

**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 REPLY BRIEF

Counsel for the General Counsel (CGC) files with the National Labor Relations Board (the Board) this Reply Brief to Respondent's Answering Brief to General Counsel's Exceptions to the Decision (ALJD) of Administrative Law Judge Margaret G. Brakebusch (ALJ), which issued on November 25, 2009.¹ In its Answering Brief, Respondent repeats its arguments made to the ALJ and offers little, if any, response to the several factual and legal arguments set forth in CGC's exceptions and brief in support thereof. CGC's exceptions to the ALJ's failure to find that Respondent violated the Act by discharging and disciplining certain of its employees are supported by the record and extant case law, while Respondent's attempts to buttress the ALJ's conclusions by its Answering Brief are without merit. More specifically, the ALJ's findings that the alleged discriminatees' conduct in protesting overtime policies was not protected by the Act and conclusion that such actions were "nothing more than their attempt to unilaterally determine their terms and conditions of employment" (ALJD 16:27 - 33), are contrary to the record evidence and controlling law.

I. BACKGROUND

The Complaint in this matter alleges that in February 2009, Respondent discharged its employee Orlando Franco (Franco) and issued unwarranted written discipline to employees

¹ All dates herein are 2009 unless otherwise noted.

Jeff Ortega (Ortega) and Royal Jacobs (Jacobs) in retaliation for their having engaged in protected concerted activities, including their concerted refusal to work overtime, in violation of Section 8(a)(1) of the Act. The Complaint, as amended at hearing, also alleges that Respondent has maintained overly-broad confidentiality rules in violation of Section 8(a)(1) of the Act. The ALJ failed to find that Respondent violated the Act by discharging Franco and issuing discipline to Ortega and Jacobs; however, the ALJ found that Respondent violated Section 8(a)(1) of the Act by maintaining two overly-broad confidentiality rules (ALJD 16:27-36; 18:45-20:32).²

II. SUMMARY OF FACTS

The U.S. Department of Energy (DOE) operates the Waste Isolation Pilot Plant (WIPP) located outside of Carlsbad, New Mexico, which is responsible for the disposal of nuclear waste (ALJD 2:23-25). The DOE contracts with Washington Tru Solutions LLC (WTS) to manage the WIPP facility, and WTS, in turn, contracts with Respondent to provide security at the WIPP facility (ALJD 2:11-14; RX 6; GCX 1). Under its contract with WTS, Respondent is required to maintain certain staffing levels, including a minimum of three security officers per shift, at least two of which must be qualified to support fire-brigade duties. As of February, nearly a year after Respondent assumed the contract, only half of its officers, also known as Security Police Officers (SPOs), were fire-brigade qualified.

The record shows that at the time in question, when Respondent needed a security officer to work overtime, its practice was to call officers from a list maintained by Respondent, with officers moving up and down the list based on a number of variables (ALJD 5:32-43; Tr. 52; 28; 324; 343). During this time, the standard practice among security officers

² On this date, CGC also files with the Board an Answering Brief to Respondent's Cross-Exceptions to the ALJ's findings and conclusions that Respondent violated Section 8(a)(1) of the Act by maintaining two overly-broad and facially invalid rules.

in situations when they did not want to work overtime was to simply not return Respondent's phone call. There is no dispute, at least up until the discharge of Franco and the discipline of Ortega and Jacobs, that there was no penalty meted out to employees for not returning Respondent's calls and that officers worked overtime on a purely voluntary basis (ALJD 5:32-43; Tr. 52; 281; 324; 343).

The alleged discriminatees were unhappy with Respondent's practice of offering to part-time employees, including SPO Julie Ruiz, hours of work at straight-time pay when such hours would otherwise be available to full-time officers at overtime rates. As a result, on February 23, Franco and Ortega called Ruiz, and Franco asked Ruiz to not accept hours of overtime so that the full-time guards could work. Ruiz declined the employees' request to do so (ALJD 6, 7; Tr. 146; 320-22).

The following day, on February 24, Franco, Ortega, and Jacobs concertedly exercised their right under Respondent's policies to not answer Respondent's phone calls regarding overtime work. At the same time, two other employees independently exercised the same right. As a result of the alleged discriminatees' concerted action regarding Respondent's wage policies, Respondent discharged Franco and disciplined Ortega and Jacobs, but took no action against the other two employees who independently did not return Respondent's calls.

The ALJ found that the alleged discriminatees' conduct was not protected and recommended that the Complaint, insofar as it relates to such allegations, be dismissed.

