

TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. QUESTIONS PRESENTED2

III. STATEMENT OF FACTS.....2

 A. About Securitas2

 B. Securitas’s Instruction to Murphy to Keep the Substance of the
 Company’s Investigation into a Co-Worker’s Complaint of Harassment
 Confidential.....3

IV. ARGUMENT4

 A. The ALJ Erred in Finding Securitas’s Confidentiality Instruction to
 Murphy Unlawful, Because the Request was Objectively Reasonable in
 Light of Another Employee’s Complaints4

 B. The Remedies Ordered By The ALJ Fail To Give Adequate Guidance.....8

V. CONCLUSION.....8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Apogee Retail, Inc.</i> , Case No. 27-CA-191574 (NLRB pending).....	2, 7
<i>Banner Health Sys. D/B/A Banner Estrella Med. Ctr.</i> , 362 NLRB No. 137 (June 26, 2015), <i>enfd in part</i> , <i>Banner Health Sys. v. NLRB</i> , 851 F.3d 35 (D.C. Cir. 2017)	2, 4, 7
<i>Bergbauer v. Mabus</i> , 934 F.Supp.2d 55 (D. D.C. 2013).....	5
<i>Boeing Co.</i> , 365 NLRB No. 154 (2017).....	1
<i>Boys Markets, Inc. v. Retail Clerks Union, Local 770</i> , 398 U.S. 235 (1970).....	7
<i>Five Bros., Inc.</i> , 344 NLRB 910 (2005)	7
<i>Hacienda de Salud-Espanola</i> , 317 NLRB No. 135 (June 26, 1995).....	8
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	7
<i>Hyundai America Shipping Agency</i> , 357 NLRB 860 (2011), <i>reversed in part</i> <i>Hyundai Am. Shipping Agency, Inc. v. NLRB</i> , 805 F.3d 309 (D.C. Cir. 2015)	5, 7
<i>Martin Luther Mem’l Home, Inc. d/b/a Lutheran Heritage Vill.- Livonia</i> , 343 NLRB 646 (2004)	1
<i>Meyers Industries, Inc. (Meyers II)</i> , 281 NLRB 882 (1986)	5
<i>RC Aluminum Indus.</i> , 343 NLRB 939 (2004)	7
<i>Southern S.S. Co. v. N.L.R.B.</i> , 316 U.S. 31 (1942).....	7
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	8

Other

National Labor Relations Act *passim*

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, § V(C)(1) (915.002, June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.....5

I. STATEMENT OF THE CASE

This case arises out of charges filed by Ryan Murphy (“Murphy”) [GX 1], a security guard employed by Securitas Security Services (USA) (“Securitas” or the “Company”) who performed services at the Samsung Austin Research Center, Securitas’s client. [GC Ex. 1; Tr. 26]. All allegations of the original Complaint against Securitas have been settled or dismissed, except for one: The allegation that Respondent violated the Act by instructing the Charging Party to keep confidential the substance of the Company’s investigation into claims of discrimination made by employee David Brown confidential. [Complaint, Par. 9].

On September 28, 2017, Administrative Law Judge Donna N. Dawson (“ALJ”) issued an opinion finding that Securitas violated the Act by “maintaining unlawful handbook rules, prohibiting employees from discussing an internal investigation and promulgating and maintaining a rule prohibiting gossip and excessive nonwork related idle talk and rumor spreading.” [2017 ALJD 15:41-43]. Securitas excepted to the 2017 ALJ decision, but while those exceptions were pending, the Board issued its decision in *Boeing Co.*, 365 NLRB No. 154 (2017), overruling the *Lutheran Heritage Village* decision on which the ALJ primarily relied in her 2017 decision. Subsequently, on November 16 and 21, 2018, the Board issued an Order (and a Corrected Order) remanding the case to the ALJ for a supplemental decision addressing the complaint allegation.

On remand, the General Counsel moved to sever and dismiss two of the three remaining allegations in the Complaint, *i.e.*, those relating to the Respondent’s “no cameras/recording” policy and its “no gossip” rule. The ALJ granted that motion, leaving for supplemental decision only the Complaint’s allegation against Respondent’s confidentiality instruction. See ALJ’s Supp. Dec. “Statement of the Case,” [ALJSD pp. 1-2]. After soliciting the positions of the

parties,¹ the Judge issued her Supplemental Decision regarding the remaining issue on August 30, 2019.

