

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

STRONGSTEEL OF ALABAMA, LLC

and

TONY MCGINTY, an Individual

and

ERIC BRACEWELL, an Individual

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**Cases 15-CA-189655
15-CA-194178**

15-CA-191573

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

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COMES NOW the Counsel for the General Counsel, in the above captioned case, and files this Brief in Support of Exceptions to the Administrative Law Judge’s (ALJ) Decision and Order (ALJD) in the above-captioned cases.¹

I. FACTS

The facts of these cases are as outlined in Sections I and II of the ALJD. (ALJD, pp. 1-4).

II. LEGAL ANALYSIS

A. Exception 1

¹ References to the Exhibits of the General Counsel and Respondent will be designated as “GC- #” and “R- #,” respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as “Tr. at.” An Arabic numeral(s) after “Tr. at” is a reference to a specific page of the transcript, and Arabic numerals following page citations reference specific lines of the page cited.

The ALJ erroneously failed to find the Respondent's Employee Conduct Rule was applied in an unlawful manner.

In this case, the ALJ correctly Respondent terminated discriminatees Bracewell and McGinty for discussing their wages with coworkers. (ALJD p. 4). Moreover, the ALJ found Respondent's proffered reasons for firing the discriminatees were pretextual. (ALJD p. 8). The undisputed evidence is that Respondent repeatedly threatened employees not to talk about their wages in violation of Section 8(a)(1) of the Act. After Respondent discovered that discriminatees Bracewell and McGinty had discussed their wages at work, Supervisor Hall told them that owner Attalla would later make a decision about whether or not to terminate them for discussing their pay. Tr. at 81: 11-22. Thereafter, they were discharged and verbally informed by Supervisors Brooks and Hall that they violated Respondent's Employee Conduct policy by talking about their wages. Tr. at 83:24-25; 84: 1-2; 85: 13-16; 103: 13-16; 106: 4-7; GC-3; GC-4. In addition, their discharge letters stated they were terminated for violating the Employee Conduct Policy. GC-3; GC-4.

The same day discriminatees Bracewell and McGinty were terminated, employees Ellison, Moody, and two other employees had a meeting with owner Attalla and Supervisors Brooks and Hall to discuss the pay discrepancy among employees. Tr. at 53: 11-25; 54: 11-25. Ellison testified that during this meeting, Attalla told the employees that "we've gotten rid of all the troublemakers, which kind of worried everybody, because there were no troublemakers." Tr. at 53: 19-25; 56: 3-5. Upon returning to the work floor after the meeting, Ellison learned that discriminatees Bracewell and McGinty had been discharged. That same day, Moody had an additional discussion with Attalla. During that discussion, Attalla told Moody that employees should not discuss their salaries. Tr. at 38: 22-25.

Under *Boeing Co.*, 365 NLRB No. 154 (2017), the Board will find a rule unlawful if it explicitly restricts the NLRA-protected activity of employees. If the rule is facially neutral but has the potential to interfere with NLRA rights, “the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.* at 4. If the employer’s justifications for the rule outweigh the possible interference with employee rights, the Board will consider the rule to be lawful, but if the potential interference with employees’ rights outweighs the employer’s justifications for the rule, the Board will deem the rule unlawful. *Id.* However, even if the rule is deemed lawful, “the Board will examine circumstances where the rule is applied to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.” *Boeing* at 5.

Here, the ALJ found the Employee Conduct Rule to be lawful. However, he failed to discuss whether the rule was applied the rule in an unlawful manner in violation of *Boeing*.

In this case, the only protected concerted activity discriminatees Bracewell and McGinty engaged in was discussing their wages. Their discharge letters stated they were terminated for violating the Employee Conduct Policy, and they were verbally informed that they violated the Employee Conduct Policy by discussing their wages and, as a result of that violation, were discharged. Therefore, the Employee Conduct Policy was unlawfully applied to discharge the discriminatees.

Respondent applied its Employee Conduct Rule to terminate discriminatees Bracewell and McGinty for engaging in the protected concerted activity of discussing their wage rates. Because the Board in *Boeing* determined that the application of an otherwise lawful rule to discipline employees for protected activities violates the Act, ALJ Ringler erred in failing to

conclude Respondent violated the Act by applying the Employee Conduct Policy in an unlawful manner.

B. Exception 2

As noted in Exception 2, the ALJ failed to state a proper remedy in the notice by not including language positively affirming the right of employees to discuss wages, hours and working conditions with other employees.

Here, the undisputed evidence is that Respondent repeatedly warned employees not to talk about their wages and then terminated two employees because they talked about their wages. ALJ Ringler correctly ruled that Respondent violated 8(a)(1) via this conduct, but he failed to include language in his notice to inform employees of their right to discuss wages.

Although the ALJ's notice includes language that Respondent will not ask about wage discussion, will not threaten employees for wage discussions, and will not fire or otherwise discriminate against employees for wage discussion, there is no language stating the right of employees to discuss wages. A more appropriate way to inform employees of their rights under the Act, in particular with regard to the discussion of pay, would be the following notice language:

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

Because this language is necessary to inform employees of their rights, ALJ Ringler erred in failing to include it in his notice.

III. CONCLUSION

The Counsel for the General Counsel submits that Respondent violated Section 8(a)(1) of the Act when it unlawfully applied its Employee Conduct Rule to terminate discriminatees

Bracewell and McGinty, and that in order to remedy Respondent's violations of the Act, it is necessary to include notice language affirming the right of employees to discuss wages, hours and working conditions with other employees.

Therefore, the ALJ erred in (1) failing to definitely find that the Employee Conduct Rule was applied in an unlawful manner; and (2) failing to include notice language affirming the right of employees to discuss wages, hours and working conditions with other employees.

Dated at New Orleans, Louisiana this 29th day of June 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed a copy of the foregoing Counsel for the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order with the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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