

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

SECURITY WALLS, LLC

and

Case 28-CA-22483

ORLANDO FRANCO, an Individual

**GENERAL COUNSEL'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

On July 10, 2009, the Regional Director for Region 28 issued an Amended Complaint and Notice of Hearing (Complaint), which was further amended at hearing, alleging, inter alia, that Security Walls, LLC (Respondent) violated § 8(a)(1) of the Act by discharging Orlando Franco (Franco), and disciplining Royal Jacobs (Jacobs) and Jeff Ortega (Ortega) because, on February 24, 2009¹, they concertedly decided that, after their shift ended that morning, they would not answer their home or cell phones later that day if Respondent called them to ask if they would work voluntary overtime. These employees made this decision in protest of Respondent's practice of offering part-time employee Julie Ruiz hours of work at straight pay when such hours would otherwise have been overtime hours with overtime pay for full-time employees.

On November 25, Administrative Law Judge Margaret G. Brakebusch (ALJ) issued her decision upholding in part and dismissing in part the Complaint. See *Security Walls, LL.*,

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

JD(ATL)-31-09 (ALJD).² In particular, the ALJ found that Respondent violated § 8(a)(1) of the Act by maintaining overly-broad confidentiality rules in its Restrictive Covenant Policy (ALJD p. 19, lines 40-42) and in its employee handbook. (ALJD, p. 20, lines 31-32) The ALJ, however, dismissed the majority of the Complaint allegations, namely the allegations that on about February 24, Respondent discharged Franco and issued written warnings to Jacobs and Ortega because they engaged in protected concerted activities. In doing so, the ALJ misconstrued the applicable law and failed to find facts established by the record.

II. FACTS

A. Respondent's Business

The U.S. Department of Energy (DOE) operates the Waste Isolation Pilot Plant (WIPP); a facility located outside of Carlsbad, New Mexico, that is responsible for the safe disposal of nuclear waste. (ALJD, p. 2, lines 23-25) The DOE contracts with Washington Tru Solutions LLC (WTS) to manage the WIPP facility, and WTS, in turn, contracts with Respondent to provide contract security at the WIPP facility. (ALJD p. 2, lines 11-14; RX 6, p. 1; GCX 1) Although WTS has had a contract with the DOE to manage the WIPP facility for numerous years, Respondent's contract with WTS commenced on April 1, 2008. (ALJD, p. 2, lines 34-35)

Pursuant to its contract with WTS, Respondent is responsible for the protection of the employees, public and Government property at the WIPP site. (RX 7, p. 7, § 5.1.4) In addition, Respondent "shall provide a minimum of two armed Security Police Officer II's (SPO II) on each crew. No maximum SPO II staff level is stipulated in this scope of work.

² References to the ALJD are designated as "ALJD." References to the transcript of the hearing in this proceeding are designated as "Tr." References to the decision and transcript are followed by the appropriate page number and as applicable, the line number(s). References to General Counsel's and Respondent's exhibits are designated as "GCX" and "RX," respectively.

All certified SPO II's will have limited arrest authority pursuant to the Atomic Energy Act and DOE M 470.4-3." (RX 6, p. 8, § 5.1.4.1) Respondent is also required to maintain Protective Force Officers qualified for situations where they may be required to react to safety emergencies while on duty to assist Emergency Services personnel at the WIPP site, including fire suppression and containment. (RX 6, p. 6, § 5.1.4.2) This provision also requires Respondent to "maintain Protective Force Officers qualified for these activities (including day staff), and will be required to support only those efforts within the fenced Site Area (Shift Captains will be exempted from this requirement)." (RX 6, p. 9, §5.1.4.2)

Under its contract with WTS, Respondent is required to "provide a minimum of three security officers per shift (optimum shift staffing is six officers/shift), on duty 24 hours/day, seven days a week, 365 days/year. Each crew will maintain at least two SPO II's capable of being armed, and carrying out all duties of an SPO II. In addition each crew will maintain at least two officers fully qualified and certified to support fire brigade duties. These tasks apply to all rotating shifts and permanent day staff as well." (RX, pp. 11-12, § 6.1.2)