The ALJ found, notwithstanding the Board’s decision in *Boeing*, that Securitas violated the Act by establishing a “rule” prohibiting employees from discussing a workplace investigation. Securitas has timely excepted to the ALJ’s Supplemental Decision and submits this brief in support of its exceptions. As further explained below, the Supplemental Decision should be reversed in its entirety because it fails to properly apply existing Board decisions to the facts presented at the hearing and improperly analyzes the facts presented at the hearing. To the extent the opinion complies with existing Board decisions, such decisions should be overturned, for the reasons presented by the General Counsel here and in *Apogee Retail*.

II. QUESTIONS PRESENTED

Securitas presents the following questions for the Board’s analysis:

- 1) Did the ALJ err in finding unlawful Securitas’s request to Murphy to keep the substance of an investigatory interview confidential under the Act? [Exceptions Nos. 1-9].
- 2) Did the ALJ err in her remedial order? [Exception No. 10].

III. STATEMENT OF FACTS

A. About Securitas.

Securitas is the second largest security services provider in America. [Tr. 55]. The company employs approximately 90,000 security guards and provides a full range of security services to approximately 14,000 clients nationwide. [Tr. 57]. The Charging Party, Ryan

¹ Neither party asked to reopen the record. The General Counsel advised the ALJ that the General Counsel had asked the Board to overrule the “unworkable” standard of *Banner Health Sys. D/B/A Banner Estrella Med. Ctr.*, 362 NLRB No. 137 (June 26, 2015), *enf’d in part, Banner Health Sys. v. NLRB*, 851 F.3d 35 (D.C. Cir. 2017), the case on which the ALJ principally relied in her 2017 decision finding Respondent’s confidentiality policy to be unlawful. *See* ALJSD at 9. The case in which the General Counsel asked the Board to overrule *Banner Health* remains pending. *See Apogee Retail, Inc.*, Case No. 27-CA-191574, General Counsel’s Brief to the Board, at 1.

Murphy, worked as a security officer for Securitas at a client's facility known as the Samsung Austin Research Center (SARC), from August 2015 until he resigned in August 2016. [ALJSD 2-3]. The branch manager for Securitas was Joe Shuler, and the Human Resource manager for that branch was Tennille Gray. [ALJSD 3].

B. Securitas's Instruction to Murphy to Keep the Substance of the Company's Investigation into a Co-Worker's Complaint of Harassment Confidential.

On or about May 5, 2016, local management at Securitas's Austin, Texas, branch office interviewed Murphy in connection with their investigation of a discrimination complaint made by a co-worker, David Brown, in relation to his supervisor, Amanda Marino. [ALJSD 3; Tr. 29]. According to Murphy, Securitas's personnel instructed him not to discuss the investigation with other employees.² [Tr. 30]. It is undisputed that the instruction was given to Murphy in the context of the discrimination investigation. [Tr. 11-12]. Shortly after Brown submitted his original complaint of discrimination, he again complained to Securitas's management that other employees were "gossiping" about him and his complaint. [Tr. 43, 135-36]. There was no confidentiality policy published by the Respondent regarding workplace investigations generally. [Tr. 42].

Murphy emailed HR manager Gray a request for clarification of her oral instruction to him regarding confidentiality. Murphy's questions asked how broadly the confidentiality instruction should be interpreted, suggesting various hypotheticals, though Gray's oral instruction was made only to him and was specific to the investigation. In response, on May 9, Gray answered "in regards to your questions, all are barred from talking during the time of the investigation in any circumstance." [GC Ex. 2] There is no evidence of any other employee

² Subsequently, the request was confirmed by email on May 6, 2017. [GC Ex. 2].

being interviewed in connection with the investigation or that Murphy talked about the investigation with any other employee, or that any other employee received Gray's email, or that Murphy was engaged in any protected, concerted activity.³

IV. ARGUMENT

A. **The ALJ Erred in Finding Securitas's Confidentiality Instruction to Murphy Unlawful, Because the Request was Objectively Reasonable in Light of Another Employee's Complaints.**

Contrary to the ALJ's finding, her application of the Board's decision in *Banner Estrella* to the facts of this case does not withstand scrutiny under *Boeing* and must be reversed. The ALJ here also erred in claiming that her analysis of Respondent's confidentiality instruction in the is consistent with the Board's new standard pronounced in *Boeing*. *Boeing* requires the Board to balance the nature and extent of the potential impact on NLRA rights and legitimate justifications associated with the challenged rule. Here, the ALJ failed to properly establish any significant impact on NLRA rights and ignored or discounted record evidence of the employer's legitimate justification for the challenged confidentiality instruction, in the context of a sensitive workplace investigation having nothing to do with wages, hours, or working conditions.

