

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

**FLEX FRAC LOGISTICS, LLC
AND SILVER EAGLE LOGISTICS, LLC,
JOINT EMPLOYERS
Respondent**

and

Case No. 16-CA-027978

**KATHY LOPEZ
An Individual**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Dated: March 19, 2012

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**FLEX FRAC LOGISTICS, LLC
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COMES NOW Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and files this Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge.

FACTS

A. Background

Respondents Flex Frac Logistics and Silver Eagle Logistics are joint employers created about February 2010. [JD slip op. at 2; Tr. 19] Respondent is an authorized Department of Transportation (DOT) carrier which delivers frac sand to oil and gas well site servicing companies. [JD slip op. at 3; Tr. 19, 21] It operates 24 hours a day. [Tr. 56]

Respondent's chain of command is as follows: William Funk is the president of Silver Eagle Logistics and oversees the entire operation of both Silver Eagle Logistics

and Flex Frac Logistics. [JD slip op. at 2-3; Tr. 21] Funk also shares ownership of the operation with Jeff Blackwood, Virginia and Marty Moore. [Id.] John Wilkinson is the chief financial officer (CFO) and Rick Fourpaugh is the general manager. [Id.] As controller, Susie Kellum reports to Wilkinson and manages employees in the office. [JD slip op. at 3] In November 2010, Kellum replaced former controller Patricia Villarreal. [Id; Tr. 27]

Respondent employs approximately 250 employees, including about 100 employee drivers. [JD slip op. at 3; Tr. 22] Respondent also uses roughly 100 nonemployee drivers (also referred to as vendors, leased drivers, independent contractors, and customers). [Id; Tr. 20]

Four managers and approximately 16 dispatcher managers work in dispatch. [Tr. 22, 27] The dispatch department responds to requests by service companies that need trucks by assigning employee or vendor drivers. [Tr. 22] The dispatch department also monitors drivers' progress and assigns them to their next load. [Tr. 22-23] In addition to dispatchers, the dispatch department also has two load planners. [Tr. 23] Jamie Stingley and Kevin Smith manage the dispatch department. [Id.] Ben Gatzke was a supervisor over dispatch at the time Lopez was employed by Respondent. Dispatch employees included, Catherine Coile-Chambers, Billy Funk, and Nocona Stingley. [Tr. 121]

CFO Wilkinson and Controller Kellum supervise the accounting department, which consists of about 10 employees. [JD slip op. at 3; Tr. 24] The accounting employees prepare the invoices for both the customers, company and leased drivers. [JD slip op. at 3] Within the accounting department, the coding department prepares the haul tickets to reflect the actual demurrage time and mileage. [Tr. 24] The coding department sends the haul tickets to accounts receivable, where the accounts receivable employees

invoice the service companies. [Tr. 25] The haul tickets are then sent to accounts payable where the employees in that area prepare the tickets to ensure that their detention hours and mileage are calculated properly before sending the ticket on to payroll. [Tr. 24-25]

B. Employer Maintained An Unlawful Overly Broad Rule

Respondent provided employee Kathy Lopez with a copy of its confidentiality agreement shortly after Lopez began her employment. [Tr. 198; GC Exh. 2] This rule states:

Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, process and plans; our financial information, including costs, prices; current and future business plans, our computer software systems and processes; *personnel information and documents*, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

[GC Exh. 2] (*emphasis added*)

Respondent stipulated that its confidentiality rule was implemented in early May 2010. The controller at the time, Patricia Villarreal, drafted the rule and CFO Wilkinson approved its implementation. [Tr. 248] The rule remained in effect at the time of the hearing. [Tr. 28, 59-62, 76]

Notwithstanding the judge's finding that Employee Frank "Tucker" Gay merely "opined" that he did not believe he should disclose drivers' pay [JD slip op. at 9, LL. 2-3], the record reflects a much clearer understanding concerning Respondent's prohibition against discussion of wages. Gay testified, under friendly questioning from Respondent's

counsel, that he believed employees were prohibited from discussing wages. [Tr. 171] Gay testified, “I know for a fact I wasn’t supposed to discuss [wages] when I was in dispatch, because some people get commissions, some people don’t.” [Id.] Gay further explained, “I know for a fact we wasn’t [sic] supposed to do that.” [Tr. 172] He clarified his point testifying, “[I]f two people decide to go outside the building and start discussing their wages, we don’t have no problem with it until they get caught. Once they get caught it’s subject for termination.” [Tr. 174]

C. Respondent Unlawfully Terminates Lopez Because It Believed She Discussed Wages

Although the judge correctly found that Respondent violated Section 8(a)(1) by promulgating and maintaining an overly broad confidentiality rule that employees could reasonably understand to prohibit them from discussing their wages and others terms and conditions of employment and discharged Kathy Lopez pursuant to this rule, Counsel for the Acting General Counsel submits that the Judge erred in failing to find that Respondent also violated Section 8(a)(1) by terminating Lopez on December 30, 2010 because she discussed wages with co-workers or because Respondent believed she discussed wages.