Respondent employs approximately 20 SPOs at the site, who work on one of five crews consisting of three SPOs. As of February, nearly a year after Respondent assumed the contract with WTS, only 50% of its SPOs were fire-brigade qualified, and, as noted by the ALJ, Captain Robert Ybarra (Ybarra) testified that captains are not qualified for fire brigade and cannot fill in for SPOs if fire brigade coverage is needed. (ALJD, p. 5, lines 45-46)

Though captains are not precluded from obtaining fire-brigade qualifications, they are simply exempted from the requirement set forth in Respondent's contract with WTS. In fact, there is no evidence that captains are not permitted to obtain fire-brigade qualifications and fill in for SPOs if fire-brigade coverage is needed.

B. Respondent's Procedure for Offering Overtime Opportunities

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 had been 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. (ALJD, p. 5, lines 32-43; Tr. 52:13, 281:11-17, 324:20-25, 343:8-25) Consequently, the standard practice of 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 inasmuch as SPOs worked overtime on a purely voluntary basis. (ALJD, p. 5, lines 32-43; Tr. 52:13, 281:11-17, 324:20-25, 343:8-25)

Although Respondent's Project Manager Richard De Los Santos (De Los Santos) testified that if Respondent is unable to provide fire-brigade coverage, Respondent's company and contract are compromised, the record shows that the consequences of such an inability would be that Respondent would not be in strict compliance with its contract with WTS. The record shows that on February 24, when Respondent needed one more SPO with fire-brigade qualifications and the three discriminates jointly exercised their right not to answer Respondent's phone calls regarding overtime work (and two other employees independently exercised the same right), WTS provided the extra coverage. As noted, *infra*, overtime is

voluntary and Respondent's past practice has been not to require employees to return calls from Respondent regarding overtime, regardless of the need for fire-brigade coverage. (Tr. 50:14, 21, 56:8, 309:5)

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

In February, Franco and other employees learned that Respondent was offering part-time SPO Julie Ruiz (Ruiz) 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. (ALJD, pp. 6-7, lines 34-46, 1-31; 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. (ALJD, p. 7, lines 8-12; 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." (ALJD, p. 7, lines 33-39; Tr. 147-148) De Los Santos replied to Ruiz by stating, "Okay, I have had enough with Orlando. I have had enough." (ALJD, p.7, lines 38-39; 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. They learned that Ruiz had initially agreed to work hours but then reneged because she was called into work by her full-time employer, WTS, where she worked as a full-time firefighter and emergency services technician. (ALJD, p. 6, lines 17-18; 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 hours available to 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. (Tr. 324, 332-333, 346-348, 365, 373)

When Respondent called them later that day, neither Franco nor Jacobs returned Respondent's calls on February 24; however, Ortega called Soto -- after Respondent had called several times -- with the intention of telling him to stop calling, 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)

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

1. Franco's Discharge

On the evening of February 24, Captain 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. It was agreed that Franco and Ybarra would go to De Los Santos' Carlsbad residence that evening.

During the meeting with De Los Santos, 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.⁴ (Tr. 212) 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

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) Moreover, the evidence establishes that other concerted activity engaged in by Franco contributed to Respondent's decision to terminate him. Specifically, Franco's termination letter states that Respondent "will not tolerate" Franco's "incessant complaining" and "continuous agitation," which De Los Santos testified referred to Franco's continuous efforts to obtain equal pay for all "Q" qualified SPOs, which is discussed further below. (TR 44-47; GCX 5)

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 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 and Ybarra admitted, as testified to by Franco, Ortega, and Jacobs, 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.⁵ (Tr. 56, 234, 281, 324, 325, 343)

Moreover, De Los Santos admitted 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 also 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)

⁵ 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)