In *Banner Health*, in the context of a broad policy imposing confidentiality requirements in all workplace investigations, the Board required employers to demonstrate that their legitimate business justifications outweigh employees' Section 7 rights. Because the policy at issue was a broad one, the Board assumed under *Lutheran Heritage Village* that some employees might reasonably construe the policy as limiting their protected rights to discuss wages, hours and

³ All the employees at the facility did receive from Securitas management a memo entitled "Excessive none [sic] related idle talk/rumor/gossip in the work place." [JX 2; Tr. 135-36]. There is no longer any allegation in this case that the "no gossip" memo interfered with any employee's Section 7 rights. That allegation was severed from the Complaint and dismissed. [ALJSD 1-2]

working conditions. Based upon that unproven premise, the Board created an unworkable requirement that employers “must proceed on a case-by-case basis” and make a “determination that confidentiality is necessary in a particular case.” *Id.*⁴

At the outset, The facts of the present case are distinguishable from *Banner Estrella*, where the employer’s human resources consultant requested confidentiality in every employee interview, provided employee-interviewees a standard form document which instructed them to “not discuss this with your coworkers,” and did not make “any individualized determinations that confidentiality was necessary.” *Banner Estrella*, Slip op. at *2. In reaching its decision, the Board there relied heavily on the employer’s lack of a “case-by-case” analysis concerning the employer’s request for confidentiality. *Id.* at *5. Contrary to the ALJ’s Supplemental Decision here, Securitas satisfied *Banner Estrella*’s requirement by making an individualized analysis concerning confidentiality in regard to the Brown investigation because: (1) the underlying complaint was based on claims of discrimination; and (2) Brown informed the Company that employees were gossiping about him. [Tr. 43, 114-16]; *see Banner Estrella*, slip op. at *6 (noting that confidentiality may be appropriate to protect witnesses or the complaining party).

Also contrary to the ALJ’s Supplemental Decision, Securitas’s decision to request confidentiality was objectively reasonable because it was supported by “legitimate and substantial business justification[s],” *i.e.*, compliance with Equal Opportunity Commission (“EEOC”) guidelines in response to claims of discrimination and harassment. *See Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) (“the obligation to comply with such guidelines may often constitute a legitimate business justification for requiring

⁴ As applied by the ALJ here, *Banner Health* is also inconsistent with *Meyers Industries*, 281 NLRB 882 (1986), in that it imposes a violation on employers in the absence of proof that the Charging Party took or planned to take any group action in connection with the pending discrimination investigation, or otherwise engaged in protected concerted activity under Section 7.

confidentiality in the context of a particular investigation or particular types of investigations”); *Banner Estrella*, slip op. *6 n.12 (noting that confidentiality may be necessary to “satisfy another statutory mandate”). Indeed, because Securitas’s investigation concerned allegations of discrimination, the Company was compelled to request confidentiality and keep all records of its investigation confidential.⁵ See *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, § V(C)(1) (915.002, June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (information regarding sexual harassment allegations and records concerning the investigations should be kept confidential).

Further, the co-worker who complained about discrimination, Mr. Brown, notified Securitas that co-workers were gossiping about him, which could create a hostile work environment if the Company failed to remedy the problem. See *Bergbauer v. Mabus*, 934 F.Supp.2d 55, 72 (D. D.C. 2013) (noting that an employer may be found liable for a hostile work environment claim if they “failed to take appropriate remedial action” after being informed of harassment in the workplace). As such, Securitas’s decision to request confidentiality was objectively reasonable.

The ALJ based her Supplemental Decision on the mistaken logic that Securitas presented “no evidence” in support of the individualized analysis it engaged in when requesting confidentiality.⁶ To the contrary, Securitas’s witness Mr. Pope affirmatively testified that (1)

⁵ In addition to the legal requirements placed on Securitas by the EEOC, the Company is also subject to the International Code of Conduct Private Security Service Providers, “a multi-stakeholder initiative” which requires signatories to “investigate allegations promptly, impartially and with due consideration to confidentiality.” INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, <https://icoca.ch/en/icoc-association> (last visited Oct. 15, 2017).

