPOs would be equal after they received their Q-clearance, and she replied that she would take care of it. (TR 193:9-10)

After Franco received his Q-clearance in about June 2008, he talked to Ortega and SPO Naaman Martinez (Martinez) about trying to get Richard De Los Santos, Respondent's Project Manager, to set up a meeting for them with Walls to try to get the same pay as the other Q-cleared SPOs. (TR 195:7-22, 317:20-25) In September 2008, at Franco's request and going through the chain of command, Walls and De Los Santos agreed to meet with Franco and Martinez about the \$2.00 per hour increase for those SPOs who had received their Q-clearance since April 1, 2008. (TR 197:2-16) Walls informed Franco and Martinez that the

² Exhibits of the General Counsel and Respondent are designated herein as "GCX" and "RX," respectively, followed by the appropriate exhibit numbers. References to the transcript are designated "TR" followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line number(s).

\$2.00 per hour increase was a policy of Santa Fe Protective Services and not of Respondent, so Respondent would not be giving the \$2.00 per hour increases. (TR 197:17-23)

Thereafter, Franco continued to complain to and with his co-workers and to management about the pay disparity among the Q-cleared SPOs. (TR 45:14-25, 46:1-18, 198:5-13) Most recently, in January, Franco and Ortega approached De Los Santos and told him that they thought they should be making the same pay as the other Q-cleared SPOs under the Equal Pay for Equal Work Act. (TR 46:19-25, 47, 198, 199-200, 319-320) De Los Santos took the issue to Walls, who then met with Franco and Ortega. During that meeting in January, Walls told them that she did not believe that Respondent had to pay an extra \$2.00 per hour just because an SPO received his or her Q-clearance. (TR 47:22-25) Although other employees complained about not getting the \$2.00 increase when they received their Q-clearance, Respondent had identified Franco as engaging in “continuous agitation” (as De Los Santos later stated in Franco’s termination notice, dated February 24) because Franco would not drop the issue of the \$2.00 per hour disparity for him and other Q-cleared SPO’s, even though Walls had given her answer on the issue. (TR 46:3-18, 141:8-21; GCX 5)

C. Respondent’s Overtime Policy as it Existed on February 23 and 24

As of February 23, Respondent’s overtime procedure consisted of maintaining an overtime, or “augmentation,” list of the names of Respondent’s security officers and the number of overtime hours each had worked or were charged. When Respondent needed a security officer to work overtime, it would contact the security officer with the least number of hours of overtime worked. If the security officer was off duty, Respondent would call his or her telephone and, if the security officer did not answer, Respondent would leave a message. If the security officer returned Respondent’s call and declined the overtime hours, the hours were charged against the security officer as though he or she had worked those

hours. If the security officer did not return Respondent's call, then no hours were charged against him or her. Consequently, the standard practice of the security guards when they did not want to work overtime was to not return Respondent's phone call, thereby avoiding being charged the overtime hours. There was no penalty for not returning Respondent's calls. (TR 52:13, 281:11-17, 324:20-25, 343:8-25)

D. Franco, Ortega and Jacobs Engaged in a Concerted Protest

In February, Franco and other employees learned that part-time SPO Ruiz was being offered hours of work at straight pay that would otherwise have been available to Franco and other full-time guards as overtime hours. On February 23, Franco and Ortega called Ruiz. At the time, all of them were friends. During the call, Franco asked Ruiz to not accept hours of overtime so that the full-time guards could work them. (TR 146:6-8, 320, 321-322) Ruiz declined to do so. Ruiz testified that although she was angry about Franco's call and considered returning to the WIPP facility to confront him about it, she decided instead to calm down and discuss the issue with him the following morning. (TR 145-146)

The following morning, she was unable to find Franco so during her lunch break, she went instead to De Los Santos to see if he could talk to Franco "because [Franco] is not in charge of telling me to come in or not to come in." (TR 147-148) De Los Santos replied to Ruiz by stating, "Okay, I have had enough with Orlando. I have had enough." (TR 149:4-5) A day or two later, De Los Santos asked Ruiz to put her complaint in writing, which she did. (TR 149:13-22; GCX 8)³

By the end of their shift on the morning of February 24, Franco, Ortega and Jacobs had learned that Respondent had offered hours of work to Ruiz for the evening of February 24

