

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

TEXAS DENTAL ASSOCIATION	§	
	§	
and	§	
	§	
NATHAN CLARK, an Individual	§	Cases Nos. 16-CA-25349
	§	16-CA-25445
and	§	16-CA-25383; and
	§	16-CA-25840.
BARBARA JEAN LOCKERMAN, an Individual	§	
	§	
and	§	
	§	
PATRICIA ST. GERMAIN, an Individual	§	

RESPONDENT’S REPLY TO GENERAL COUNSEL’S ANSWERING BRIEF

TO THE NATIONAL LABOR RELATIONS BOARD:

Respondent Texas Dental Association (“TDA”) submits its Reply to General Counsel’s Answering Brief to Respondent’s Exceptions and, in support of its request that its exceptions be sustained, would show the Board the following:

- I. The record evidence and legal authority do not support the judge’s conclusions and findings.**
 - A. Respondent’s exceptions to factual findings and legal determinations should be sustained.**
 - 1. Exceptions 1, 20-22: Lockerman was not discharged for refusing to commit an unfair labor practice because TDA never at any time asked her to commit an unfair labor practice. (Reply to Response II.C.3).**

The judge’s finding that Lockerman, a supervisor, was discharged for refusing to commit an unfair labor practice, *Decision* at p. 11, lines 13-15, is not supported by substantial evidence, nor is it supported by the controlling law. General counsel highlights this error by stating that

the facts in this case “may be analogized” to cases in which a supervisor was discharged for refusing to engage in surveillance of protected activity, for refusing to identify union activists, or for refusing to fill out termination slips that supported pretextual reasons for discharging employees. General Counsel’s Answering Brief to Respondent’s Exceptions (“Response”) at 25-26. The problem with this “analogizing” is that none of the determinative facts in those cases – or even any similar facts – are present in this record, which general counsel repeatedly misstates by asserting that Lockerman was discharged for failing to disclose the identity of those behind the petition. Response at 9 (Lockerman was discharged because she “failed to disclose her knowledge of the e-mail communications *and their authors* in violation of the May 17 directive.”); at 26 (“Lockerman, *by refusing to disclose the identity...* also engaged in protected activity by refusing to commit an unfair labor practice.”) (emphasis added).

The only evidence general counsel cites is Ms. Linn’s testimony, Response at 9 (*citing* 1R-83 through 84), but the relevant testimony there is that the termination statement read to Ms. Lockerman said she had “knowledge of the events leading up to the annual session and petition and the anonymous emails, and failed to discuss your knowledge with [Ms. Linn],” which was insubordinate. R1-83:4 through 84:12. Nothing in this testimony suggests that Lockerman was asked to identify the involved employees, nor that she was discharged for refusing to do so.

General counsel’s only other record citation is to Lockerman’s speculation that she was terminated because she did not identify the employees involved in the petition. Response at 9 (*citing* 1R-231, 242, 243). Lockerman’s speculation, however, is just that. The fact is that she was never asked to identify the employees involved and the directive from Ms. Linn was specifically aimed at identifying what the employees’ complaints were. GC-9 (“In order to allow

one more opportunity to discuss any concerns within appropriate channels, I expect that anyone who has participated in anyway in these anonymous communications to call or e-mail me....”).

It is indisputable that an employer can discharge a supervisor for participating in union activities and can question a supervisor concerning its employees’ complaints about working conditions. For instance, in *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), *enf’ sub nom.*, *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (1st Cir. 1982), the Board affirmed a judge’s finding that questioning a supervisor concerning why the employees were unhappy and instructing her to report union activity did not violate the Act. 261 NLRB at 868. What did violate the Act, the judge found and the Board affirmed, was terminating the supervisor for refusing to disclose the identities of employees who had attended union organization meetings. *Id.* at 870-71. General counsel’s attempts to bring this case within that and similar holdings fails because it is undisputed that Lockerman was never asked a single question concerning the employees’ petition, including the identities of those involved. In fact, she testified that she was terminated without discussion. R1-219:18 through 220:25.

To find in favor of a discharged supervisor, the Fifth Circuit requires proof the supervisor was fired for refusing to commit an unfair labor practice. *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1315-16 (5th Cir. 1994). There is no such proof here. All that Lockerman refused to do was respond to Ms. Linn’s directive. Because she refused to respond, TDA never asked Lockerman either the kinds of questions that *Howard Johnson* found are permitted – what the employees were unhappy about – or the kinds that are not permitted – the identity of union (or, here, protesting) employees. Unless the Board is willing to hold that merely requiring a supervisor to meet with her own supervisor to discuss employee concerns is an unfair labor practice, TDA’s discharging Lockerman did not violate the Act.