⁶ The original ALJ Decision rejected Respondent’s evidence as “hearsay.” [ALJ 13:27-38]. This was clear error, as the Board permits hearsay evidence, where the evidence is corroborated. See *Five Bros., Inc.*, 344 NLRB 910, 913 (2005) (admitting corroborated hearsay evidence); *RC Aluminum Indus.*, 343 NLRB 939 (2004) (same). The Supplemental Decision now asserts that the Judge did not rely on the

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); 135-36]. This testimony was corroborated by Charging Party Murphy. [Tr. 43]. Mr. Pope also testified that Securitas sought to comply with the EEOC's guidance on workplace investigations, to ensure that the "Mr. Browns of the world" would not be discouraged from coming forward to make a comment if they know that everybody is talking behind their back." [Tr. 122-24]. As such, Securitas's evidence was more than sufficient and the ALJ erred in failing to acknowledge as much in the Supplemental Decision.

In reaching her decision, the ALJ also explicitly failed to consider the EEOC's requirement that employers keep investigations concerning allegations of harassment confidential. [ALJ 8:31-35]. As such, the ALJ's opinion contradicts Supreme Court precedent which states that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Indeed, in order to comply with the ALJ's opinion, Securitas would be forced to disregard the EEOC's requirement and possibly subject Brown to continued gossiping in the workplace, which could lead to a hostile work environment. Therefore, the ALJ's reasoning is flawed and the opinion should be reversed.⁷

The ALJ's Supplemental Decision amply demonstrates the problems inherent in the *Banner Estrella* decision. If *Banner Estrella* and its progeny in any way support the ALJ's

hearsay nature of Respondent's evidence, but on the failure of Respondent to provide any evidence at all on the connection between the instruction of confidentiality and the complaint of Mr. Brown. ALJSD at 7. As discussed above, the ALJ's Supplemental Decision is contrary to the record.

⁷ The ALJ also argues that Securitas's instruction to keep the substance of the Company's investigation confidential "after the investigation is concluded," is overbroad. [ALJ 8:38-40]. To the contrary, the hostile impact of such talk on Brown, the complaining party, would have been just as detrimental regardless of when it occurred, and served no purpose protected by the Act.

Supplemental Decision, then those rulings must be overruled because they are contrary to the Supreme Court holdings in *Southern S.S. Co.*, *Hoffman Plastic Compounds*, and *Boys Markets*. As further acknowledged by the ALJ [ALJSD at 9], and noted above, the Board is currently considering a request by the General Counsel to overrule *Banner Estrella*. See *Apogee Retail, Inc.*, Case No. 27-CA-191574, General Counsel’s Brief to the Board, at 1 (“[I]t is the General Counsel’s view that the standard articulated by the panel majority in *Banner Estrella* is unworkable and fails to give appropriate weight to the shared employee and national interests furthered by the maintenance of confidentiality in the course of sensitive workplace investigations.”). See also Chairman Miscimarra’s dissent in *Banner Estrella*, which is hereby incorporated by reference, cogently explaining why the case should be overturned as an arbitrary departure from earlier Board precedent. See 362 NLRB No. 137, slip op. at *10.

B. The Remedies Ordered By The ALJ Fail To Give Adequate Guidance.

Though it should be unnecessary for the Board to reach remedial issues, the ALJ nevertheless 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.” [ALJ 16:25-28]. The ALJ’s order fails to give Securitas sufficient guidance as to what a “lawfully worded rule” would be. See *Sure-Tan*, 467 U.S. at 900-01; *Hacienda de Salud-Espanola*, 317 NLRB No. 135 (June 26, 1995).

V. CONCLUSION

For the reasons set forth above, Securitas's Exceptions should be granted and the ALJ's Supplemental Decision should be reversed in its entirety.

Respectfully submitted,

/s/Maurice Baskin

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

Attorneys for Respondent
Securitas Security Services USA

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Support of Exceptions has been served on the following this 26th day of October, 2017:

By email: Maxie E. Gallardo
Field Attorney
NLRB, Region 16
819 Taylor St., Room 8A24
Fort Worth, TX 76102-6107
maxie.gallardo@nlrb.gov

By regular mail: Ryan Patrick Murphy
1193 Curve St.
Austin, TX 78702

/s/Maurice Baskin _____