Securitas Security Services USA *and* Ryan Patrick Murphy. Cases 16–CA–176006 and 16–CA–183494

April 14, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 28, 2017, Administrative Law Judge Donna N. Dawson issued a decision in this proceeding. On November 21, 2018, the National Labor Relations Board remanded the case to the judge for the purpose of reopening the record, if necessary, and preparing a supplemental decision addressing the complaint allegations under *Boeing Co.*, 365 NLRB No. 154 (2017). On August 30, 2019, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The single remaining issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by prohibiting an employee from discussing the Respondent's internal investigations.[1] On April 26, 2016,[2] Charging Party Ryan Patrick Murphy, an employee of the Respondent, witnessed an incident involving another employee and a supervisor, which resulted in the employee filing an internal racial discrimination complaint against the supervisor. On May 5, the Respondent's Branch Manager Joe Shuler and Human Resources Manager Tennille Gray interviewed Murphy about the incident. Shuler and Gray "orally instructed [Murphy] not to discuss the investigation or the incident with anyone." Murphy subsequently requested that Gray clarify the scope of the instruction. On May 9, Gray replied to Murphy's request for clarification in two substantially similar emails stating:

> [A]ll [employees][3] are barred from talking during the time of the investigation in any circumstance. After the investigation is concluded—if any one starts conversing about it and those conversations become a distraction to the workplace anyone involved in conversing could face disciplinary action in accordance with the handbook.

In her supplemental decision, the judge reasoned that *Boeing* did not alter the balancing test applicable to investigative confidentiality policies set forth in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015). There, the Board had held that "an employer may restrict . . . discussions [of ongoing disciplinary investigations] only where the employer shows that it has a [particularized] legitimate and substantial business justification that outweighs employees' Section 7 rights." Id. at 1109–1110. Applying that standard, the judge concluded that the Respondent had not made the requisite particularized showing and accordingly had violated the Act by prohibiting discussion of its internal investigations.

On December 16, 2019, while the Respondent's exceptions to the judge's supplemental decision were pending before the Board, the Board overruled *Banner Estrella* and held that investigative confidentiality rules that by their terms apply only for the duration of any investigation are categorically lawful under *Boeing*. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, slip op. at 1 (2019). Specifically, the Board found that "justifications associated with investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with the exercise of Section 7 rights." Id., slip op. at 8. Accordingly, the Board held that investigative confidentiality rules limited to open investigations fall into *Boeing* Category 1(b).[4]

Applying *Apogee*, we find that the Respondent's investigative confidentiality instruction to Murphy does not violate the Act as alleged by the General Counsel. Specifically, the complaint alleged that the Respondent violated Section 8(a)(1) when it "prohibited an employee from discussing internal investigations," and, further, the General Counsel has consistently maintained that the conduct at issue was the Respondent's instruction to Murphy not to discuss the internal investigation. It is clear from the emails Gray sent Murphy on May 9, however, that the Respondent's confidentiality instruction to Murphy was expressly limited to "the time of the investigation."[5] Because the specific conduct alleged and litigated as unlawful by the

[1] On August 5, 2019, the judge granted the General Counsel's motion to sever complaint allegations pertaining to the Respondent's no-recording, no-photography, and no-gossip rules, which the General Counsel no longer alleges to be unlawful.

[2] Dates below are in 2016, unless otherwise specified.

[3] Only one of Gray's two May 9 emails used the word "employees".

[4] *Boeing* Category 1(b) includes the types of rules that the Board has designated as lawful to maintain because the justifications associated with such rules predictably outweigh their potential adverse impact on employees' exercise of their protected rights under the NLRA. See, e.g., *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 & fn. 2 (2019).

[5] We also find that an objectively reasonable employee would understand the second part of Gray's May 9 email clarification not as part of

General Counsel was the Respondent's maintenance of an investigative confidentiality policy limited to the term of the investigation—a policy of a type found categorically lawful to maintain in *Apogee*—we conclude that the Respondent did not violate the Act as alleged.