³ Notably, an attorney for Respondent asked Ruiz to give an affidavit regarding her complaint about Franco. In the affidavit, she made statements in response to the attorney's questions that related to issues about which she had never complained to Respondent. (TR 153:2-11, 164:2-12; RX 11)

and 25, which she had initially agreed to work. They also learned that she had to renege on her commitment to work on February 24 because she was called into work by her full-time employer, another contractor at the WIPP facility. (TR 39, 345) Franco, Ortega and Jacobs were upset with Respondent for giving a part-time SPO first choice for hours that would otherwise be overtime hour available for full-time SPOs. (TR 324, 345-346) They openly informed other employees and Captain Steve Soto (Soto), who was coming on shift, that if Respondent needed SPOs for overtime later that day, not to bother calling them because they would not answer their phones inasmuch as they would not work any overtime hours that day. They explained to Soto that they had made an agreement with each other that they would not accept any overtime hours that day in protest of Respondent's first offering hours of work to Ruiz at straight pay instead of offering those hours to full-time SPOs as overtime hours. (TR 324, 332-333, 346-348, 365, 373) Neither Franco nor Jacobs returned Respondent's calls on February 24; however, Ortega did. He called Soto with the intention of telling Soto to stop calling him, but Soto was not available. Instead, Ortega left a message asking that Soto call him back, which he did not do. (TR 333:2-25, 337:10-14, 364:20-25)

E. Respondent's Adverse Reaction to Employees' Concerted Activities

1. Franco's Discharge

On the evening of February 24, Captain Robert Ybarra, who supervised Franco, Ortega, and Jacobs, went to Franco's house and told him that De Los Santos had instructed him to tell Franco to bring in his equipment to the facility the following day because De Los Santos wanted to fire him. (TR 56-57-8, 210-212) Franco asked Ybarra why De Los Santos wanted to fire him but Ybarra did not know, so Franco asked to meet with De Los Santos that night and it was agreed that Franco and Ybarra would go to De Los Santos' Carlsbad residence that evening. During the meeting, De Los Santos asked Franco, "What did you

think you were doing? Why did you do these things?” (TR 57, 211) De Los Santos also told Franco that he was being fired because of his complaining and calling Ruiz. (TR 212)⁴ The following day, De Los Santos issued Franco a termination notice, informing him that “a complaint has been filed regarding misconduct on your part” and that Respondent decided to terminate Franco’s employment because his “incessant complaining and continuous agitation and harassment of your fellow workers has created a negative and hostile working environment [that Respondent] cannot and will not tolerate. ” (TR 41:10-21, 43:13-21, 44:12-25, 45:1-25, 46:3-18, 49:9-25, 50:1-23; GCX 5)

At hearing, Respondent admitted that Franco was discharged because he engaged in protected conduct. Specifically, De Los Santos testified that Franco was terminated because he had attempted to “emphasize his displeasure with the way we handle our overtime assignments, organized a situation. He called Ms. Ruiz who was scheduled to work overtime, and asked her to lay off the overtime, because he thought she was taking it from him, and at the same time, he coerced his teammates into not accepting the phone calls the next day.” (TR 38) De Los Santos further testified that he “concluded that they knew before they got off work that morning that we needed help that night and in their [obstinacy], they just decided not to accept the calls and not to return the calls, and not give us the opportunity or not support the company in its contractual requirements that they were aware of.” (TR 39-40)

On the first day of the hearing, De Los Santos also testified that Franco was fired because he “sabotaged [Respondent’s mission] because he got other employees to decline the opportunity to work overtime,” and on the second and last day of the hearing, he reiterated

⁴ Although Ybarra was Franco’s immediate supervisor, he testified that De Los Santos did not question him about Franco’s activities or conduct before De Los Santos decided to fire Franco. In addition, De Los Santos did not solicit Ybarra’s opinion as to whether Franco should be fired, and Ybarra did not offer his opinion. Ybarra also testified that although in Franco’s termination notice, De Los Santos referred to Franco’s “incessant complaining” as behavior that Respondent would not tolerate, Ybarra did not know to what the “incessant complaining” referred. (TR 278:1-8, 377:20-25; GCX 5)

