

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

SECURITY WALLS, LLC,

Respondent,

and

ORLANDO FRANCO,

An individual.

Case 28-CA-22483

RESPONDENT'S MEMORANDUM
IN SUPPORT OF ITS CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S
NOVEMBER 25, 2009 DECISION

George Cherpelis
Jeffrey W. Toppel
JACKSON LEWIS LLP
2390 E. Camelback Rd., Suite 305
Phoenix, Arizona 85016
(602) 714-7044

MEMORANDUM

I. RESPONDENT SECURITY WALLS' CONFIDENTIALITY RULES DO NOT VIOLATE SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT.

A. The Administrative Law Judge's Ruling on Security Walls' Confidentiality Rules.

Administrative Law Judge Margaret Guill Brakebusch ("ALJ") held a hearing in this matter on July 28-29, 2009 in Carlsbad, New Mexico.¹ At the Hearing, Counsel for the General Counsel moved to amend the Amended Complaint to allege that Respondent maintained three overly-broad confidentiality rules:

- Page 8 of Respondent's Employment Handbook, which relates to reports of discrimination and harassment, and provides 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.
- Page 11 of Respondent's Employment Handbook, which relates to the disclosure of the Company's confidential and proprietary information.
- Page 2 of Respondent's Restrictive Covenant Policy, which prohibits employees and terminated employees from disclosing certain of the Company's confidential information.

Despite the objections of counsel for Respondent to the last minute Motion to Amend, the ALJ permitted the Board to amend its Amended Complaint (the "Second Amended Complaint") to assert the additional allegations described above. In response to the additional allegations in the Second Amended Complaint, Respondent orally amended its

¹ Citations to the Transcript of the Hearing shall be cited as "TR [page]"; hearing exhibits introduced by Counsel of the General Counsel shall be cited as "GC Exhibit [number]" and exhibits introduced by the Respondent shall be cited as "R Exhibit [number]."

answer to deny all of the new allegations added through these amendments, while preserving all other aspects of its answer to the Board's First Amended Complaint.

Specifically, the General Counsel alleged that the following three rules were over-broad in violation of Section 7 of the National Labor Relations Act ("NLRB"):

Page 8 of Security Walls' 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, Security Walls' duty to investigate and remedy harassment makes absolute confidentiality impossible. Security Walls 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.

Page 11 of Security Walls' 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 customer, customer lists, payroll or personnel records of past or present employees, financial records of the Company, all records pertaining to purchases from vendors or suppliers, correspondence and agreements with manufacturers or distributors and documents concerning operating procedures of the Company. All telephone calls, letters, or other requests for information about current or former employees should be immediately directed to the proper members of Security Walls' management.

Page 2 of Security Walls' Restrictive Covenant Policy, which prohibits employees and former employees from the use or disclosure of the following:

(1) Insurance and benefits cost formulas and payment premiums.

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

In the ALJ's November 25, 2009 decision (the "decision"), the ALJ recognized that under the Board's current standard for determining whether a work rule violates Section 8(a)(1) of the NLRA, "even if a rule does not explicitly restrict Section 7 rights, the rule is nonetheless unlawful *if employees would reasonably construe the language of the rule to prohibit Section 7 activity.*" [ALJ Decision at 17] Applying this standard, the ALJ held the following:

- **Restrictive Covenant Policy:** The language in Security Walls' Restrictive Covenant policy violated Section 7 because it prohibits employees from discussing "confidential information" which includes certain terms and conditions of employment.
- **Page 8 of the Employee Handbook:** The language on Page 8 of the Employee Handbook concerning confidentiality in connection with harassment and discrimination investigations violated Section 7 of the NLRA because "employees could construe the wording of the Respondent's confidentiality rule as prohibiting discussions as guaranteed by their rights under Section 7 of the Act." [ALJ Decision at 20] The ALJ ruled that Security Walls' articulated interest in investigating harassment and discrimination claims did not outweigh "the rule's infringement on employee rights." [*Id.*]

The ALJ, however, rejected the General Counsel's argument that the confidentiality rule on Page 11 of the Employee Handbook violated Section 7 of the NLRA. In doing so, the ALJ stated:

While I note that payroll or personnel records are included in the list of documents prohibited from disclosure, an objective reading of this rule would indicate that the rule is directed toward the confidentiality of Respondent's business records and not to the prohibition of employees' Section 7 rights. *It is not apparent that employees would construe this*

rule to preclude their ability to discuss among themselves matters relating to wages and terms and conditions of employment.