The Board further stated in *Apogee* that its holding "does not extend to rules that would apply to nonparticipants [in an investigation], or that would prohibit employees—participants and nonparticipants alike—from discussing the *event or events* giving rise to an investigation (provided that participants do not disclose information they either learned or provided in the course of the investigation)." 368 NLRB No. 144, slip op. at 2 fn. 3. Here, the judge's description of the Respondent's policy would permit an inference that the policy might have applied to nonparticipants in the investigation or prohibited employees from discussing the incident that gave rise to the investigation. But the General Counsel's complaint does not allege that the Respondent's policy was unlawfully overbroad in these respects, and no such issues have been litigated in this proceeding. It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated. See, e.g., *Wal-Mart Stores, Inc.*, 368 NLRB No. 146, slip op. at 1 fn. 3 (2019) (citing *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990)). Here, however, nothing about the litigation of this case put the Respondent on notice that it should have clarified or specifically justified aspects of its policy's scope. Accordingly, because these issues have not been fully and fairly litigated, we do not decide whether the Respondent's policy may have been unlawfully overbroad in restricting employee discussion of incidents underlying its internal investigations or discussion by employees not involved in those investigations. See, e.g., *Laborers' International Union of North America, Local Union No. 91 (Scrufari Construction Co.)*, 368 NLRB No. 40, slip op. at 1 & fn. 2 (2019) (declining to find violation on theory not advanced in complaint, which, even if closely connected to subject matter of complaint, was not fully litigated) (citing *Pergament United Sales*, 296 NLRB at 334).

the Respondent's confidentiality policy, but as a reminder that post-investigation discussion of the investigation, while not banned under the confidentiality policy, would remain subject to the Respondent's generally applicable rules against disruptive, inappropriate, or abusive workplace conversations. See *LA Specialty Produce*, above, slip op. at 2 (analysis of work rules under *Boeing* "should be determined by reference to the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job") (internal quotation marks omitted).

ORDER

IT IS ORDERED that the consolidated complaint in Cases 16–CA–176006 and 16–CA–183494 is dismissed.

Dated, Washington, D.C. April 14, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Robert Perez, Esq. and *Maxie Gallardo, Esq.,* for the General Counsel.

Maurice Baskin, Esq. (Littler Mendelson, PC), of Washington, DC, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. On September 28, 2017, I issued a decision in which I found that the General Counsel had established that some of the challenged work rules violated Section 8(a)(1) of the Act.[1] Securitas Security Services USA (Respondent) and the General Counsel both filed exceptions to my decision. While those exceptions were pending before the Board, the Board issued its decision in *Boeing Co.*, 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018). In that decision, the Board modified the standards for determining whether an employer's work rules interfere with employees' rights under the Act in violation of Section 8(a)(1). On November 16, 2018, the Board issued an order remanding to me certain of Respondent's work rules contained in the consolidated complaint issued on April 7, 2017, at paragraph 7 (no-recording and no-camera), paragraph 9 (prohibited discussion of internal investigations), and paragraph 10 (no-gossip).[2] On November 21, 2018, the Board issued a corrected order remanding

[1] The Charging Party, Ryan Patrick Murphy, filed charges on May 9 and September 16, 2016. The General Counsel filed orders consolidating cases and amended consolidated complaints on November 30, 2016, and April 7, 2017. (GC Exh. 1(e) and 1(m).)

[2] Previously, on July 6, 2017, I granted the parties' joint motion to sever allegations and approve a partial bilateral informal settlement agreement executed by the parties on June 29, 2017. Pursuant to that agreement and subsequent order, complaint allegations at par. 6 (confidentiality), par. 8 (proprietary information), and the portion of par. 7 alleging that Respondent maintained an unlawful social networking policy

those issues to me "for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the complaint allegations (including allegations regarding the Respondent's recording and camera policies) under *Boeing* and setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order."

