UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lowes Home Centers, L.L.C. v. National Labor Relations Board

No. 20-60472, United States Court of Appeals for the Fifth Circuit (March 15, 2021)

SUMMARY

The Fifth Circuit affirmed the NLRB's decision that Lowe's Home Centers violated Section 8(a)(1) of the NLRA by maintaining an overly broad confidentiality policy that explicitly included "salary information." Applying the *Boeing Co.* framework, the court classified the policy as a Category 3 rule because it could be reasonably construed to restrict employees' rights to discuss wages, and Lowe's justifications did not outweigh this adverse impact. The court emphasized that the policy was not tailored to specific employees with special access to confidential records, making it unlawfully broad.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Davis; Stewart; Dennis
JURISDICTION	Federal
DECIDED	March 15, 2021
DOCKET	20-60472
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petition for review of an order of the National Labor Relations Board
STANDARD OF REVIEW	Legal conclusions reviewed de novo; factual findings reviewed for substantial evidence.
PRECEDENTIAL VALUE	Unpublished
PARTIES	Lowes Home Centers, L.L.C. v. National Labor Relations Board

TOPICS

employment law · administrative law · standard of review · statutory interpretation

PRACTICE AREAS

Labor and Employment Law · Administrative Law

QUESTIONS PRESENTED

1. Whether the Board erred by applying the 'reasonably construe' standard from Lutheran Heritage after Boeing overruled it.
2. Whether the Board erred by failing to consider Lowe's legitimate justifications for the policy.
3. Whether Lowe's confidentiality policy violated Section 8(a)(1) of the NLRA by interfering with employees' right to discuss wages.

HOLDINGS

1. The policy, which explicitly includes salary information as confidential, can be reasonably construed to limit employees' rights to discuss wages under the NLRA, and the Board's conclusion that the policy is unlawful is affirmed.

KEY QUOTATIONS

> *"Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential. Confidential information includes, but is not limited to: · material non-public information; and · proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy."* (at 2)

> *"Under Lutheran Heritage, even when an employer's facially neutral employment policies, work rules and handbook provisions do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity, the Board will still determine that the maintenance of these requirements violates Section 8(a)(1) if employees 'would reasonably construe the language to prohibit Section 7 activity.'"* (at 3)

> *"When a facially neutral rule, reasonably interpreted, would not prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board's inquiry into maintenance of the rule comes to an end. ... Conversely, when a rule, reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. Again, the Board must carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications, and the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7."* (at 4)

> *"Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."* (at 4-5)

> *"Category 3 rules are generally unlawful because they 'would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.'"* (at 5)

FACTUAL BACKGROUND

Lowe's workplace policy prohibited disclosure of confidential information, including salary information. An employee challenged the policy under Section 8(a)(1) of the NLRA, which prevents employers from limiting employees' discussions of their wages. The policy was facially neutral.

PROCEDURAL HISTORY

Employee Amber Frare filed an unfair labor practice claim against Lowe's. The ALJ determined that Lowe's confidentiality policy violated Section 8(a)(1) of the NLRA. Lowe's appealed to the NLRB, which affirmed. Lowe's then petitioned for review in the Fifth Circuit.

DISPOSITION

affirmed

CASES CITED

- The Boeing Co., 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017)
- Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)
- T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 271 (5th Cir. 2017)
- Strand Theatre of Shreveport Corp. v. NLRB, 493 F.3d 515, 518 (5th Cir. 2007)
- J. Vallery Elec., Inc. v. NLRB, 337 F.3d 446, 450 (5th Cir. 2003)
- Asheville School, Inc., 347 NLRB 877, 877 fn. 2 (2006)