

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**FRESENIUS USA MANUFACTURING, INC.,
Respondent,**

Case No. 2-CA-39518

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445,
Charging Party.**

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
COUNSEL FOR THE ACTING GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION**

**Dated at New York, New York
This 10th day of November, 2010**

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Counsel for the Acting General Counsel (“General Counsel”) submits this Reply to Respondent’s Opposition to General Counsel’s Exceptions to the Administrative Law Judge Decision (“Respondent’s Opposition”).¹ Respondent’s Opposition is hampered by assertions unsupported in the record and mischaracterizations of the record evidence, as set forth in further detail herein.

A. Respondent’s References, Throughout its Brief, to Purported Concerns of Title VII Liability are Unsupported by the Record

In its Opposition, Respondent repeatedly asserts that it investigated Mr. Grosso’s conduct and disciplined him for that conduct out of concern for its potential liabilities under Title VII of the Civil Rights Act of 1964 and applicable state anti-discrimination law. (Resp. Opp., p. 2, 10, 21, 30). Respondent similarly asserts that its purported managerial concern for avoiding liability for workplace harassment should outweigh Grosso’s Section 7 rights. (Resp. Opp., p. 10). Such assertions disregard the fact that there is no record evidence that Respondent had any such concerns, and furthermore, fall far short of Respondent’s obligation under Board law to demonstrate through record evidence that it had “reasonable grounds for determining that it had to remove or discipline [the discharged employee] in order to avoid liability under Title VII.” *St. Pete Times Forum*, 342 NLRB 578, 579 (2004). (See also GC Exc., p. 35-36). This showing also requires consideration of Title VII law, and as in *St. Pete*, it is worth noting here that “even where an employee has been shown to have sexually harassed a co-worker, Title VII does not necessarily require the employee’s discharge, so long as the employer takes reasonable action to protect the complainant from further harassment.” 342 NLRB at 579, n.8 (citing *Baskerville v.*

¹ All references herein to General Counsel’s Exhibits will be identified as “GC Ex. ___”; references to Respondent’s Exhibits as “Resp. Ex. ___”, references to the hearing transcript as “Tr., ___”, references to the ALJ Decision as “ALJD ___”; references to General Counsel’s Exceptions as “GC Exception ___”, references to General Counsel’s Brief in Support of Exceptions as “GC Exc., ___); and references to Respondent’s Brief in Support of Opposition to General Counsel’s Exceptions as “Resp. Opp., ___).

Culligan International Co., 50 F.3d 428, 432 (7th Cir. 1995)). In any event, Respondent has failed to make any such legal or factual showing here.

Respondent's reliance (Resp. Opp., p. 43) on the D.C. Circuit's decision in *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.* is misplaced. 253 F.3d 19, 27 (D.C. Cir. 2001) (certain NLRB restrictions on employer policies may impede an employer's ability to insulate itself from Title VII liability and thus "place it in a catch 22"). These statements have no bearing here because that case concerned the very different issue of whether an employer's issuance of a broad rule prohibiting harassment was, in and of itself, a violation of Section 8(a)(1). In holding that mere promulgation of the rule did not violate the Act, the court explicitly "recognize[d] that the uneven or partial application of a rule against abusive and threatening language could constitute an unfair labor practice if directed against employees seeking to exercise their statutory rights." *Id.*, 253 F.3d at 27-28. Indeed, in *St. Pete Times Forum*, the Board itself explicitly distinguished the *Adtranz* decision in concluding that the discharge of a union supporter based on purported Title VII concerns was unlawful. 342 NLRB at 579.

Moreover, Respondent's discussion of Title VII law (Resp. Opp., p. 30, 41-44) in its Opposition Brief is the first time that Respondent has proffered such arguments as a matter of fact or law: there is not a single reference in the transcript or in Respondent's Post-Hearing Brief to the Administrative Law Judge to any determination – reasonable or not – that Grosso's conduct might subject Respondent to potential Section VII liability, nor is there any citation to Title VII case law or even to the *Adtranz* decision on which Respondent now relies. Indeed, Respondent does not cite to any such record evidence, and the closest it comes, Resp. Opp., p. 31, n.24, falls far short of the showing required by the Board in *St. Pete Times Forum*. Notably, Respondent's references to its own EEO policies cannot serve to satisfy this burden. As the D.C.