I offered the parties an opportunity to participate in a supplemental hearing or otherwise re-open the record to present any additional evidence they believed was relevant to reconsideration of the work rules under the *Boeing* standards. In response, both parties opposed the reopening of the record, contending that the presentation of additional evidence was not necessary, and stated their positions. In addition, the General Counsel included a motion to sever certain of the complaint allegations pertaining to the no-recording, the no-photography, and the no-gossip rules in the complaint at paragraphs 7 and 10. In doing so, the General Counsel determined that those rules are lawful under *Boeing*. Of course, Respondent did not object. On August 5, 2019, I issued an order granting the General Counsel's request to sever and remand to the Region for appropriate action. I also gave the parties an opportunity to file supplemental briefs on or before August 19, 2019.

Based on the August 5 order, the only remaining allegation before me for reconsideration is set forth at complaint paragraph 9 that: On or about May 5, 2016, Respondent prohibited an employee from discussing internal investigations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and position statements filed by the parties, I make the following findings of facts and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

Respondent owns and operates a corporation with an office and place of business in Austin, Texas, where it provides security services to other companies. In conducting its operations in 2015, Respondent performed services valued in excess of $50,000 in states other than the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

A. Respondent's Business

Respondent is the second largest security service provider in the country, with about 14,000 customers and 90,000 security guards/officers. It provides its customers with security officers, as well as a variety of security services and products. In the Austin, Texas area, Respondent provides security officers to two Samsung facilities—the Samsung Austin Research Center (SARC/Research Center) and the Samsung Austin Semiconductor Plant. Respondent employs about 110 employees at both locations, with Branch Manager Joe Shuler (Shuler) over area operations. This case involves occurrences at the Research Center, where Respondent employs about 10 security officers/guards, with 2 officers and a shift supervisor on each shift.

B. Respondent Bans Employees from Discussing Internal Investigations

The Charging Party, Ryan Patrick Murphy (Murphy), worked as a security officer for Respondent at its Research Center from August 2015 to August 2016.[3] His duties included conducting entry and exit control of personnel and items, monitoring the facility via closed circuit television, providing customer service, and responding to incidents. Murphy worked his shift with two other officers—Amanda Marino (Marino),[4] his direct shift supervisor, and David Brown (Brown), security officer. As stated, Joe Shuler managed the facility. Tennille Gray (Gray) was the human resources manager.[5]

On April 26, 2016, Murphy witnessed or was present during an incident that resulted in his coworker, Brown, filing a race discrimination complaint against a supervisor and the company initiating an investigation. Murphy was the only other employee present during this incident. (Tr. 27, 29–31, 122–123, 127.) On May 5, Branch Manager Shuler and Human Resources Manager Gray interviewed Murphy regarding the April 26 incident.[6] Management did not inform Murphy that a discrimination complaint had been filed, but Murphy understood the investigation to be about an argument that occurred on April 26. While questioning Murphy, Shuler and Gray orally instructed him not to discuss the investigation or incident with anyone. They also asked him to submit a written statement, which he emailed to Gray on May 6. (Tr. 31–32, 45.) Murphy attached to his email to Gray specific questions about the directive not to discuss the investigation or incident. He asked the following:

> First, are you barring me and any other officer who is assigned to SARC from discussing this matter in perpetuity? Is it just while you are investigating it? Are there specific individuals with whom this bar is attached or is it a blanket prohibition among every security officer? Does the prohibition to talk just include this incident or does it include other work related matters? What is the intent of this prohibition? Does the prohibition only apply during work hours and on site, or am I, and every other officer prohibited from speaking about this incident amongst ourselves regardless of the setting? Lastly, what are the possible ramifications that I or any other officer may face if we fail to adhere to this prohibition?
>
> If I don't receive a response, I'll assume that the prohibition to not talk about this incident applies to myself and every officer assigned to SARC [Samsung Austin Research Center] regardless of the timing or the setting. If this prohibition was in fact [erroneous], it is my hope that I, along with every officer on site [receives] education on this matter.

were remanded to the Region to sever from the complaint, monitor the settlement and dismiss those allegations as appropriate and in accord with the agreement.