[Decision at 20 (emphasis added)]

Respondent takes exceptions to the ALJ's decision on the following points: (1) that language in its Restrictive Covenant Policy violates Section 7 of the NLRA; and (2) that the language in its Employee Handbook relating to harassment and discrimination violates Section 7 of the NLRA. For the reason explained below, Respondent respectfully requests the Board reverse the ALJ's decision on these points.

B. The Evidence Presented at the Hearing Demonstrates that Neither the Restrictive Covenant Policy or the Language in Security Walls' Discrimination/Harassment Policy Was Reasonably Construed to Prohibit the Exercise of Employee Section 7 Rights.

Respondent recognizes the fact that the Board and the Courts have long acknowledged that employees have an abiding interest in communicating among themselves regarding wages, hours and other terms and conditions of employment. *See Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972). However, what Respondent contests is the ALJ's conclusion that Respondent's employees "would reasonably construe the language" contained in the harassment/discrimination policy on page 11 of Respondent's Employee Handbook and in Respondent's Restrictive Covenant Policy to prohibit their exercise of their Section 7 rights. The evidence presented at the Hearing – and more importantly, the ALJ's own findings – demonstrate that Respondent's employees *did not construe either of these two policies to prohibit their discussion of the terms and conditions of their employment and they were free to, and did, regularly exercise these rights without fear of reprisals.*

In her decision, the ALJ relied upon the Board's decision in *The NLS Group*, 352 NLRB 744, 745 (2008) in which the Board reiterated its method of determining whether a work rule violates the Section 7 rights of the employees. In *The NLS Group*, the Board stated that irrespective of whether a work rule *explicitly* restricts Section 7 rights of employees, it will still be found unlawful if "employees would reasonably construe the language of the rule to prohibit Section 7 activity." *Id.* The problem with application of this rule in the instant case (and presumably others) is that it completely ignores context and practice. The Board should not be permitted to ignore the facts and make a determination based on how employees *may construe a work rule when there is undisputed evidence presented as to how they actually construed that rule.* To do so, would permit the Board to divorce the rule of law from reality.

In ruling on the validity of Respondent's confidentiality provisions, the ALJ stated "[c]learly, the way in which employees may reasonably construe the language is pivotal." [ALJ Decision at p. 18] Indeed, that is the case here. Despite this statement, the ALJ specifically found that on more than one occasion employees raised concerns relating to the terms and conditions of their employment, and specifically about their wages, directly with Security Walls' management, including the Company's owner, Juanita Walls. For example, in determining that the discipline issued to the Discriminatees did *not* violate Section 7 of the Act, the ALJ specifically found:

[T]here is no dispute that both Franco and Ortega voiced concerns to management about Respondent's pay rate for the SPOs. I do not, however, find these discussions significant to the discipline that was issued to these three employees. Although Franco, Ortega, and Jacobs may have all participated in these discussions and voiced complaints about Respondent's

failure to pay the additional \$2 for the Q-clearance, *the overall evidence does not support a find that this conduct was the basis for the alleged unlawful discipline.*

Additionally, while Franco and Ortega were involved in discussions with De Los Santos and Walls about the issue of equal pay for equal work, *there is nothing in the record to show that Respondent discouraged the meetings or the attempts to raise such issues.*

Additionally, while SPOs Franco and Ortega were involved in discussions with De Los Santos and Walls about the issue of equal pay for equal work, there is *nothing in the record to show that Respondent discouraged the meetings of the employees attempts to raise such issues.* Additionally, SPO Martinez participated in the September meeting with Franco, De Los Santo and Walls without any apparent adverse consequences. Thus while the record reflects that employees engaged in discussions among themselves and complained to management about the Respondent's failure to pay the \$2 differential for the Q-clearance, the overall evidence does not support a finding that the discipline in issue [that of Franco, Ortega and Jacobs] was motivated by any other than the employee's conduct on February 23 and February 24, 2009.

[ALJ Decision at pp. 11, (emphasis added)] Based on the ALJ's own findings, it is clear that there was absolutely no evidence presented at the Hearing to establish that any Security Walls' employees did – *or would* – reasonably construe the language of any of the allegedly unlawful confidentiality provisions as prohibiting, or in any way restricting, their right to discuss the terms and conditions of their employment with other employees.

The decision in *Aroostook County Regional Ophthalmology Ctr. v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996)² is particularly instructive. In *Aroostook*, the employer filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit concerning a Board order finding the employer violated the NLRA by promulgating and enforcing an

² *Aroostook County Regional Ophthalmology Ctr. v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996).

overly restrictive rule limiting the rights of employees to discuss office business and work grievances. The Court of Appeals granted the employer's petition as it related to the allegedly unlawful policies. In doing so, the Court concluded:

In the absence of any evidence that ACROC is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified. If an occasion arises where ACROC is attempting to use the rule as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, the rule on its face is not unlawful.