that Franco was terminated, “[f]or compromising our mission and for sabotaging our ability to meet the contract” (TR 56, 426). However, De Los Santos, Ybarra, Franco, Ortega, and Jacobs all testified that SPOs were not required to return Respondent’s calls, and often did not return Respondent’s calls if they did not want to work overtime and did not want to be charged the overtime hours. (TR 56, 234, 281, 324, 325, 343) Indeed, on February 26, De Los Santos implemented a change to the “augmentation” or overtime policy, to wit, “If the opportunity to work overtime is declined by phone from home, the hours will not be added to the log.” (TR 70, 72-73, 119, 352, GCX 10) De Los Santos further testified that Franco was discharged for “leading the effort” of the “conspiracy of the three of them to compromise [Respondent’s] contract and sabotage [its] mission” by failing to respond to Respondent’s phone calls to work overtime on February 24. (TR 56, 59) Notably, De Los Santos admitted that the phone call to Ruiz was the catalyst, “but the basic foundation of the whole thing is that they compromised our contract. They sabotaged our mission.” (TR 50) De Los Santos was very angry about the employees’ protected conduct. In fact, he testified that when he wrote Franco’s termination notice, “I was terribly upset. I was emotional and I was hot – I was hot I was not in a good emotional state and I was terribly upset about it. They compromised our company, they compromised our security, they compromised the whole ball of wax by these little actions that they took.” (TR 50:15-23)

The record shows that Respondent would not have objected if Franco, Ortega and Jacobs had independently not returned Respondent’s calls. Instead, because they made the decision as a group not to return calls for overtime, Respondent considered such conduct to be a “conspiracy” and “sabotage.” (TR 59:1-3) Respondent explicitly admitted as much at hearing. Specifically, the record shows that, as with Franco, Ortega and Jacobs, Soto also called SPO Luis Ramirez for overtime on February 24 and left a message. Ramirez did not

return the call; however, De Los Santos did not issue a written warning to Ramirez because “he wasn’t part of the conspiracy.” (TR 65:8-25; GCX 9)

Even Respondent’s prior conduct with regard to Franco shows that Respondent, in discharging Franco, was motivated by his protected conduct. Specifically, on February 6 and 13, Respondent called Franco for overtime, left a message for him to return the call, which he did not do. Franco was not written up on those occasions because, as De Los Santos testified, Franco’s actions on those dates were not “a part of a conspiracy.” (TR 69:6-17; GCX 9)

2. Written Warnings for Misconduct Issued to Ortega and Jacobs

On February 27, Respondent issued Official Warnings for misconduct to Ortega and Jacobs for failing to meet Respondent’s expectation of “the courtesy of a return call to advise us if you are able to work or not. This conduct is not acceptable and will not be tolerated.” (TR 348; GCX 6, 7) However, approximately a week later, Ortega informed De Los Santos that he had called back on February 24 to tell Soto that he would not be coming in to work. As a result, De Los Santos agreed to remove the warning from his record. (TR 71, 327)

On about July 22, approximately a week before the hearing in this matter, Ybarra informed Jacobs that the warning issued to him on February 27 had been removed from his file effective immediately. Ybarra also told Jacobs that De Los Santos had said the reason the warning was pulled was because on February 26, De Los Santos changed the overtime procedure so that if an SPO returns a call from Respondent about overtime and the SPO declines the proffered overtime hours, those hours will not be charged against the SPO. (TR 72:10-15, 352:17-25; GCX 10)

At hearing, De Los Santos failed to explain how the February 26 change to the overtime policy vis-à-vis charging employees declined overtime hours enabled him to remove the warning, which he testified was issued to Jacobs because he engaged in the “conspiracy”

with Franco and Ortega. (TR 72-73) More telling, however, is De Los Santos' testimony as to why he could not rescind Franco's discharge in keeping with his rescission of Jacobs' written warning, which was, "It was my perception that Mr. Franco was the ringleader and he instigated the whole incident and he was the one that should be held accountable. The other folks were just followers." (TR 119:21-25, 120:1-2) De Los Santos further explained that Franco should be held accountable "[f]or compromising our mission and our contract," and when asked how Franco compromised Respondent's mission, De Los Santos testified, "Because he talked them into not accepting the overtime we were not able to meet the requirement for true fire brigade support personnel on duty." (TR 120:3-8)

F. Respondent's Confidentiality Rules

Since at least October 24, 2008, Respondent has maintained the following confidentiality rules:

(a) On page 8 of its Employee Handbook:

Confidentiality In cases involving a report of harassment or discrimination, all reasonable efforts will be made to protect the privacy of the individuals involved. In many cases, however, [Respondent's] duty to investigate and remedy harassment makes absolute confidentiality impossible. [Respondent] will try to limit the sharing of confidential information with employees on a 'need to know' basis. Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.