[3] Murphy voluntarily resigned, effective in August 2016.

[4] Marino's last name is misspelled in the transcript. This is the correct spelling.

[5] Marino, Shuler and Gray have been supervisors and/or agents of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[6] Murphy recalled that on April 26, 2016, Shuler and a human resources representative, Pablo Gonzalez arrived after the incident to begin an investigation or questioning. He was not questioned until May 5. (Tr. 30.)

(Tr. 31–34; GC Exh. 2.)

On May 9, Murphy emailed Shuler (copied to Gray and Marino) at 7:10 a.m., indicating that he did not receive a response to his May 6 email inquiry. (GC Exh. 2.)

Later that morning, at 8:42 a.m., Gray emailed Murphy thanking him for his statement, and responding to his May 6 email inquiries as follows:

> In regards to your questions, all are barred from talking during the time of the investigation in any circumstance. After the investigation is concluded—if any one starts conversing about it and those conversations become a distraction to the workplace anyone involved in conversing could face disciplinary action in accordance with the handbook.

(Id.) Gray sent a second email to Murphy on May 9 at 8:53 a.m., repeating her earlier response to Murphy's inquiry regarding the ban on and warning about anyone discussing the investigation. (Id.) Thus, there is no doubt that this policy prohibiting discussion about the investigation applied to "all" employees. At some point, Gray informed David McAllister (McAllister), Respondent's vice president of human resources, via email that they went out to the facility to investigate "the hotline call we received." She explained that they told "all Officers" not to discuss the investigation with anyone and asked him for guidance on how to respond to Murphy's inquiry. In response, McAllister told her to advise Murphy that "we are barring him from talking during the time of the investigation in any circumstances. After the investigation is concluded—If he starts conversing about it and those conversations become a distraction to the workplace then he could face disciplinary action in accordance with the handbook."[7] (Jt. Exhs. 4(a) and 4(b).)

Murphy testified that he interpreted Gray's prohibition on discussing the investigation as prohibiting him from talking about "any work conditions at all" to any other employees. (Tr. 39, 42–43, 46–49, 55.) There is no evidence that Murphy or any other employee received discipline or reprimand concerning this prohibition.

Michael Christopher Pope (Pope), Respondent's deputy general counsel, the only witness for Respondent, testified that he believed Respondent implemented its prohibition on discussing the investigation because Brown had complained about employees gossiping about his complaint. Respondent's counsel asked Pope if he "[could] talk to us about the reasons for the Company's policy on having employees not discuss internal investigations?" In response, Pope testified that Respondent sought to "have witnesses come forward with unvarnished, untainted, uninfluenced statements" to get to the truth and to ensure that the "Mr. Browns of the world" come "forward to make a comment," without "know[ing] that everybody is talking behind their back." (Tr. 122–124.)

In addition, Pope insisted that banning employees from discussing the internal investigation complied with the Equal Employment Opportunity Commission's (EEOC's) guidelines for investigating discrimination and harassment claims. (Tr. 109–111, 116, 122–124; R. Exh. 4.) This testimony, regarding types of investigations that lend themselves to bans on employees discussing them belies Pope's earlier testimony that Respondent's prohibition was not a policy "which is kind of the Bible of the Company," but "words out of that particular manager's mouth on that particular day." (Tr. 139.)

II. DISCUSSION AND ANALYSIS

A. Legal Standards

The Board has long recognized the right of employees to communicate in the workplace, which includes the right to discuss with each other hours, wages and other terms and conditions of employment. *Parexel Int'l.*, *LLC*, 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996). The Board has also determined that employee discussions about employer investigations involving themselves or coworkers are "vital to employees' ability to aid one another in addressing employment terms and conditions with their employer." *Banner Estrella Medical Center*, 362 NLRB 1108, 1109 (2015), enfd. 851 F.3d 35 (D.C. Cir. 2017), citing *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155–156 (2014); see also *SNE Enterprises*, 347 NLRB 472, 472 fn. 4 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007.)