Most significantly, the record shows that what motivated Respondent to discharge Franco and discipline Ortega and Jacobs was not their refusal to take Respondent's calls, but the concerted nature of their refusal to take such calls. Specifically, the record establishes that Respondent would not have objected if Franco, Ortega and Jacobs had independently not returned Respondent's calls. It was because they made the decision as a group not to return calls for overtime that Respondent considered such conduct to be a "conspiracy" and "sabotage." (Tr. 59:1-3) Respondent explicitly admitted as much at hearing. In fact, 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)

In addition, Respondent called Robert Lucas twice to work on February 24; the first time he did not answer or return Respondent's call; the second time, he answered and declined to work the overtime, yet he did not receive any discipline for failing "to take reasonable precautions to protect both Respondent and the WIPP site from "foreseeable imminent danger." (Tr. 64-65; GCX 9, p. 2)

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 Respondent's 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) Notwithstanding De Los Santos' testimony, Respondent offered no other evidence, and indeed there is no other evidence, that Respondent's "mission" was compromised.

III. ARGUMENT

A. The Record Evidence

Although much of the ALJD's recitation of facts comports with the record, significant portions do not, particularly with respect to the testimony of Mark Friend (Friend), WTS' contract administrator. In this connection, the ALJD states, "WTS contract administrator Mark Friend testified without contradiction that if Respondent had been unable to provide fire brigade services for that evening shift, WTS would have had to depend upon back up services from county services that were located 32 to 40 miles away from the facility." (ALJD, p. 15, lines 39-44) Friend did not testify as described in the ALJD. Such a rendition of the facts is not supported by Friend's testimony or the record.

To the contrary, an examination of Friend's testimony shows that the statements attributed to Friend are not reflected by his testimony. Specifically, in his testimony, Friend reiterated that under the contract, Respondent is required to have, *at a minimum*, three SPOs on each crew. (Tr. 394:13-15) Friend also testified that if Respondent were unable to provide two fire brigade-trained SPOs on a particular crew, Respondent would be required to notify WTS, which, in turn, "would do its best to cover that situation. However, if [WTS] could not, then the plant would be shut down from waste handling operations." (Tr. 405:1-4)

Friend also testified that he was aware that on February 24, Respondent was not able to provide two fire brigade-qualified SPOs on a shift but that WTS was able to cover the shift with other emergency service technicians who were also fire-brigade trained security police officers. (Tr. 405-406:24-25, 1-4) Friend further testified in general that if Respondent were not able to meet its contractual requirements with WTS, including providing the requisite number of SPOs who are fire-brigade trained, then WTS would likely issue Respondent a formal, written show cause letter asking Respondent to show cause why WTS should not take further actions towards terminating the contract because of such a breach. (Tr. 406:14-19) As a result, it is respectfully submitted that the ALJ did not accurately summarize Friend's testimony. As a result, to the extent that the ALJ relied upon such a reading in concluding that Respondent did not violate the Act as alleged, the ALJ erred.

Similarly, the following finding in the ALJD is not supported by or reflected in the record: "If Respondent is unable to provide the coverage, WTS must contact the Eddy County Fire Department and the Lee County Fire Department to request assistance in coverage. The Eddy County Fire Department is located 32 miles from the WIPP site and the Lee County Fire Department is located approximately 40 miles from the facility. If WTS cannot arrange for alternate coverage, the facility is closed down for waste handling operations." (ALJD, p 4, lines 3-8)

B. The ALJ Erred in Finding that the Conduct Engaged in by Franco, Ortega and Jacobs Lost the Protections of the Act (Burnup & Sims)

The ALJ correctly concluded that, based on the record as a whole, it is clear that the conduct engaged in by Franco, Jacobs and Ortega with respect to the overtime availability on February 24 was the triggering factor in their discipline. Specifically, the record shows, and

the ALJ found, 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. The ALJ also properly concluded that 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).⁶

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 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 belief, “the General Counsel must affirmatively establish that the employee[s] did not

⁶ 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 confidentiality rules. Although the facts of the instant case show that at *Burnup & 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.