III. LAW AND ANALYSIS

A. Respondent's Stated Reasons for Discharging Franco Changed Between the Time of Franco's Discharge and the Hearing

Despite the fact that much of Respondent's Answering Brief appears to be simply a restatement of its brief to the ALJ, Respondent makes certain assertions that warrant reply.

More specifically, Respondent, at page 2 of its Answering Brief, asserts that it terminated Franco for two reasons, i.e., “(1) his refusal to work on the night of February 24, 2009 compromised Respondent’s contractual relationship with [WTS]; and (2) the fact that a co-worker, Julie Ruiz, reported to Respondent’s Project Manager at the WIPP site, Richard De Los Santos, that she was ‘upset’ by a telephone call she received from Franco on February 23, 2009 telling her to ‘lay off the overtime.’” This reflects Respondent’s position taken at trial. However, Respondent’s stated reasons for the discharge and discipline of the alleged discriminatees at the time such discipline was meted out were far different.

More specifically, on February 26, Respondent discharged Franco. In its termination letter, Respondent states that it discharged Franco because it received a complaint regarding misconduct on his part³ and because of his “incessant complaining and continuous agitation and harassment of your fellow workers has created a negative and hostile working environment. [Respondent] cannot and will not tolerate this type of behavior” (ALJD 9:45-50; GCX 5). Nowhere in the termination letter does Respondent mention any purported interference with Respondent’s contractual relationship with WTS.

Notwithstanding the content of its termination letter, which was written after Respondent’s managers checked with Respondent’s corporate office (ALJD 9:35-40), at hearing Respondent put forth a different basis for discharging Franco. Specifically, De Los Santos testified that Franco was terminated because he compromised Respondent’s contract to provide security and that, because of Franco’s actions, Respondent did not have enough people on duty to provide the fire protection that it was required to provide (ALJD 10:4-9).

³ The record also establishes that Respondent inflated Ruiz’ complaint about Franco’s call and exaggerated her reaction to it (see Ruiz’ testimony at Tr. 158-62).

These reasons were not mentioned in the termination letter issued to Franco at the time of his discharge.

The ALJ failed to see that Respondent presented shifting defenses, and failed to consider that shifting defenses as indicators that the reasons asserted by the Respondent for discharging Franco and disciplining Ortega and Jacobs are pretextual. *Smoke House Restaurant*, 347 NLRB 192 (2006), citing *Tracer Protection Services*, 328 NLRB 734 (1999); *Food Cart Market*, 286 NLRB 1016, 1018 (1987). The ALJ, in essence, rejected the clear content of Franco's termination letter, written before any unfair labor practice charges had been filed, and instead relied on the self-serving testimony of Respondent's managers at hearing in determining that the alleged discriminatees' conduct was not protected by the Act.

1. The ALJ's Failure to Find that the Alleged Discriminatees Were Discharged Because of Their Protected Concerted Activities is Contrary to Credited Record Evidence

The ALJ's conclusion that Respondent did not discharge or discipline the alleged discriminatees because they engaged in protected concerted activities is contrary to certain facts credited by the ALJ. More specifically, the ALJ found that in the months leading up to his discharge, Franco, as well as the other alleged discriminatees, engaged in protected concerted conduct (unrelated to its concerted conduct related to overtime issues) by making concerted complaints about Respondent's wages and other working conditions.⁴ In fact, the record supports a conclusion that such protected conduct is what is described in Franco's termination letter as his "incessant complaining and agitation." Similarly, Respondent admits that the written warnings issued to Ortega and Jacobs on February 27 (which acknowledge

⁴ The ALJ found that all three employees participated in such "discussions and complaints." This included: five months prior to his discharge, Franco and another employee met with De Los Santos and Respondent's principal concerning Respondent's failure to follow the predecessor's practice of paying an increase to security officers when they obtained a Q-clearance; and in January 2009, the month prior to his discharge, Franco and Ortega met with De Los Santos to discuss the issue of equal pay for all armed SPOs (ALJD 11:22-50).

that Respondent “cannot require you to work incidental overtime”) were issued because of their failure to work overtime, which De Los Santos described to Jacobs as a “conspiracy” (ALJD 10:16 - 11:2).

