Quicken Loans, Inc. *and* Lydia E. Garza. Case 28–CA–075857

June 21, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On January 8, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings,[2] findings, and conclusions as modified, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[3]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent excepts to many of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

[3] We agree with the judge, for the reasons stated in his decision, that the provision of the Mortgage Banker Employment Agreement (MBEA) entitled, "Non-disparagement" is unlawful because employees would reasonably construe its broad prohibitions as encompassing Sec. 7 activity. See *Knauz BMW*, 358 NLRB 1755, 1755 (2012).

In finding the MBEA unlawful regarding nondisclosure of certain personnel information, we agree with the judge that it is significant that Attachment A to the Agreement defines "Proprietary/Confidential Information" as including the following: (1) "non-public information relating to or regarding . . . personnel" and (2) "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses[.]" The Board has found that rules prohibiting employees from disclosing this type of information about employees violate Sec. 8(a)(1) of the Act. See, e.g., *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 533, 535 (2013); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131–1132 (2012); *Costco Wholesale Corp.*, 358 NLRB 1099, 1099–1100 (2012).

We shall modify the judge's conclusions of law, remedy, and recommended Order to conform to the violations found and to the Board's standard remedial language, and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). As explained in the amended remedy, our modifications include revising the recommended Order to require rescission of only those portions of the "Proprietary/Confidential Information" rule found unlawful by the judge. We shall substitute a new notice to conform to the Order as modified.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 2.

"2. The Respondent has violated Section 8(a)(1) of the Act by maintaining the following provisions of the Mortgage Banker Employment Agreement (MBEA):

"1. The term 'personnel' in Attachment A, Paragraph A(a);

"2. The paragraph entitled 'Personnel Information' in Attachment A insofar as it applies to 'personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers' and 'handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses'; and

"3. Section K, Paragraph 2, entitled 'Non-disparagement.'"

AMENDED REMEDY

The judge's recommended Order requires the Respondent to rescind the "Proprietary/Confidential Information" and "Non-disparagement" provisions in their entirety. We agree that the entire "Non-disparagement" provision should be rescinded. With respect to the "Proprietary/Confidential Information" provision, however, the judge's analysis of the rule addressed only certain language in Attachment A, viz. where "Proprietary/Confidential Information" is defined. Accordingly, we shall require the Respondent to rescind only the offending language.

We agree with the judge that the Respondent may comply with our order of rescission by reprinting the MBEA without the unlawful language or, in order to save the expense of reprinting the MBEA, supply its mortgage bankers with handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes the MBEA without the unlawful provisions. Any copies of the MBEA that include the unlawful rules must include the inserts before being distributed to employees. Accord: *Bettie Page Clothing*, 359 NLRB No. 96, slip op. at 2–3 (2013); *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

ORDER

The National Labor Relations Board orders that the Respondent, Quicken Loans, Inc., Scottsdale, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining provisions in attachment A of its Mortgage Banker Employment Agreement (MBEA) that define "proprietary/confidential information" to include the following: (1) "non-public information relating to or regarding . . . personnel" and (2) "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses[.]"

(b) Maintaining MBEA section K, paragraph 2, entitled, "Non-disparagement."

(c) 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) Rescind the following provisions of the MBEA: (1) Attachment A, paragraph A(a) to the extent that it defines "Proprietary/Confidential Information" to include "non-public information relating to or regarding the Company's . . . personnel"; (2) the paragraph entitled, "Personnel Information" in attachment A insofar as it applies to "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses"; and (3) section K, paragraph 2, entitled, "Non-disparagement."

(b) Furnish all current mortgage bankers with inserts for the current MBEA that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised MBEA that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

(c) Within 14 days after service by the Region, post at all of its offices nationwide copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, 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, 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. If 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 mortgage bankers and former mortgage bankers employed by the Respondent at any time since September 5, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

[4] 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following provisions contained in our Mortgage Banker Employment Agreement (MBEA):

1. Attachment A, Paragraph A(a) to the extent that it defines "Proprietary/Confidential Information" to include "non-public information relating to or regarding the Company's . . . personnel[.]"

2. The paragraph entitled "Personnel Information" in attachment A insofar as it applies to "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses[.]"