(GCX 4; 30:25, 31:1-25, 32:1-6)

(b) On page 11 of its Employee Handbook:

Confidentiality All records and files of the Company are property of the Company and considered confidential. No employee is authorized to copy or disclose any file or record. Confidential information includes all letters or any other information concerning transactions with customers, customer lists, payroll or personnel records of past or present employees

(GCX 4; 32:7-25, 33:1-16)

(c) On page 2 of Respondent's Restrictive Covenants Policy, which

Respondent requires employees to sign:

The specific "Confidential Information" any employee or terminated employee is prohibited to use or disclose is:

2. Insurance and benefits cost formulas and payment premiums;

6. Personal and/or sensitive information regarding any *Security Walls LLC* employee with particular emphasis on salary/hourly wage rate, benefits, promotions, demotions, disciplinary actions, bonuses or other actions which are clearly the authority of the Human Resource Department.

(GCX 3, p.2; 33:17-25, 34:1-23)

III. ISSUES

- A. Whether Franco, Ortega and Jacobs engaged in protected concerted activity regarding Respondent's overtime practices by refusing to return Respondent's telephone calls on February 24;
- B. Whether Respondent violated Section 8(a)(1) of the Act by terminating Franco and issuing letters of warning for misconduct to Ortega and Jacobs;
- C. Whether Respondent's confidentiality rules violate Section 8(a)(1) of the Act.

IV. ANALYSIS

A. The Alleged Discriminatees Engaged in Protected Concerted Activity

Section 7 of the Act states, in part, that employees "shall have the right to self-organization and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." More specifically, Section 7 of the Act protects employees who engage in activity for "other mutual aid or protection," and protects concerted employee activity unrelated to union organization. *Wall's Mfg. Co. v. NLRB*, 321 F 2d 753 DC Cir. 1963), *cert denied*, 375 US 923 (1963); *Red Wing Carriers, Inc.*, 137 NLRB 1545

(1962), *affirmed*, *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 US 905 (1964).

B. Respondent's Discharge of Franco and Discipline of Ortega and Jacobs are Violative of the Act (*Burnup & Sims*)

In the instant case, there is no dispute as to Respondent's reasons for discharging Franco and disciplining Ortega, and Jacobs. Specifically, the record shows that, at a minimum, the Respondent discharged or disciplined these employees because of their failure and refusal to return calls asking them to work overtime and because of other conduct protected by Section 7 of the Act. As a result, the appropriate analytical framework is derived from *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), where the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. *La-Z-Boy Midwest*, 340 NLRB 80 (2003).⁵

Under the *Burnup* analysis, the General Counsel must establish that the alleged discriminatees were engaged in activity protected by Section 7 of the Act, and that the

⁵ As the Board stated in *Phoenix Transit System*, 337 NLRB 510 (2002):

The *Wright Line* analysis is appropriately used in cases that turn on the employer's motive. Here, however, it is undisputed that the [r]espondent discharged [the alleged discriminatee] because of the articles he wrote in the union newsletter concerning the [r]espondent's handling of employee sexual harassment complaints. The judge found and we agree that [the employee's] articles constituted protected concerted activity. Thus, the only issue is whether [the employee's] conduct lost the protection of the Act because, as asserted by the [r]espondent, his articles disclosed confidential information or otherwise crossed over the line separating protected and unprotected activity. See *Felix Industries*, 331 NLRB 144 (2000), remanded 251 F.3d 1051 (D.C. Cir. 2001); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), *enfg.* 148 NLRB 1379 (1964); and *Mast Advertising & Publishing*, 304 NLRB 819 (1991).

In *Phoenix Transit*, a case which present issues similar to those in the instant case, the Board concluded that the employee's conduct, in writing an article for the union's newsletter, was protected, finding that the employees did not engage in misconduct by reporting on allegations of harassment, contrary to the respondent's confidentially rules. Although the facts of the instant case show that at *Burnups & Sims* analysis is appropriate, Respondent raises, as one of its affirmative defenses, that its conduct was lawful under a *Wright Line* analysis (*Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982)). Accordingly, Counsel for the General Counsel also submits, in the alternative, a *Wright Line* analysis, as set forth below, which reaches the same result, i.e., that Respondent's conduct violated Section 8(a)(1) of the Act, as alleged.

respondent took action against them for conduct associated with that protected activity.