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 engaged in concerted activities by failing and refusing to return Respondent’s telephone calls regarding overtime availability. Although counsel for Respondent cited a number of cases in his post-hearing brief in which the various courts have found partial strikes and intermittent work stoppages to be unprotected, the ALJ rejected the application of those cases, noting that the circumstances in the instant case are not analogous to a partial strike or intermittent work stoppage. (ALJD, p. 15, lines 2-6) In support of her rejection of Respondent’s argument, the ALJ noted that Respondent does not allege that these three employees failed to report for scheduled work or allege that these employees left work during a scheduled shift. (ALJD, p. 5-6) However, relying on the Board’s decisions in *International Protective Services, Inc.*, 339 NLRB 701, 702 (2003) and *AKAL Security, Inc.*, 354 NLRB No. 11, slip op. at 1 (April 30, 2009), the ALJ embraced Respondent’s argument that the discriminatees’ conduct is not protected under the Act because they “decided to engage in a concerted refusal to work knowing that their conduct would compromise the ability of Respondent to provide the required security services to the WIPP site and, in doing so, the discriminatees failed to take reasonable precautions to protect both Respondent and the WIPP site from “foreseeable imminent danger.”” (ALJD, pp. 15-16, lines 47, 1-4) However, both *International Protective Services, Inc.* and *AKAL Security, Inc.* are inapposite to the facts in this case.

In *International Protective Services, Inc.*, the Board, quoting *Bethany Medical Center*, 328 NLRB 1094, at 1094 (1999), stated that,

the right to strike is not absolute, and Section 7 [of the NLRA] has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). The Board has held concerted activity indefensible where employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work. *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953), enf. denied 218 F.2d 409 (5th Cir. 1955).

The Board further stated that, under such well-established principles, the test of whether the strike engaged in by the security officers (in *International Protective Services, Inc.*), lost the protection of the Act is not whether the union gave the respondent adequate notice of its strike⁷ or whether the strike resulted in actual injury. Rather, the test of whether the strike by the security guards in that case lost the protection of the Act is whether they failed to take reasonable precautions to protect the employer's operations from such imminent danger as would foreseeably result from their sudden cessation of work. Citing *Bethany Medical Center*, supra; *Vencare Ancillary Services*, 334 NLRB 965, 971 (2001). The Board reaffirmed that this is the correct standard under Board precedent for determining whether concerted activity is indefensible. Id; *Vencare Ancillary Services*, supra, 334 NLRB at 971.

Under the particular facts of *International Protective Services, Inc.*, the Board found that the security guards' strike lost its protection under the Act, in particular because the timing of the strike was scheduled to coincide with the anniversary of the Oklahoma City Federal Building bombing; the union, as found by the administrative law judge, "was not the

⁷ As discussed below, however, Franco, Jacobs and Ortega did in fact inform Respondent of the reasons for their concerted action, namely 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) The record shows that once Respondent was aware of their intention to concertedly not return phone calls, Respondent did not advise these employees that their failure to return the phone calls would put Respondent in any sort of "imminent danger."

least concerned about the Federal buildings or their occupants;” and the union had originally calculated to commence a strike to coincide with a conference of some 50 law enforcement and military officials. Thus, the Board concluded that the record supported the administrative law judge’s finding that the union was willing to compromise the security of the Federal buildings and their occupants by post abandonment. The Board further agreed with the administrative law judge that the union failed to take reasonable precautions, when exercising its right to strike, to protect the Federal buildings and their occupants from “such imminent danger as foreseeably would result from their sudden cessation of work.” *International Protective Services, Inc.*, supra, citing *Bethany Medical*, supra at 1094.

In *AKAL Security, Inc.*, supra, the Board reversed the ALJ who found that the respondent violated Section 8(a)(1) of the Act by discharging two employees, Lee Ryan and Stephen Winther, for engaging in protected concerted activity by holding a meeting while on duty to discuss their concerns about the performance of another employee, Bill Lopez.

