

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SECURITAS SECURITY SERVICES USA)	
)	
and)	Case No. 16-CA-176006
)	16-CA-183494
RYAN PATRICK MURPHY,)	
an Individual)	

**RESPONDENT’S EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respondent Securitas Security Services (USA) (“Securitas” or the “Company”), hereby files exceptions and a supporting brief to the August 30, 2019 supplemental decision of Administrative Law Judge Donna N. Dawson (“ALJSD”) in the above-captioned matter, pursuant to National Labor Relations Board (“NLRB” or the “Board”) Rule 102.46, as follows¹:

1. The ALJ erred in finding that the balancing test formulation set forth in the *Boeing* decision “does not appear to have meaningfully altered the balancing test that I have previously applied to Respondent’s confidentiality in investigation restrictions.” [ALJSD 5:42-45].

2. The ALJ erred in finding the Board’s decision in *Boeing* “did not alter” the Judge’s prior conclusion that Respondent’s confidentiality instruction to the Charging Party unlawfully interfered with his rights under the Act. [ALJSD 6:1].

3. The ALJ erred in relying on the Board’s holdings in *Banner Estrella*, 362 NLRB 1108, *Hyundai America Shipping Agency*, 357 NLRB at 874, enf. den., 805 F.3d 309 (D.C. Cir. 2015); *Caesar’s Palace*, 336 NLRB 271, 272, n. 6 (2001), or *SNE Enterprises*, 347 NLRB 472, n.

¹ The ALJ’s Supplemental Decision appears to supercede and replace the Judge’s prior decision of September 28, 2017, as to which Securitas previously filed exceptions with the Board. *See also* the Board’s remand order dated November 21, 2018. It should therefore be unnecessary to repeat Respondent’s previous exceptions to the ALJ’s 2017 decision. Securitas nevertheless incorporates by reference its previously filed exceptions and brief opposing the earlier decision, which are part of the record before the Board.

4 (2006), *enfd.* 257 Fed. Appx. 642 (4th Cir. 2007), to the extent those cases support finding Respondent’s instruction to the Charging Party violated the Act, which they do not. [ALJSD 6:5-45]. The Board should in any event overrule the overbroad holdings of the foregoing cases, which conflict with *Boeing*, as the General Counsel has argued in this case and others.

4. The ALJ erred in finding that Respondent maintained a “rule” or “blanket prohibition” which required special justification, as opposed to merely issuing an instruction to an individual employee who was not himself engaged in any protected activity. From this faulty premise, the Judge further erred in finding “Respondent failed to prove that its justification for its confidentiality rule banning employees from discussing investigations outweighs the interests of employees in their rights under the Act. [ALJSD 7:5-10]

5. The ALJ erred in finding “there was no evidence here that Respondent had experienced actual or potential problems with witnesses being harassed or intimidated...” and in her dismissal of the undisputed testimony of Respondent’s witness Mr. Pope. [ALJSD 7:16-30]. To the contrary, Securitas’s witness affirmatively testified without contradiction that (1) David Brown’s complaint related to discrimination; and (2) Brown complained that co-workers were gossiping about him. [Tr. 115-16 (Q: In fact, did Mr. Brown make a complaint about people gossiping about his complaint? A. Absolutely); *see also* Tr. 135-36]. This testimony was corroborated by Charging Party Murphy. [Tr. 43]. The Judge’s attempt to recast her prior improper rejection of evidence as hearsay and to now claim there was “no evidence” the confidentiality instruction at issue here was issued after Mr. Brown complained about worker gossip is belied by both the documentary and testimonial evidence. [ALJSD 7:21-30].

6. The ALJ erred in failing to find that the confidentiality instruction at issue was made solely in response to the circumstances of this case, in which a discrimination complainant

further complained he was being gossiped about, as to which a failure by the Company to take steps to restrict such conduct would have violated EEOC guidelines. Despite acknowledging “on its face, one might interpret that [HR] only referred to the investigation at hand” in telling the Charging Party not to discuss the investigation “in any circumstances,” the Judge erred in finding employees “might also reasonably interpret it to preclude such discussions in future investigations.” [ALJSD 8:1-15].

7. The ALJ erred in finding Mr. Pope’s testimony about the reason for the Company’s policy somehow “belied” his testimony that the instruction to Murphy was limited to the incident at hand. [ALJSD 8:17-29]. The ALJ conflated testimony addressed to different points of argument to create a false inconsistency.

8. The ALJ erred in finding that Securitas’s request for confidentiality concerning the investigation into Brown’s discrimination complaint, in order to comply with EEOC guidelines in harassment cases, did not satisfy the requirements of *Banner Health* and/or *Hyundai*. [ALJSD 8:31-45].

9. The ALJ erred in failing to agree with the General Counsel’s stated position in this case that the *Banner Health* standard on which the ALJ purports to rely is “unworkable” and fails to accommodate the requirements of anti-discrimination laws of equal importance to the NLRA. [ALJSD 9:15-28]. Contrary to the ALJ’s Supplemental Decision, *Banner Health* and its progeny should be overruled.

10. The ALJ erred in ordering Securitas to “rescind, in writing, the overbroad, unlawful prohibition on employees discussing internal investigations, and advise all current employees working in Austin, Texas facilities in writing (1) that the unlawful prohibition has been rescinded, or (2) provide lawfully worded rules.” [ALJSD 9:39-44; *See also* the proposed Order]. Aside

from being unsupported by the evidence in the record, the ALJ's order fails to give Securitas sufficient guidance as to what a "lawfully worded rule" would be,

Conclusion

For the foregoing reasons, and the reasons set forth in Securitas's Brief in Support of Exceptions, the Company's Exceptions should be granted and the ALJ's opinion reversed.

Respectfully submitted,

/s/Maurice Baskin _____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Exceptions have been served on the following this 27th day of September 2019:

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