Finally, general counsel fails to even address another critical point made in Respondent's opening brief: supervisors do not have rights protected by the Act. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, *404, 1982 WL 90211, *rev. denied sub nom. Automobile Salesmen's Union Local 1095*, 711 F.2d 383 (D.C. Cir. 1983). The discharge of a supervisor is unlawful only when it interferes with employees' § 7 rights. The only way the termination of a supervisor can interfere with, restrain, or coerce non-supervisory employees in the exercise of their § 7 rights is if the employees know that the supervisor was terminated for refusing to commit an unfair labor practice. *See Russell Stover Candies, Inc. v. National Labor Relations Bd.*, 551 F.2d 204, 208 (8th Cir. 1977); *see also, General Engineering, Inc. v. NLRB*, 311 F.2d 570, 574 (9th Cir. 1962), *disagreed with on other grounds in N.L.R.B. v. Raytheon Co.*, 398 U.S. 25 (1970). There is no such evidence here. Not a single employee testified to having known why Lockerman had been discharged (or even that she had been discharged). Absent such evidence, Lockerman's discharge cannot have interfered with, restrained, or coerced non-supervisory employees in the exercise of their organizational rights, *Russell Stover*, 551 F.2d at 208, and thus the ALJ erred in finding that TDA's discharging her violated the Act.

2. Exceptions 3, 13, 14: Respondent's electronic communications policy was not disparately enforced. (Reply to Response II.C.2).

The judge erred in finding that TDA's electronic communications policy was disparately enforced because there is no evidence that Respondent allowed a similar use of its property while discharging Clark for his use. TDA's electronics communications policy permits employees to use its electronics communication system for "reasonable personal purposes ... provided such use does not interfere with ...Texas Dental Association's orderly work flow." GC-4A, p. 18. The policy warns that "improper use of the E-mail system...will not be tolerated. Employees who violate this policy are subject to disciplinary action, up to and including discharge." *Id.*

The addendum to the policy also states, “Electronic communications may not be used to create any ... disruptive messages....” GC-4b at 2.

It is undisputed that Clark’s use of TDA’s confidential e-mail address list and his e-mailing the petition to Dr. Baxley and others disrupted TDA’s business. As Dr. Black, the immediate past president, testified, “that stopped the business of the house... and was very disruptive to the organization.” R1-259:20 through 260:7. Dr. May confirmed the disruption. R2-231:14 through 322:2. In addition, Dr. Black testified that the e-mails later sent to the board and selected members of the TDA “were very disruptive. They were very inflammatory, and they were not true.” R1-260:12-20.

Although general counsel made exhibits of personal e-mails among various TDA employees as well as routine business e-mails between TDA employees and the TDA board, GC-28 through GC-32 and GC-39 through GC-45, none of these e-mails involve communications to the TDA board or TDA members that were “disruptive” or “inflammatory” and thus in violation of TDA’s electronic policy. All of the e-mails in evidence either concern personal communications between employees or routine business communications between TDA employees and members of management or TDA board members. Nor did the general counsel present any evidence that these e-mail exhibits disrupted TDA business, as had the e-mails sent by Clark. Thus, general counsel failed to make out even a *prima facie* case that the policy’s prohibition of “disruptive messages” was selectively applied to Clark’s actions.

Under the standard established in *The Guard Publishing Co. d/b/a the Register-Guard and Eugene Newspaper Guild*, 351 NLRB 70, 2007 WL 4550458 at *11-12 (December 16, 2007) (“*Register Guard*”), Clark’s discharge was not the result of TDA’s “selectively and disparately” applying its policy to § 7 activity. As Ms. Linn testified, she would have discharged

any employee who used TDA's confidential email list – as Clark had – to disrupt the annual meeting. R2-355:1-4. That Ms. Linn would not have discharged an employee for sending a personal message using the confidential emails, Response at 22-23, is irrelevant; such a message would not have violated the policy by disrupting TDA's business. Thus, *Register Guard's* holding controls: “unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status....” The Act, however, does not prohibit an employer from discriminating based on non-Section 7 grounds, *id.* at 12, which is what TDA did here.

3. Exceptions 1, 2, 16-18: Clark did not engage in protected activity. (Reply to Response II.C.1).

The crucial question is whether Clark was discharged for engaging in “concerted activities for the purpose of ... mutual aid and protection,” 29 U.S.C. § 158(a)(1); *Bob Evans Farms, Inc.*, 163 F.3d 1012, 1021 (7th Cir. 1998), which has been interpreted to mean that the underlying dispute must relate to the terms and conditions of work. *NLRB v. Washington Alum. Co.*, 370 U.S. 9, 17 (1962). Here, once the building conditions claim is disregarded, as it ought to be, since it so obviously is a recent creation, it is clear that Clark's concern was what he believed to be financial improprieties, a view no one else shared; Kim's concern was the Katherine Simms issue, a matter involving only supervisors; and St. Germain's concerns – aside from the Simms' issue – were different still. None were concerned about the same issues, much less with issues that affected their terms and conditions of work. For this reason, the judge's finding that the employees were engaged in *protected* concerted activity is in error.