Notwithstanding these facts, the ALJ concluded that the alleged discriminatees’ concerted conduct, including their concerted “discussions and complaints” during the preceding five months, were not “significant” to the discipline that was issued to these employees (ALJD 11:22-33). Instead, the ALJ concluded that the discharges and discipline were motivated by nothing “other than the employees’ conduct on February 23 and 24” (ALJD 11:44-50). Such a finding begs the question: if not to Franco’s concerted conduct during the preceding five months, to what does Respondent refer in its termination letter when describing Franco’s “incessant complaining and continuous agitation?” The record fails to establish that Respondent was referring to anything other than the employees’ protected concerted conduct. It is respectfully submitted that the ALJ’s refusal to find that Respondent was motivated by the alleged discriminatees’ protected conduct is contrary to the record.

2. The ALJ Erred by Refusing to Apply *Wright Line*

In the face of such substantial evidence calling into question Respondent’s stated motives, the ALJ erred in refusing to apply, if even in the alternative, *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). It is respectfully submitted that, applying the Board’s standard *Wright Line* analysis, the record establishes a strong *prima facie* case, and that Respondent has failed to meet its burden of showing that it would have taken the same action absent the discriminatees’ protected conduct. In fact, a conclusion to the contrary requires one to ignore too much of

Respondent's documentary and testamentary evidence, including evidence credited by the ALJ. See also CGC's Brief in Support of Exceptions at p. 13, fn. 6.

B. The Record Fails to Support Respondent's Claim Regarding the Seriousness of Its Failure to Provide Adequate Coverage

The ALJ erred by adopting Respondent's defense, presented at trial and reiterated in its Answering Brief, that the discriminatees failed to take reasonable precautions to protect both Respondent and the WIPP site from "foreseeable imminent danger" and that, as a result, their conduct was not protected (ALJD 16:2-4).⁵ The ALJ goes so far as to adopt Respondent's vernacular, describing the alleged discriminatees' nuts-and-bolts, run-of-the-mill protected concerted conduct as a "conspiracy" (i.e., "[Jacobs] admitted to De Los Santos that their conduct ... has been a conspiracy;" "[Jacobs] fully acknowledged that the three employees conspired and agreed that they were not going to work") (ALJD 16:6-10).

Most telling, however, is the fact that record is devoid of any evidence that would suggest that there existed, or that the employees' concerted conduct triggered, a "foreseeable imminent danger" from which the alleged discriminatees were obliged to protect Respondent. The danger identified by the ALJ, i.e., that there existed the possibility that the parties, including Respondent and WTS, would have to use an existing back-up coverage system for a night, cannot reasonably be called a "foreseeable imminent danger." To the contrary, the very existence of such a back-up system shows that the parties themselves, obviously, had foreseen such an eventuality and prepared for it by having a back-up plan in place.

Perhaps sensing the fragility, and the absence, of support in the record for its proffered "foreseeable imminent danger" defense, Respondent, in its Answering Brief, asserts that the testimony of WTS's procurement specialist, Mark Friend, establishes the "significance of

⁵ The cases cited by the ALJ and upon which she relies in support of the ALJ's theory of the violation are distinguished in CGC's Brief in Support of Exceptions.

[Respondent's] failure to provide fire-brigade coverage on the night of February 24.”

Respondent touts Friend's testimony as showing the “dire consequences” if Respondent is unable to meet its contractual obligation to provide sufficient coverage. See Respondent's Answering Brief at pp. 5-7.

Even though Friend testified without contradiction in certain respects (see ALJD 15:39-48; 16:20-25), the ALJ elected to not rely on much of Friend's testimony, as evidenced by her refusal to recite or reference such testimony in the ALJD, including the extensive portions excerpted by Respondent in its Answering Brief.⁶ The likely reason is evident from the excerpts of Friend's testimony highlighted by Respondent in its brief. Friend's hyperbolic predictions as to what would happen if WTS could not cover for Respondent (“then the plant would be shut down from waste handling operations”), are just that -- hypothetical and not otherwise supported by the record (Tr. 405; Respondent's Answering Brief at p. 6), and are belied by the fact that Respondent and WTS have a simple and routine back-up plan in place to avoid any risk of interference with operations.