3. Section K, Paragraph 2, entitled "Non-disparagement."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the following language in the following provisions of our MBEA:

1. Paragraph A(a) of attachment A to the extent that it defines "non-public information relating to or regarding the Company's . . . personnel" as "Proprietary/Confidential Information."

2. The paragraph entitled "Personnel Information" in attachment A of the MBEA insofar as it applies to "personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers" and "handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses[.]"

3. Paragraph 2 of Section K of the MBEA, entitled "Non-disparagement."

WE WILL furnish all mortgage bankers with inserts for the current MBEA that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or WE WILL publish and distribute a revised MBEA that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

QUICKEN LOANS, INC.

Eva Herrera, Esq., for the General Counsel.
Frederick Miner, Esq. (Littler Mendelson, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 13, 2012,[1] in Phoenix, Arizona. The complaint, which issued on September 14 and was based upon an unfair labor practice charge that was filed on March 5 by Lydia Garza, alleges that Quicken Loans, Inc. (the Respondent) has maintained certain overly broad and discriminatory rules in its Mortgage Banker Employment Agreement, in violation of Section 8(a)(1) of the Act.

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

Respondent, which is engaged in providing mortgage loan services, has its main office in Detroit, Michigan, as well as other offices throughout the country, including one in Scottsdale, Arizona, where Garza was employed as a mortgage banker from 2006 to 2011. Respondent employs approximately 1,700 mortgage bankers nationwide. Their job duties include the processing of loan applications, as well as negotiating the terms and interest rate of the proposed loans. The sole issue here is the legality of two provisions contained in its Mortgage Banker Employment Agreement, (the Agreement), which all of its mortgage bankers must agree to be bound by. The allegedly unlawful provisions are "Proprietary/Confidential Information" and "Non-Disparagement."

Section D: Proprietary/Confidential Information

2. You agree that:

(a) You shall hold and maintain all Proprietary/ Confidential Information in the strictest of confidence and that you shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information;

(b) You shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity . . .

* * *

(e) You shall take all necessary precautions to keep Proprietary/Confidential Information secret, private, concealed and protected from disclosure, and shall follow and implement the Company's privacy and security procedures . . .

Attachment A

A. "Proprietary/Confidential Information"—For purposes of this Agreement, "Proprietary/Confidential Information" means: (a) non-public information relating to or regarding the Company's business, personnel, customers, operations, or affairs; (b) non-public information which the Company labeled or treated as confidential, proprietary, secret or sensitive business information . . .

"Proprietary/Confidential Information" includes, but is not limited to, the following categories of information, irrespective of the medium in which it is stored . . . :

. . . .

Personnel Information including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses;

Personal Information Pertaining to Company Executives and Officers including, but not limited to, personal and family information, personal financial information, investment and investment opportunities, background information, personal activities, information pertaining to the work and non-work schedules, contacts, meetings, meeting attendees, travel, home phone numbers, cell phone numbers, addresses, and email addresses;

Section K: Additional Terms and Requirements

2. **Non-disparagement**. The Company has internal procedures for complaints and disputes to be addressed and resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or

[1] Unless indicated otherwise, all dates referred to relate to the year 2012.

> image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

Garza had been employed as a mortgage banker for the Respondent for about 5 years beginning in 2006, when she signed the Agreement. After she resigned that employment on October 18, 2011, she received a letter from Respondent regarding her "continuing obligations to Quicken Loans," stating inter alia:

> As a reminder, some of the terms contained in your Employment Agreement remain in effect despite your voluntary departure from Quicken Loans. Such ongoing obligations include:
>
> 1. Your continuing obligation to *keep secret all Proprietary/Confidential Information.* This includes, but is not limited to, information relating to proprietary software, business methods, client information, employee information, financial information, or any other internal information about Quicken Loans.
>
> 2. Your obligation to *return all Company Property and Information and to delete any residual Information stored on any of your personal devices or other electronic storage means.* Company Property and Information includes, but not limited to, computers, monitors, pagers, lists, reports, employee handbooks, manuals, business cards, diskettes or any other Quicken Loans equipment and material. . .
>
> 3. Your continuing obligation *to refrain from using any work product* outside of Quicken Loans, even if you created it, invented it or developed it while working here.
>
> 4. Your continuing obligation to *refrain from contacting or soliciting Quicken Loans' employees or clients, for any reason*, even if you cultivated the clients while working here.
>
> 5. Your continuing obligation to *refrain from engaging in a competing line of business or working for a competing company for a period of nine months after your date of separation.*

The letter ends by saying that if the recipient has any questions "pertaining to your continuing obligations under your employment agreement," he/she should call the Respondent for answers.