Applying *Burnup & Sims*, supra, the judge found that the respondent had a good faith belief that Ryan and Winther engaged in misconduct by harassing and intimidating Lopez during the meeting, but that the General Counsel proved that the misconduct did not occur. In reversing the judge, the Board held that, even assuming the judge is correct as to the alleged harassment and intimidation, the respondent had a good-faith belief that Ryan and Winther engaged in other misconduct by neglecting their duties and the respondent’s security procedures during the meeting, and the General Counsel failed to prove that this alleged misconduct did not occur. *Id.* at 1.

The facts of the instant case are clearly distinguishable from the facts in both *International Protective Services*, supra, and *AKAL Security, Inc.*, supra. Here, Franco,

Jacobs and Ortega were upset that Respondent had first offered the hours, which would otherwise have been overtime hours for full-time SPOs, to Ruiz, who had then been allowed to renege on her commitment. (Tr. 324, 345-346) The employees openly informed other employees and Captain 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) Moreover, at no time did Respondent advise these employees that their action would put Respondent in imminent danger, and such danger, if any, was not shown to be foreseeable.

1. The Employees' Did Not Lose the Protection of the Act

Contrary to the ALJ's conclusion, the employees' conduct in failing and refusing to respond to overtime calls is presumptively protected. *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962) (the Court held that when unrepresented employees concertedly cease work to protest unsatisfactory working conditions, their actions are protected by the Act.) That protection is not lost because the work stoppage is limited to overtime hours or unaccompanied by indications of what the employees intend to do in the future should the employer not yield to their demands. *First National Bank of Omaha*, 171 NLRB 1145 (1968), *enfd.*, 413 F.2d 921 (8th Cir. 1969). A single concerted refusal to work overtime is presumptively protected strike activity and that presumption is deemed rebutted "when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action." *Polytech, Incorporated*, 195 NLRB 695, 696 (1972).



In *Polytech*, the Board reconciled the presumption fashioned in *First National Bank of Omaha*, supra, with the holding in an earlier case, *John S. Swift Company, Inc.*, 124 NLRB 394 (1959), enfd. 277 F.2d 641 (5th Cir. 1960), and concluded that an intermittent or recurring refusal to work overtime is inconsistent with genuine strike activity which contemplates that the striker put himself in the position to be replaced. However, in *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990), a case involving unorganized employees who engaged in two work stoppages, the Board agreed with the administrative law judge that “two work stoppages, even of like nature, are insufficient to constitute evidence of a pattern of recurring, and therefore unprotected, stoppages.” Similarly, in *Robertson Industries*, 216 NLRB 361, 362 (1975), another case involving unorganized employees who also engaged in two work stoppages, the Board states:

While there is no magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature, certainly the two work stoppages in the case at bar, which involved a total of 2 day’s absence from work, do not, in our opinion, evidence the type of pattern of recurring stoppages which would deprive the employees of their Section 7 rights. [Footnote citation omitted.]

In the instant case, the record shows that Orlando, Jacobs and Ortega engaged in a one-time concerted complaint about Respondent’s overtime distribution and that their actions were not “intermittent or recurring.” Based on the facts presented in this case, Respondent’s adverse actions against them, which Respondent admits was based on their respective degree of concerted involvement in the group protest, violate Section 8(a)(1) of the Act.

Moreover, Respondent presented no evidence supporting even an inference that intermittent or recurring activity was contemplated by Orlando, Jacobs and/or Ortega, and the record affirmatively reveals that Respondent discharged Orlando, and disciplined Jacobs and Ortega, without inquiring into their intentions concerning future refusals to work overtime.

J.P. Hamer Lumber Company, Division of Gamble Brothers, Inc., 241 NLRB 613 (1979) (Board found a Section 8(a)(1) violation for an employer's discharge of employees who concertedly refused to work overtime in order to bring their overtime grievance to the attention of management.)

Similarly unfounded is the ALJ's adoption of Respondent's argument, set forth in its post-hearing brief, that because the employees knew that Respondent needed fire-brigade trained SPOs on February 24, their concerted refusal to answer or return calls from Respondent that day constitutes a failure on their part "to take reasonable precautions to protect both Respondent and the WIPP site from 'foreseeable imminent danger.'" (ALJD, p. 16, lines 3-4) As discussed above, Respondent's assertion is just that -- there is no record evidence upon which to conclude that the employees' concerted action caused imminent danger or that possible imminent danger was foreseeable. To the contrary, the employees were exercising their options permitted by Respondent's overtime policies as the time. If anything, it was Respondent's policies that would cause whatever "imminent danger" Respondent feared, not its employees' conduct within the bounds of such policies.