Aroostook, 81 F.3d at 213. As in *Aroostook*, the ALJ specifically recognized that there was no evidence in the instant case that Security Walls "is imposing an unreasonably broad interpretation" of any of the allegedly unlawful policies on any of its employees. To the contrary, as explained above, there was substantial evidence introduced at the Hearing that Security Walls' employees did not construe the policies to prohibit discussion of the terms and conditions of their employment. The ALJ's decision concerning these policies simply does not comport with reality.

Moreover, the very definition of the term "construe" requires the Board to consider the factual context in which the confidentiality provisions are being viewed. Specifically, the term "construe" is defined by Black's Law Dictionary as follows:

To put together; to arrange or marshal the words of an instrument. To ascertain the meaning of language by a process of arrangement and inference.

[Black's Law Dictionary 4th Edition, 1951] Moreover, the term "construction" is similarly defined to require consideration of context:

The process of the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, written instrument or oral agreement or the application of such subject to the case in question by reasoning in the light derived from extraneous connected circumstances or laws or writings bearing upon the same of a connected matter, or by seeking and applying the probable aim and purpose of the provision.

[Black's Law Dictionary 4th Edition, 1951] Therefore, both the manner in which a written document is "construed" and the "construction" of its terms turn upon *the light derived from extraneous connected circumstances*. See e.g., *Aroostook*, 81 F.3d at 213 (analyzing the "construction" of the work rule and concluding that based on the "construction" of the rule that it was not intended to prohibit protected activity under Section 7 of the Act.) Here the circumstances or context clearly demonstrate that although the *confidentiality* language *could* have been interpreted as restrictive of Section 7 rights, it clearly was not so interpreted in that way by any of the Respondent's employees.

The question then becomes, which is more important in legal analysis, hypotheses as to what may have occurred or the reality of what actually happened. In the instant case, the reality – based on the evidence presented at the Hearing – demonstrates that the employees clearly did not construe that language as restricting any of their Section 7 rights. The ALJ specifically found that Security Walls' employees openly discussed concerns over wages and other terms and conditions among themselves and also brought those concerns directly to Security Walls' management without any negative consequences. If any misconstruing has taken place regarding this issue, it has been

fostered by ill-conceived Board language which has relied on form over function, or to put it more bluntly, *what might happen over what did happen!*

There was absolutely no evidence presented at the Hearing to establish that any of Respondent's employees actually construed the language in the allegedly unlawful policies to limit their ability to exercise their Section 7 rights. The record in this matter is devoid of any evidence to suggest that a single employee *did or would construe the language in these policies as a prohibition on his or her right to engage in protected activity under the NLRA*. To the contrary, there was significant evidence introduced to demonstrate that Respondent employees *regularly exercised these rights*. The ALJ's conclusion, based solely on the language of the policies, that the Respondent employees "could easily construe the wording of Respondent's" confidentiality provisions as prohibiting discussions protected by Section 7 of the NLRA is not supported by the evidence.

CONCLUSION

Based on the foregoing, the Board should reverse the ALJ's decision to the extent the ALJ found: (1) that language in its Restrictive Covenant Policy violates Section 7 of the NLRA; and (2) that the language in its Employee Handbook relating to harassment and discrimination violates Section 7 of the NLRA.

Dated: January 6, 2010.

Respectfully Submitted,
JACKSON LEWIS, LLP

By s/George Cherpelis
George Cherpelis
Jeffrey W. Toppel
2390 East Camelback Road, Suite 305
Phoenix, Arizona 85016-3466
Counsel for Respondent Security Walls, LLC

This pleading was electronically filed
VIA E-GOV, E-FILING on January 6, 2010 with:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW, Room 11602
Washington, DC 20570-0001

VIA E-MAIL on January 6, 2010 to:

Liza Walker-McBride
Counsel for the General Counsel
National Labor Relations Board, Region 28
Albuquerque Resident Office
421 Gold Avenue SW, Suite 310
P.O. Box 567
Albuquerque, New Mexico 87103-0567
liza.walker-mcbride@NLRB.gov

Mr. Orlando Franco
2106 Iris Street
Carlsbad, New Mexico 88220
Yvette_franco_79@hotmail.com



VIA U.S. MAIL on January 6, 2010 to:

Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28
2600 N. Central Avenue, Suite 1800
Phoenix, AZ 85004

 /s/Suzanne Hickey



11
10