Lopez’s termination notice stated:

Kathy told one of our dispatch employees that we paid our drivers one rate and our customers another. She has also discussed what people make in the accounting office to other employees that are or were looking for raises.

[GC Exh. 5]

Controller Kellum drafted this notice and presented it to Lopez as part of the termination. [JD slip op. at 10, LL. 18-27] Respondent admits that Kellum was an agent pursuant to Section 2(13) of the Act. [GC Exh. 1(g)]

Lopez worked in accounts payable from May 2010 until her termination. [JD slip op. at 3] Her job required her to obtain haul tickets from the drivers, input their data, and prepare the drivers' pay at the end of each week. [Id.] Prior to Lopez's termination, she had no prior discipline. [Tr. 208] Lopez received a stellar performance review and a glowing letter of recommendation. [GC Exhs. 4 and 7] Kellum testified that she was aware Lopez was talking about wages in accounting. [Tr. 80-81, 88, 90-92] Furthermore, the termination slip that Kellum prepared for Lopez demonstrates Respondent's knowledge she discussed accounting wages. [GC Exh. 5] Kellum testified that she was sorry to see Lopez leave the company and that despite Funk's orders, she and Wilkinson "fought for her" to be able to stay. [Tr. 84] Furthermore, Kellum even testified that Lopez was not terminated because of any disciplinary issues. [Tr. 85]

II. ARGUMENT

Lopez was not only terminated pursuant to Respondent's unlawful overly broad confidentiality rule, as discussed in Counsel for the Acting General Counsel's Answering Brief, but also because Respondent believed that she discussed wages. The Board has long held that an employer's belief that an employee engaged in protected concerted activity is unlawful even if the belief is mistaken and the employee did not engage in protected concerted activity. *Monarch Water Systems, Inc.*, 271 NLRB 558 fn. 3 (1984); *Bo-Ty Plus, Inc.*, 334 NLRB 522, 528 (2001); *Hamilton Avnet Electronics*, 240 NLRB 781, 791 (1979). As the Board held in *Parexel International*, wage discussions among employees are at the core of Section 7 rights because wages are "probably the most critical element in employment" and are "the grist on which concerted activity feeds." 356 NLRB No. 82, slip op. at 3 (2011), citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), *enfd.* in part 81 F.3d 209 (D.C. Cir.

1996). Thus, any discharge motivated by a mistaken belief that an employee may have engaged in protected concerted activity is a violation of the Act.

Here, the evidence shows that the Kellum, who supervised Lopez and is an admitted agent for Respondent, believed Lopez discussed wages in the accounting department. Lopez believed that this was a basis for her termination. Certainly, this was a reasonable belief given the fact that the termination slip that Kellum prepared for Lopez expressly demonstrates not only Respondent's perception that she discussed wages, but also that this was a basis for her discharge.

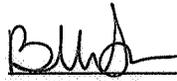
When an employer is motivated to discharge an employee based upon a perception that the employee is engaged in protected concerted activity, even if that perception is mistaken, the respondent violates the Act. *Dayton Hudson Dept. Store Co.*, 324 NLRB 33, 34 (1997). Because the discussion of wages is protected concerted activity, Respondent's termination of Lopez pursuant to that belief is unlawful. See *Compuware Corp.*, 320 NLRB 101-102 (1995) (violation found when employer terminated employee for perception that employee "might" engage in protected concerted activity).

III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel requests that the Board grant the General Counsel's Cross-Exceptions in their entirety. Specifically, Counsel for the Acting General Counsel find that Respondent violated Section 8(a)(1) of the Act terminating employee Lopez pursuant to its belief that she talked about wages. Counsel for the Acting General Counsel requests that the Board so find and order the appropriate remedy. Counsel for the Acting General Counsel also requests any further relief the Board deems appropriate.

Dated at Fort Worth, Texas, this 19th day of March 2012.

Respectfully submitted,



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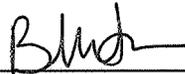
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the Acting General Counsel's Brief in Support of Cross-Exceptions has been served this 19th day of March 2012, upon each of the following:

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