In *Boeing Co.,* 365 NLRB No. 154 (2017), the Board announced standards for determining whether an employer's facially neutral rule interferes with its employees' rights in violation of Section 8(a)(1) of the Act. The Board stated that unless the rule is of a type that the Board has already designated as being uniformly lawful or unlawful, the lawfulness of the rule, under Section 8(a)(1), will be evaluated using a balancing test. First, the Board will determine whether the rule is one that the employees would "reasonably interpret [ ]" as "potentially interfer[ing] with the exercise of NLRA rights." If it is, the Board will evaluate whether the "nature and extent of the potential impact on NLRA rights" outweighs any "legitimate justifications associated with" the rule. *Boeing*, slip op. at 3–4 and 16. The Respondent's rule in this case regarding employee participation in internal investigations is facially neutral and not among those types that the Board has, as of this time, designated as uniformly lawful or unlawful.

The balancing test formulation set forth in the *Boeing* decision, while it modified the analysis for many types of workplace rules, does not appear to have meaningfully altered the balancing test that I have previously applied to Respondent's confidentiality in investigation restrictions. Nor does analysis under the *Boeing* test alter my conclusion that the restrictions unlawfully interfere with employees' rights under the Act. In other words, I adhere to Board precedent holding that an employer may prohibit employee discussion of an investigation only when the employer's need for confidentiality with respect to that specific investigation outweighs employees' rights under Section 7 of the Act. Thus, an employer is permitted to lawfully impose such a restriction only on a case-by-case basis and by considering whether the circumstances of an investigation create legitimate concerns of witness intimidation or harassment, the destruction

[7] Although Gray's email to McAllister reflects that it was sent at 9:26 a.m., McAllister's email response indicates that he sent it at 8:36 a.m. on May 9. Thus, it appears that Gray probably sent her inquiry to McAllister after Murphy's May 9 request for clarification. (Jt. Exhs. 4(a) and 4(b).)

of evidence, or other misconduct tending to compromise the integrity of the inquiry. See *Banner Estrella*, 362 NLRB at 1109–1110. Also see, *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011), enfd. in relevant part, 805 F.3d 309 (D.C. Cir. 2015); *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001). Further, a confidentiality rule applied post investigation cannot be justified as necessary "to protect the sanctity of an ongoing investigation." *SNE Enterprises*, 347 NLRB 472, 472 fn. 4 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007).

In *Banner Estrella*, the Board emphasized that "it is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation." The Board also stated that "the employer must proceed on a case-by-case basis;" must not "reflexively impose confidentiality requirements in all cases or in all cases of a particular type; and must determine "that confidentiality is necessary in a particular case…based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." *Banner Estrella,* above at 1110. The Board affirmed the standard endorsed in *Hyundai* that it is the employer's "responsibility to first determine whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up." *Banner Estrella*, quoting *Hyundai*, above, slip op at 15.

In *Hyundai*, the Board also adopted the judge's rejection of the employer's justification that the rule was necessary to protect the victim, witnesses and the accused harasser; "to preserve confidentiality consistent with the [EEOC] guidelines and state and federal courts;" and "to avoid potential liability from accused harassers in defamation and other causes of action;" *Hyundai*, above at 873–874.

In *Caesars Palace*, the Board recognized the confidentiality in investigations rule intruded on employees' Section 7 right to discuss with each other internal investigations and determined the issue was "whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications." Id. at 272. However, when the Board in *Caesar's Palace* examined the facts and circumstances in that case, it found that the employer's need for confidentiality during a drug investigation was a "substantial business justification" that outweighed interference with employees' exercise of their Section 7 rights. Id. In doing so, the Board considered the specific allegations in the case (drug activity, "management coverup and possible management retaliation," and threats of violence) and Respondent's intent to "impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." Id. See also, *Menorah Medical Center*, 362 NLRB 1746, 1767 (2015), enfd. in relevant part, 867 F.3d 1288 (D.C. Cir. 2017) (the Board found the medical center's confidentiality prohibition against discussing incidents under investigation by the peer-review committee was unlawful where there was no evidence or accusation of coercion, fabrication of testimony, or threats of physical harm.