Detroit Newspapers, 342 NLRB 223, 228 (2004). The burden then shifts to the respondent to establish that it had an honest belief that the employees engaged in the purported misconduct for which they were disciplined or discharged. *Id.* If the respondent establishes such a good-faith believe, “the General Counsel must affirmatively establish that the employee[s] did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge.” *Id.*; *Akal Security*, 354 NLRB No. 11 (2009).

Applying the *Burnup & Sims* analysis to this case, Respondent admits, and the record shows, that Respondent discharged Franco and disciplined Ortega and Jacobs because they failed and refused to return overtime calls and engaged in concerted activities. The employees’ conduct in failing and refusing to respond to overtime calls was, in and of itself, protected conduct.⁶

Respondent’s assertion that the employees’ actions amounted to misconduct under Respondent’s rules is not supported by the record evidence. To the contrary, the act of failing and refusing to take or return overtime calls, by Respondent’s admission, is not a violation of Respondent’s rules. Moreover, Respondent takes the untenable position that one employee’s failure to return an overtime call is not a violation of Respondent’s rules, while the agreement of the three alleged discriminatees to do so in an effort to change or improve their working conditions is grounds for discharge and discipline. Respondent’s belief that Franco influenced Ortega and Jacobs to “conspire” against it – where such conduct is protected --

⁶ Moreover, to the extent that Respondent was motivated by the alleged discriminatees efforts to obtain a \$2.00 Q-clearance differential or the call to Ruiz, such conduct is also protected by the Act. Specifically, Franco’s “incessant complaining” about the \$2.00 per hour disparity in pay among the Q-qualified SPOs was, itself, protected, concerted activity. As Ruiz testified, De Los Santos told her, “Okay, I have had enough with Orlando. I have had enough” (TR 149:4-5). When Franco phoned Ruiz and asked her not to work the hours that full-time SPOs could work on overtime, he was engaged in protected concerted activity for the mutual aid and protection of other SPOs.

does not constitute misconduct. To the contrary, what Respondent calls a conspiracy is actually concerted conduct protected by the Act.

Respondent has failed to establish that Franco, Ortega, and Jacobs were engaged in misconduct or that its discharge or discipline of these employees was permissible under the Act. Accordingly, it is respectfully submitted that Respondent violated Section 8(a)(1) of the Act by discharging Franco and discharging Ortega and Jacobs.⁷

C. Respondent's Discharge of Franco and Discipline of Ortega and Jacobs are Violative Under *Wright Line*

Though it is respectfully submitted that Respondent's conduct appropriately treated under a *Burnup & Sims* analysis, in the event that the Administrative Law Judge were to find that Respondent had dual motives in discharging and disciplining the alleged discriminatees, the record also supports a finding that Respondent's conduct in discharging Franco and disciplining Ortega and Jacobs is violative under *Wright Line*, supra.⁸

To establish that Respondent's adverse actions against Franco, Ortega, and Jacobs were violative of the Section 8(a)(1), a *Wright Line* analysis requires the General Counsel to first prove by a preponderance of the evidence that the employees' protected activities were a motivating factor in Respondent's decision to discharge and discipline them. *Wright Line*, supra, 251 NLRB at 1089. Once that is established, the burden of persuasion shifts to

⁷ Although De Los Santos testified that Respondent has rescinded the discipline issued by Respondent to Ortega and Jacobs, the record fails to establish that this is the case. Moreover, even if Respondent has rescinded such discipline, the issuance of the warnings remains an unremedied violation of the Act. It is respectfully submitted that Respondent's unfair labor practice warrants a full remedy under the Act. The Board has noted that under certain circumstances, an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. *Passavant Memorial Hospital*, 237 NLRB 138, 139 (1978). The Board explained that in order to be effective, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed illegal conduct, and with adequate publication. Respondent has failed, completely, to meet the Board's standard. The rescission of the discipline, if it has occurred, was not timely, and there has been no publication of the rescission or a statement that Respondent will not issue discriminatory discipline in the future. Respondent's furtive efforts to avoid liability should be rejected.