Garza testified that shortly after she left the Respondent's employ, she and five other former employees of the Respondent were sued by the Respondent for an alleged violation of the no contact/no raiding and the noncompete provisions of the Agreement. Matthew Stoffer, site vice president for the Respondent's Scottsdale Web Center, where Garza was employed, testified that all employees employed as mortgage bankers are required to sign the Agreement. He also testified that to his knowledge, no employee of the Respondent has ever been disciplined for violating the Agreement.

III. ANALYSIS

The issues here are whether the Respondent's Proprietary/Confidential Information Rule, Section D, and the Non-Disparagement Rule, Section K, contained in the Agreement, which Garza and all mortgage bankers employed by the Respondent were required to sign, violates Section 8(a)(1) of the Act. Counsel for the General Counsel alleges that the restrictions contained in these two provisions unlawfully restrict employees in the exercise of their Section 7 rights. Respondent defends that because of the time and expense spent in educating and training its mortgage bankers, it requires them to sign the Agreement in order to protect its investment in them, as well as to protect the confidential and proprietary information that they are entrusted with.

The line between lawful and unlawful restrictions is very thin and often difficult to discern. The two principal Board cases relevant to this issue are *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *Lafayette Park*, the Board stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." The test enunciated in *Lutheran Heritage* is:

> Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon the showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Proprietary/Confidential Information rule requires employees to maintain this information "in the strictest of confidence" and "you shall not disclose [it] to any person, business or entity." The Agreement defines proprietary and confidential information as "non-public information relating to . . . the Company's business, personnel . . . all personnel lists, personal information of co-workers . . . personnel information such as home phone numbers, cell phone numbers, addresses and email addresses." There can be no doubt that these restrictions would substantially hinder employees in the exercise of their Section 7 rights. In complying with these restrictions, employees would not be permitted to discuss with others, including their fellow employees or union representatives, the wages and other benefits that they receive, the names, wages, benefits, addresses or telephone numbers of other employees. This would substantially curtail their Section 7 protected concerted activities. The Proprietary/Confidential Information Rule contained in the Agreement therefore violates Section 8(a)(1) of the Act. *NLS Group*, 352 NLRB 744, 745 (2008); *Security Walls, LLC*, 356

NLRB 87 (2011).

The remaining issue is whether the Non-Disparagement provision contained in Section K also violates Section 8(a)(1) of the Act. That provision states that the employees will not ". . . publicly criticize, ridicule, disparage or defame the Company or its products, services, policies . . . through any written or oral statement . . ." In *Albertson's, Inc.*, 351 NLRB 254, 259 (2007), the Board stated: "In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation." There can be no doubt that an employee reading these restrictions could reasonably construe them as restricting his rights to engage in protected concerted activities. Within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support. A reasonable employee could conclude that the prohibitions contained in the Agreement prohibited them from doing so. The Non-Disparagement provision therefore violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The provisions and restrictions contained in Section D, Proprietary/Confidential Information, and Section K2, Non-Disparagement, of Respondent's Mortgage Banker Employment Agreement, violate Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices by promulgating and maintaining the Proprietary/Confidential and the Non-Disparagement rules in its Mortgage Banker Employment Agreement, I recommend that it be ordered to post the attached notice and to notify all of its mortgage bankers, nationwide, that it will rescind these provisions. Respondent may comply with this Order by reprinting the Mortgage Banker Employment Agreement without these provisions or, in order to save the expense of reprinting the Agreement without these provisions, Respondent may supply its mortgage bankers either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules regarding Proprietary/Confidential and Non-Disparagement rules. *Carney Hospital*, 350 NLRB 627, 631 (2007).

[Recommended Order omitted from publication.]