B. Respondent Violated the Act Under the Board's Balancing Test

I find that 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 and is therefore unlawful. See, e.g., *Hyundai America Shipping Agency, Inc.*, above. Even if, under *Boeing*, a blanket prohibition on the sharing of information from investigations could be rendered lawful by a sufficiently weighted justification, the result here would be the same because the record does not establish any such justification. There was no evidence here that Respondent had experienced actual or potential problems with witnesses being harassed or intimidated, evidence being destroyed, false testimony or other false evidence being created, or with anyone otherwise exploiting information from investigations to interfere with those investigations. Pope, Respondent's only witness, who did not interview the employees or issue the directive and rule to Murphy and the other employees, testified that he believed the rule was implemented because Brown complained that people were gossiping about his discrimination case and to prevent harassment.[8] However, in Gray's written ban and email to McAllister, she referenced that she had told "all" officers not to discuss the investigation. Although Respondent complained in his post-remand response that I erroneously dismissed Pope's testimony as hearsay, that is simply not the case. Rather, I found that there was no evidence, including Pope's testimony, that the prohibition here was initially issued after or in response to Brown's complaint that others were gossiping about his case. It is true that Gray told McAllister that she and presumably other of Respondent's representatives went out to investigate "the hotline call we received," and that there is undisputed evidence that Brown filed a discrimination complaint. However, as stated, there was no evidence that Brown complained about being harassed, threatened, intimidated, or even ridiculed by anyone regarding his allegation.[9] Further, in her email to McAllister, Gray did not mention justification for her instruction to all officers other than to infer that it was in relation to a "hotline call."

In support of the complaint in this case, the General Counsel relied in part on the recently overruled (by *Boeing*) analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), as well as the analysis set forth in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015). In its opposition to reopening the record, the General Counsel maintains its reliance on the current Board law set forth in *Banner Estrella*, which has not been overruled by *Boeing*. Consequently, the General Counsel has correctly argued that even under the *Boeing*

[8] Respondent did not call Shuler, Gray, or Gonzalez to testify regarding justification for the rule. Although Pope testified that he was involved with updating handbook rules, there was no evidence that he participated in the prohibition on employees discussing the investigation or underlying incident which involved Murphy and other employees.

[9] There was no evidence that Murphy was the one who allegedly discriminated against Brown. Rather, the evidence indicates that Murphy was the witness to an alleged altercation between the supervisor and Brown.

standard, Respondent violated the Act by promulgating a rule prohibiting employees to talk about a pending investigation.

C. Respondent's Defenses

Respondent, on the other hand, argues that the record shows that its ban on employee discussion of an on-going investigation as well as a completed one does not restrict an individual employee's exercise of Section 7 rights. Respondent asserts that the record demonstrates that the prohibition at issue was made solely for the legitimate business reason of protecting the rights of the employee complaining of discrimination in that instance. Gray's email to Murphy stated that "all are barred from talking during the time of the investigation in any circumstances," and that anyone creating a distraction to the workplace by talking about it could face disciplinary action. On its face, one might interpret that Gray only referred to the investigation at hand. However, I find after considering the email, along with all other evidence, that employees might also reasonably interpret it to preclude such discussions in future investigations. Gray did not tell Murphy that her directive would not apply to other situations which would include other investigations. (GC Exh. 2; Jt. Ex. 4(a) and 4(b).)