⁸ Where Respondent's motivation is not at issue, and the *Wright Line* analysis is not appropriate. See *Felix Industries*, 331 NLRB 144, 146 (2000), remanded on other grounds 251 F.3d 1051 (D.C. Cir. 2001).

Respondent to prove that it would have taken the same adverse action even in the absence of the protected activities. *Id.* This two-part test applies in both dual-motive cases, where a respondent has proffered a purported legitimate explanation for the adverse action, and in pretext cases, where a respondent's proffered legitimate explanation is without merit. See, e.g., *Frank Black Mechanical Services, Inc.*, 271 NLRB 1302, 1302 n.2 (1984); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982); *Wright Line*, 251 NLRB at 1083, n.4 ("there is no real need to distinguish between pretext and dual motive cases").

In applying *Wright Line* to the facts of the instant case, the record establishes that Franco, Ortega, and Jacobs engaged in significant protected concerted activity that was well-known to Respondent. Specifically, during 2008 and in January of this year, Franco and Ortega concertedly advocated to Respondent that it should pay employees a \$2.00 hourly differential when SPOs obtained their Q-clearance. This was part of the "continuous agitation" referenced by De Los Santos when discharging Franco in February.

In addition, in February, Franco and Ortega acted concertedly when they solicited the support of Ruiz to engage in their concerted conduct aimed at influencing the manner in which Respondent assigned overtime hours. In response to this protected conduct, Respondent solicited Ruiz to file a report against Franco.⁹ The following day, February 24, Franco, Ortega, and Jacobs engaged in further protected conduct by concertedly exercising their option under Respondent's work rules to fail and refuse to return overtime calls. They did so openly, advising Captain Soto of their intention to do so that very night.

⁹ Ruiz testified that she did not feel threatened; rather, she felt angry that Franco appeared to be assuming a role in which he could questioning her work hours. There is nothing in the testimony of Ruiz, Franco, or Ortega regarding Franco's phone call to Ruiz that suggests inappropriate conduct by Franco.

The record, including the admissions made by De Los Santo and the credible testimony of the alleged discriminatees, established that Respondent was well aware of the employees' concerted conduct and harbored significant animus against such "conspiracies" and "agitation."¹⁰ The record also belies any assertion by Respondent that by failing and refusing to return the overtime calls, the alleged discriminatees violated Respondent's rules. To the contrary, the record, including the testimony of De Los Santos and Ybarra, establishes that Respondent allows employees to fail and refuse to return overtime calls without adverse consequences. The pretextual nature of Respondent's discharge and discipline of the alleged discriminatees is illuminated by De Los Santos' testimony. While De Los Santos testified that Franco was discharged for "sabotaging [Respondent's] mission," he defined such sabotage as encouraging other employees to decline overtime opportunities in concert with him.

The record makes clear that Respondent is unable to establish that it would have taken the same adverse actions against the discriminatees even in the absence of their protected conduct. To the contrary, the record is replete with admissions that Respondent discharged Franco and disciplined Ortega and Jacobs not for undermining or subverting Respondent's mission, but because of their protected conduct, including calling Ruiz and concertedly failing to return overtime calls.

As a result, it is respectfully submitted that Respondent's adverse actions against Franco, Ortega, and Jacobs violate Section 8(a)(1) of the Act.

¹⁰ As Ruiz testified, De Los Santos told her, "Okay, I have had enough with Orlando. I have had enough" (TR 149:4-5).

D. Respondent's Overly-Broad Confidentiality Rules Violate Section 8(a)(1) of the Act

At hearing, the Administrative Law Judge permitted Counsel for the General Counsel's amendments to the Complaint which allege that by the maintenance of the confidentiality rules set forth above under the Facts section, Respondent has violated Section 8(a)(1) of the Act.

Central to the protections provided by Section 7 of the Act is the protection afforded to communications among employees regarding their wages, hours, and other terms and conditions of employment. The Board and courts have long recognized the importance of communication among employees to their full exercise of Section 7 rights. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972). The Act's protection afforded to communication is not limited to communication for organizational purposes, "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit System*, 337 NLRB 510 (2002) (citing *Container Corporation of America*, 244 NLRB 318, 322 (1979)).