4. Exceptions 4 and 10; 7; 9; 11; 12 and 19: The record does not support the judge's factual findings concerning credibility. (Reply to Response II.B and II.C.4).¹

TDA agrees that an administrative law judge's credibility resolutions will not be overturned unless the clear preponderance of all the relevant evidence demonstrates that the administrative law judge is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951), which is just what the relevant evidence demonstrates here.

Clark's testimony that he did not draft the petition on his TDA computer is not credible² because the forensic analysis, GC-11 – which the General Counsel put into evidence – revealed that fragments of the petition were saved in “snapshots” taken *at different times* by the system. GC-11, paras. 11-15. Clark's testimony that all he did was open the petition on his TDA computer, 1 R-167, is not credible because he does not explain how the petition could have been available on his TDA computer to be opened unless he had saved it there.

Clark's testimony that building issues were part of the petition, R1-183:9-13, is not credible³ because these complaints were not made in *any* contemporaneous document, including the petition itself, GC-8; Clark's proposed resolution and letter transmitting the petition to Dr. Baxley, GC-34; Clark's actual charge (filed on December 12, 2006), GC-1(a); or his Application for Unemployment Benefits, GC-12. Nor do these documents mention his later claim that an anonymous employee was concerned about sexual harassment or time card alteration, issues that only appeared once Clark realized that, to succeed on his NLRB claim, the petition had to concern terms and conditions of his employment and not merely the employees' dissatisfaction with the termination of a supervisor, Katherine Simms.

¹ Although Section II.B references the judge's credibility determinations in its title, it does not discuss Respondent's specific exceptions, only some of which are addressed in II.C.4. Therefore, this section of the Reply responds only to general counsel's specific arguments.

² Exceptions 4, 10.

General counsel notes that Exception 9 challenges the judge's finding that the petition was sent only to members of the Board of Directors. Upon review of the evidence, this is correct.

With respect to Exception 11, general counsel states that the record supports the judge's conclusion that Ms. Linn's discharging Lockerman, who clearly ignored a directive to discuss the employees' concerns, but not a supervisor merely suspected of the same thing, confirms the employees' perception of unfairness. Response at 30. The fallacy in this argument is two-fold: first, it is not "unfair" to discharge a supervisor who actually *has* ignored a direct order but not discharge one only suspected of doing so. In the former instance, the insubordination is patent; in the latter, it is not. Second, as discussed *supra*, there is no evidence that any employee (other than Lockerman herself) knew that she was discharged, nor knew that the other supervisor was under suspicion. In the absence of such evidence, these unrelated decisions confirm nothing.

Finally, with respect to Exceptions 12 and 19, which object to the judge's error in finding that there was no support for Ms. Linn's conclusion that in approaching the auditor when no audit was in process, 1R-188:4-23, Clark and St. Germain were attempting to find out more than how to code the settlement, the evidence is that the settlement had just occurred; Clark was in communication with Baxley (who was intensely concerned with Ms. Simms' discharge), 1R-125:4-19, 127:15-21, 259:8-14; and Clark testified that no matter what his supervising CPA told him, in his view it was unethical to code the settlement as wages. R1-296:25 through 297:3. It strains credulity to believe that Clark and St. Germain jointly called the outside auditor to ask only, "how do you code this settlement," and that question and that question alone prompted the auditor to call Ms. Linn and tell her they were seeking more information than just how to code it. R2-360:7-24, 361:3-16.

³ Exceptions 5, 15, 16, 18.

II. Respondent's exceptions are not procedurally flawed. (Reply to Response II.A).

General counsel first objects that Respondent's initial filing, which exceeded 20 pages, did not contain a subject index with page reference and a table of authorities and that Respondent's argument and authorities were general and did not cross-reference the exceptions, as required by the rules. Respondent now has supplied the Board (and the parties) with the cover page, table of contents, and table of authorities referencing the exceptions that were inadvertently omitted from the initial filing. Respondent submits that this correction satisfies the rules and that the rules do not demand so harsh a penalty for a technical omission as the general counsel would impose.

General counsel also objects that Respondent argued that Lockerman should not be reinstated without specially excepting to the relief ordered, although that exception is subsumed within Exception 1. The problem with reinstating Lockerman, however, goes beyond the argument advanced in Respondent's opening brief (which will not be repeated here). The problem is that when she was discharged, her duties were assigned to another supervisor and her position was eliminated, leaving no comparable position in which she could be placed.

III. Request for Relief

For these reasons, Respondent respectfully requests that the Board sustain these exceptions and deny enforcement of the ALJ's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June, 2008 a true and correct copy of the above was filed electronically through the Board's e-filing system. In addition, the original and four paper copies were sent regular mail to:

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