In addition, Respondent's assertion that the employees' actions amounted to misconduct under Respondent's rules is contrary to the record evidence. As Respondent admits, the act of failing and refusing to take or return overtime calls is not a violation of Respondent's rules. Although De Los Santos testified that Franco was fired because he "sabotaged [Respondent's mission] because he got other employees to decline the opportunity to work overtime," and "[f]or compromising our mission and for sabotaging our ability to meet the contract" (Tr. 56, 426), De Los Santos, Ybarra, Franco, Ortega, and Jacobs all testified that SPOs are not required to return Respondent's calls for overtime, 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)

The specious nature of Respondent's assertions is further illuminated by its treatment of other employees who failed to accept offers of overtime, though in a non-concerted fashion. In this connection, the record establishes that on February 24, Robert Lucas was called twice; the first time he did not answer or return Respondent's call; the second time, he answered and declined to work the overtime, yet he did not receive any discipline for failing "to take reasonable precautions to protect both Respondent and the WIPP site from "foreseeable imminent danger.'" (Tr. 64-65; GCX 9, p. 2) Similarly, Respondent called SPO Luis Ramirez, who was not a part of the "conspiracy," on February 24 to work overtime but he did not answer his phone so Respondent left a message. Although Ramirez did not return the call, he was not disciplined like Franco, Jacobs and Ortega. (Tr. 65:8-25; GCX 9, p. 3) CGC respectfully submits that if, in fact, Respondent or the WIPP facility were in foreseeable imminent danger, Respondent would have called Lucas again and insist he come in, yet Respondent did not. Similarly, Respondent called Robert Valenzuela on February 24, and he answered the first call but declined to work the overtime hours; Respondent called him a second time, left a message but Valenzuela did not return the call, yet he did not receive any discipline. (Tr. 66-68; GCX 9, p. 3)

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. This is, by its essence, an admission conduct violative of Section 8(a)(1) of the Act.

In this connection, 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) Respondent’s belief that Franco influenced Ortega and Jacobs to “conspire” against it – where such conduct is protected -- 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 and 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 disciplining Jacobs and Ortega.⁸

⁸ 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.

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 was appropriately treated under a *Burnup & Sims* analysis by the ALJ, in the event that the Board 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.⁹

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 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

⁹ 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).

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.¹⁰ 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.

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.”¹¹ 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

¹⁰ Ruiz testified that she did not feel threatened; rather, she felt angry that Franco appeared to be assuming a role in which he could question 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.

¹¹ As Ruiz testified, De Los Santos told her, “Okay, I have had enough with Orlando. I have had enough” (Tr. 149:4-5).

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.

IV. CONCLUSION

Based upon the above facts and legal analysis, the General Counsel submits that the ALJ erred by failing to find that Respondent violated Section 8(a)(1) of the Act when it discharged Franco and disciplined Jacobs and Ortega. CGC respectfully asks that the Board reverse those ALJ's findings and conclusions that are the subject of these exceptions and issue an order finding that Respondent violated Section 8(a)(1) as alleged and adopting the ALJD in other respects, and directing Respondent to reinstate Franco, to remove references of the unlawful adverse actions against the discriminatees from Respondent's records, to make whole Franco by payment to him of full backpay with interest compounded on a quarterly



basis, to post a full Notice to Employees which addresses and remedies the violations found, and ordering other relief deemed appropriate by the Board.

Dated at Albuquerque, New Mexico, this 23rd day of December 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in **SECURITY WALLS, LLC**, Case 28-CA-22483, was served via E-Gov, E-Filing, e-mail, and overnight delivery via Federal Express, on this 23rd day of December 2009, on the following parties:

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Respectfully submitted,

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