Further, Pope's extensive testimony in response to Respondent's counsel's question about "the reasons for the Company's policy on having employees not discuss internal investigations," belies his prior testimony, and Respondent's argument, that this rule against speaking to others about a pending investigation was somehow an isolated incident. More specifically, he explained how Respondent's purpose for this policy was to seek to "have witnesses come forward with unvarnished, untainted, uninfluenced statements" to get to the truth; to comply with the "EEO" desire to see companies perform thoughtful, intelligent investigations; and to ensure that the "Mr. Browns of the world" will not be discouraged from "[coming] forward to make a comment if they know that everybody is talking behind their back." (Tr. 122–124.) This testimony clearly does not reflect a policy limited to the investigation of Mr. Brown's complaint. Consequently, I find that Respondent intended this policy to apply to all internal investigations and especially those involving discrimination complaints.

Respondent also argues that it must follow EEOC rules and guidelines in harassment cases in order to maintain confidentiality by keeping records and other information confidential, and by creating an environment where investigation participants can speak freely. However, similar assertions regarding EEOC (and even some state) guidelines and expectations have been rejected by the Board. See *Hyundai*, above at 873–874. Respondent distinguishes this case from *Banner Health System,* above, slip op. at 2. However, Respondent did not sufficiently justify its rule such that its need for the rule outweighed employees' rights under the Act. Further, I find that Respondent's ban on employee discussions constituted an overly broad confidentiality provision applied to future cases pending investigation, including investigations of a particular type such as those involving discrimination complaints. The Board has cautioned that an employer must not "reflexively impose confidentiality requirements in all cases or in all cases of a particular type." *Banner Estrella,* above at 1110. Moreover, the Board has rejected an employer's justification that the rule was necessary to protect the victim, witnesses and the accused harasser; "to preserve confidentiality consistent with the [EEOC] guidelines and state and federal courts;" and "to avoid potential liability from accused harassers in defamation and other causes of action;" *Hyundai*, above at 873–874.

This case is also distinguishable from *Caesar's Palace*, above, where the Board decided that the respondent's policy was lawful because it involved drug activity, cover ups by management, and evidence of possible witness tampering.

Therefore, I find that under either articulation of the Board's balancing test, under *Banner Estrella* or *Boeing*, Respondent's prohibition on employee discussion of investigations unlawfully restricts employees' Section 7 rights. Accordingly, I find that this rule violates Section 8(a) (1) of the Act.

D. The General Counsel's Plea to the Board

I must note, however, that in the same opposition statement in support of a violation, the General Counsel advocated for the Board to overturn its long-held ruling in *Banner Estrella*. The General Counsel contended that the standard set forth in *Banner Estrella* "could be viewed as unworkable and that it may fail to give appropriate weight to the shared employee and national interests furthered by the maintenance of confidentiality in the course of sensitive workplace investigations." (GC Mot.) The General Counsel further argued against *Banner Estrella's* "single-minded adherence to the notion that its expansive and questionable vision of rights under the NLRA should trump the countervailing federal and national interests reflected in the employment statutes administered by other agencies." (Id.) Finally, the General Counsel asks the Board to reject *Banner Estrella's* central requirement that employers determine a need for confidentiality on a case-by-case basis as impractical and dismissive of an employer's legitimate and substantial need to conduct confidential investigations. Without going into further detail, since the administrative law judge must follow current Board law, I will leave the General Counsel's call for a reversal of *Banner Estrella* to the Board.

CONCLUSIONS OF LAW

By maintaining an unlawful rule prohibiting all employees in its Austin, Texas Samsung Research Center from discussing with each other and anyone else internal investigations, Respondent, Securitas Security Services USA, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must rescind, in writing, the overbroad, unlawful prohibition on employees discussing with each other and anyone else internal investigations, and advise all current employees working in its Austin, Texas Samsung facilities in writing that the unlawful prohibition has been rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Securitas Security Services USA, Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an oral or written rule prohibiting all employees from discussing with each other and anyone else internal investigations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from this Order, rescind, in writing, the prohibition on employees from discussing with anyone internal investigations and notify all employees currently employed at its Austin, Texas facilities that this prohibition has been rescinded.

(b) Within 14 days after service by the Region, post at its Austin, Texas Samsung facilities in Austin, Texas, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 30, 2019

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."