The Board, in *The NLS Group*, 352 NLRB No. 89 Slip Op. 3 (2008), reiterated the *Lutheran Heritage Village-Livonia*¹¹ standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1) of the Act. The Board first determines whether the rule explicitly restricts Section 7 activity. If it does, it will be found to be unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper

¹¹ 343 NLRB 646 (2004).

interference with employee rights. The alleged unlawful rules in the instant case are unlawful because employees reasonably would construe them as prohibiting activity protected by Section 7.

Specifically, the confidentiality rule set forth at page 8 of Respondent's Employee Handbook states that with regard to the investigation of harassment or discrimination claims, "Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action." An objective reading of such a rule requires one to draw the conclusion that employees are prohibited from discussing with each other acts of discrimination and other types of harassment in the workplace once it is under investigation by Respondent. As a result, the rule, on its face, prohibits Section 7 conduct. See *Phoenix Transit System*, supra, 337 NLRB at 510 (in finding that the rule against discussing the sexual harassment allegations and the discharge that resulted from the violation of the rule violated the Act, the Board concluded that the rule prohibited employees from speaking among themselves and to outsiders, and that respondent had failed to establish a legitimate and substantial justification for the rule).

Similarly, employees would also reasonably construe the rules maintained at page 11 of the Employee Handbook¹² and page 2 of Respondent's Restrictive Covenants Policy (as fully set forth above in the Facts section) as restricting their right to talk to each other about their wages and the wages of other employees, benefits, insurance benefits, employee discipline, and other terms and conditions of employment, including, explicitly:

¹² "Confidentiality All records and files of the Company are property of the Company and considered confidential. No employee is authorized to copy or disclose any file or record. Confidential information includes all letters or any other information concerning transactions with customers, customer lists, payroll or personnel records of past or present employees . . ."

Personal and/or sensitive information regarding any [Respondent] employee with particular emphasis on salary/hourly wage rate, benefits, promotions, demotions, disciplinary actions, bonuses or other actions which are clearly the authority of the Human Resource Department.

GCX 3, p.2.

Not only does the rules' language make clear that employees would reasonably construe the language of the rule to prohibit Section 7 activity, the record shows that the rules have "been applied to restrict the exercise of Section 7 rights." See the *Lutheran Heritage Village-Livonia* analysis set forth above. Specifically, De Los Santos admitted that each of the rules in question is currently in effect and that an employee who has a complaint is not to share that complaint with any of his or her co-workers (TR 32:4-6); employees may not share information related to employees' pay or benefits (TR 32:14-25, 33:1-16); and, employees may not share information regarding salary, hourly rates of pay, benefits, promotions, demotions, disciplinary actions, bonuses, and other information related to salaries and benefits (TR 34:6-23).

Moreover, Respondent has failed to establish a legitimate and substantial justification for these rules. Respondent contends that the Confidentiality provisions are necessary because it is engaged in a competitive business that rises or falls based on a bidding process, and therefore information related to employees' pay, benefits, bonuses, promotions, etc., must be kept confidential from third parties. If that is Respondent's genuine concern, and even assuming that it would be an adequate justification for some degree of confidentiality, the rules maintained by Respondent are significantly overly-broad in that they go well beyond the bounds of its concerns. An objective reading of Respondent's rules, which do not by their terms make clear to employees that they are not intended to restrict employees' rights to discuss with each other, or others, such as a labor organization, their wages, hours, and terms

and conditions of employment, impermissibly restrict employees in the exercise of their Section 7 rights and, as a result, are unlawful.¹³

Limitations like those imposed by Respondent's rules have consistently been found to violate Section 8(a)(1) of the Act. See *Bryant Health Center, Inc.*, 353 NLRB No. 80 (January 30, 2009) ([r]espondent's confidentiality rule .is both explicit and unlawfully overbroad," citing *Double Eagle*, supra); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 fn. 7 (2007) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity."); *Jeannette Corp.*, 532 F.2d 916, 919 (3d Cir. 1976), enf'g 217 NLRB 653 (1975) ("dissatisfaction due to low wages is the grist in which concerted activity feeds. Discord generated by what employees view as unjustified differentials also provide the sinew for persistent concerted action").

Accordingly, the Respondent's prohibition of employee discussion of pay rates, discipline, investigations, harassment, and terms and conditions of employment with other employees or others violates Section 8(a)(1) of the Act.