Moreover, Friend's testimony regarding the actual effect on Respondent of its failure to provide full coverage on February 24, is contradicted, in critical part, by De Los Santos. Specifically, Friend testified that should Respondent fail to provide adequate coverage, such conduct would put WTS in position to take action against Respondent. When asked if that would happen immediately every time there was a failure to provide appropriate fire-brigade coverage, Friend testified “yes” (Tr. 405). Friend went on to say that as a result of the February 24 incident, “I believe that WTS had a stern conversation with [Respondent] on that,

⁶ The ALJ adopted from Friend only his testimony that if Respondent had been unable to provide fire brigade service for that evening shift, WTS would have had to depend upon backup services from the county (ALJD 15:39-47) and that the overtime incident in February 2009, was the first time that he had been aware that Respondent had not been able to provide the requisite fire brigade services under the contract (ALJD 16:22-24)

probably between [WTS agent] Scott Cassingham and Mr. De Los Santos” (Respondent’s Brief at pp. 6-7; Tr. 406). Such testimony is entirely baseless. De Los Santos’ testimony shows that no one from WTS complained to Respondent about its coverage on the night in question, and that WTS did not even know of Respondent’s inability to provide coverage until Respondent informed WTS the following day (Tr. 42-43).⁷

1. Respondent’s Failure to Provide Coverage is as a Result of its own Failure to Manage and Train its Workforce, not the Section 7 Activities of the Alleged Discriminatees

Respondent’s defense, as reiterated in its Answering Brief, is that the alleged discriminatees, by their concerted activities, put Respondent at risk. The record shows that it was not the discriminatees’ concerted conduct that put Respondent at risk, but rather Respondent’s inability to properly staff the contract. De Los Santos admitted at hearing that “at the time this incident occurred, the majority, or almost fifty percent of my SPO force was not fire brigade certified....This is why we were in the predicament that we were in at that time.” He also admits that since that time, Respondent has corrected its deficiency by having “quite a few more [employees] complete their fire brigade training, so it really doesn’t occur that often anymore. It does on occasion, we have a need for overtime, but not that often anymore...” (Tr. 133:4-16). Respondent’s efforts to paint the alleged discriminatees’

⁷ In fact, in addition to its “foreseeable imminent danger” tack, Respondent’s suggestions that it fired Franco and disciplined Ortega and Jacobs because their actions “compromised Respondent’s contractual relationship” with WTS, appear to be a construction. The record, including the testimony of De Los Santos, shows that there was no real or imagined impact on Respondent as a result of the concerted refusal to work overtime. Project manager De Los Santos admitted that if all of the employees at issue had *called in* and refused overtime on the night in question, Respondent would have been in the position to “justify it” to its client (“We could have justified to WTS that we couldn’t get anyone to come out and work that night. We can’t force them to work the overtime. I think we can all agree on that, but I didn’t have anything to say to my oversight [at WTS], because [the alleged discriminatees] never called back” (Tr. 42:1-5). Again, this begs the question: if it is permissible for Respondent to tell WTS that it cannot provide adequate coverage as a result of employees turning down invitations to work overtime, what is it that makes February 24 any different -- other than the fact that employees unavailability to work overtime was as a result of their Section 7 conduct?

concerted refusal to accept overtime assignments as misconduct should be rejected by the Board.⁸

IV. CONCLUSION

Based on the foregoing and the record as whole, it is respectfully submitted that the Board should find that Respondent discharged Franco and disciplined Ortega and Jacobs in violation of Section 8(a)(1) of the Act; deny Respondent's cross-exceptions regarding its overly-broad rules, as discussed in CGC's Answering Brief filed separately this date; and order Respondent to provide a full and appropriate remedy for all such violations.

Dated at Phoenix, Arizona, this 20th day of January 2010.

/s/ Paul R. Irving

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⁸ In its Answering Brief, Respondent admits that the difference between the alleged discriminatees and those employees who independently failed to return overtime calls on February 24, was that the other employees did so on an individual basis, while the alleged discriminatees "conspired deliberately to refuse to work overtime with the full knowledge that, as a result of their refusal, Respondent would not be able to comply with its responsibilities under the contract with WTS." Respondent's Answering Brief at p. 11. Assuming that such an inquiry is relevant, Respondent fails to explain how, in the absence of evidence establishing that the discriminatees knew ahead of time that other employees would also refuse to return overtime calls unrelated to their concerted effort, the discriminatees could have "full knowledge" that their concerted conduct -- as a result of other employees also failing to return calls -- may have caused Respondent to not be able to comply with its contractual obligations. Respondent's statement, and the failure to support such a defense by record evidence, exposes the fallacy of its own defense.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S REPLY BRIEF** 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 20th day of January 2010, on the following parties:

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Dated at Phoenix, Arizona, this 20th day of January 2010.

Respectfully submitted,

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