IV. THE REMEDY

It is respectfully submitted that, based upon the foregoing and the record as a whole, the Administrative Law Judge should find that Respondent violated Section 8(a)(1), as alleged, and issue an order requiring Respondent to reinstate Franco; make him whole by the payment to him of 100% backpay plus interest compounded on a quarterly basis; to the extent it has not done so already, rescind the disciplines issued to Ortega and Jacobs; expunge the records of Franco, Ortega, and Jacobs regarding the discharge and disciplines issued to them, and notify each in writing that this has been done; rescind and cease giving effect to the

¹³ Employees have a protected right to discuss among themselves and with their union representative the terms and conditions of their employment. Infringement of that right violates the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enf'd. 414 F.3d 1249 (10th Cir. 2005), cert denied 546 U.S. 1170 (2006).

alleged unlawful confidentiality rules and to notify its employees that this has been done; post a Notice to Employees which sets forth employees' rights under the Act and addresses and provides a remedy for the violations found in this matter (a proposed Notice to Employees is attached); and providing for whatever other remedy deemed appropriate by the Administrative Law Judge.

Dated at Albuquerque, New Mexico, this 16th day of September 2009.

Respectfully submitted,

/s/ Liza Walker-McBride
Liza Walker-M^cBride
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FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT maintain overly-broad confidentiality rules prohibiting you from discussing your salary, wage rates, promotions, demotions, performance appraisals, wage increases, bonuses, complaints, or other terms and conditions of your employment with other employees.

WE WILL NOT discharge you because you have engaged in protected concerted activities.

WE WILL NOT discipline you because you have engaged in protected concerted activities.

WE WILL NOT in any similar way frustrate your exercise of any of the rights stated above.

WE WILL immediately rescind the overly-broad confidentiality rules contained in our Employee Handbook and our Restrictive Covenants Policy.

WE WILL notify you in writing that the overly-broad confidentiality rules contained in our Employee Handbook and our Restrictive Covenants Policy, prohibiting you from discussing your salary, wage rates, performance appraisals, wage increases, and complaints with other employees, are rescinded, void, of no effect and will not be enforced, and that we will not prohibit you from discussing your salary, wage rates, performance appraisals, wage increases, bonuses, discipline, promotions, demotions, complaints, and other terms and conditions of your employment with other employees in a manner protected by the Act.

WE WILL immediately reinstate **ORLANDO FRANCO** to his former position with full seniority and all other rights and privileges previously enjoyed by him.

WE WILL make **ORLANDO FRANCO** whole, with interest, for any loss of earnings or benefits resulting from his discharge.

WE WILL expunge and physically remove from our files any references to the discharge of **ORLANDO FRANCO** and notify him, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against him or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

WE WILL rescind and withdraw the unlawful discipline that we issued to **JEFF ORTEGA** and **ROYAL JACOBS**.

WE WILL expunge, and physically remove from our files any references to the discipline issued to **JEFF ORTEGA** and **ROYAL JACOBS** and notify them, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against them or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

SECURITY WALLS, LLC

Date: _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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, AZ 85004-3099

Telephone: 602-640-2160 (and from within AZ: 800-552-8809)

Hours of Operation: 8:15 a.m. to 4:45 p.m.

Si quiere, se puede hablar con un agente de la Junta Nacional de Relaciones del Trabajo en confianza. [a Board agent who speaks Spanish can be made available to speak with you in confidence.] Pagina electronica de red de la Junta Nacional de Relaciones del Trabajo tambien tiene informacion en espanol" www.nlr.gov [Information in Spanish is also available on the Board's website: www.nlr.gov]



CERTIFICATE OF SERVICE

I hereby certify that the GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE in SECURITY WALLS, LLC, Case 28-CA-22483, was served via E-Gov, E-Filing, E-mail and by overnight delivery via Federal Express on this 16th day of September, on the following:

The Honorable Margaret Guill Brakebusch
Administrative Law Judge
National Labor Relations Board
Division of Judges
401 W. Peachtree Street, Suite 1708
Atlanta, GA 30308-3510

One copy on the following via E-mail:

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One copy of the following via overnight delivery via Federal Express

Security Walls, LLC
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Dated at Albuquerque, New Mexico, this 16th day of September 2009.

Respectfully submitted,

/s/ Liza Walker-McBride

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