Circuit observed in *Adtranz*, an employer may lawfully *promulgate* a rule in order to comply with its Title VII obligations, but an employer’s *enforcement* of that rule “could constitute an unfair labor practice if directed against employees seeking to exercise their statutory rights.” *Id.*, 253 F.3d at 27-28. Thus, it is insufficient simply to rely its own policies, without any record evidence that Respondent’s enforcement of its policies here – specifically, as the basis for discharging Mr. Grosso – was specifically required by Title VII law. Finally, as explained in General Counsel’s Exceptions (GC Exc., p. 36, n.26), Respondent may not now argue that its discussions with counsel constitute record evidence of concern for Title VII liability, while refusing to put the substance of those discussions into the record. (Resp. Opp., p. 42, n.29, n.30). The substance of conversations withheld from the record on the basis of privilege cannot be imagined, conjured, or presumed to constitute evidence satisfying Respondent’s burden.

B. Respondent’s Opposition to General Counsel’s *Atlantic Steel* Arguments Repeatedly Mischaracterizes the Record Evidence

Respondent refers to General Counsel’s argument that Grosso wanted employees to read specific articles in the Union newsletters, asserting that such argument is “complete conjecture” because Grosso never testified that he read any of the contents of the newsletters. (Resp. Opp., p. 3). Respondent further asserts that the ALJ found that Grosso did not read the contents of the newsletters. (*Id.*). In fact, there was no testimony either way as to whether Grosso read the newspapers, and the Judge never found that Grosso did not read the newspapers – and Respondent fails to cite to a place in the ALJD in which the Judge purportedly made such a finding. Far from conjecture, General Counsel’s argument is based on Grosso’s credited testimony that he wanted his coworkers to read the newsletters, and specifically, that he wanted them to read a particular article about the Union campaign at Fresenius. (Tr., 262:16-18, 265:21-265:11). Essentially, Respondent now asks the Board to discredit Grosso’s statement that he

wanted his coworkers to read this article. In any event, there is no dispute – and the ALJ specifically found – that Grosso “wrote his comments on union newsletters with the purpose of getting employees to not only read the papers but also to support the Union in the upcoming election.” (ALJD, p. 21).

Respondent’s assertion that Grosso’s testimony at trial is somehow inconsistent with his contemporaneous explanation for his activities – that he was “looking out for the little people” – is without merit; these explanations are by no means inconsistent. (Resp. Opp., p. 4). Moreover, the Judge credited Grosso’s explanation that his goal was to encourage his coworkers to support the Union (ALJD p. 20, ln 34-40), and thus Respondent is improperly attacking the Judge’s credibility findings.

Respondent is without base in its implication that General Counsel dishonestly omitted from its Exceptions Brief facts related to the female employees’ complaints about the newsletters. (Resp. Opp., p. 5-6). In fact, General Counsel specifically stated that it accepted the Judge’s recitation of the facts unless otherwise noted (GC Exc., p. 6), and in any event, General Counsel specifically objected and excepted to the admissibility of the testimony that Respondent now claims General Counsel has “conveniently neglected”. (GC Exception 1; GC Exc., 25-26).

Respondent mischaracterizes the record testimony of Jason Tyler, its HR Director, who made the decision to terminate Grosso. (Resp. Opp., p. 7). Tyler testified that, consistent with his written termination letter, he decided to terminate Grosso for violations of the company’s harassment and EEO policies. (GC Ex. 5; Tr., 77:21-78:25). Notwithstanding this clear evidence and testimony, Respondent now contends that because Tyler testified that he consulted the Employee Handbook (which contains a variety of personnel policies), he somehow also

relied on the sexual harassment policy contained therein – an assertion clearly at odds with the record evidence. (Resp. Opp., p. 7).

Respondent's challenge to General Counsel's assertion that "Respondent was aware ... that the newsletter comments were related to the Union and the decertification election" is without merit. (Resp. Opp. P. 7-8, n.4). While Tyler admitted only to being aware that the comments were written on a Union newsletters, other managers involved in the investigation leading to Grosso's discharge testified that they understood that the comments related to the election. (Tr., 81:15-23; *see also* GC Exc., p. 8).

Respondent is not supported by the record in asserting that the female employees complained about the newsletter comments on both September 10 and September 21 because the company was not adequately responding to their concerns. (Resp. Opp., p. 13). Respondent fails to cite any record evidence for this assertion and, in fact, there was no record testimony about why the women purportedly made complaints on these two separate occasions. In contrast, General Counsel has asserted that the record evidence concerning these two sets of complaints is riddled with inconsistencies supporting a finding of pretext and animus under the *Wright Line* analysis. (*See* GC Exc., p. 37-39).

Respondent is incorrect in asserting that "there is no record evidence 'RIP' conveys anything other than a connotation of death in its regular usage." (Resp. Opp., p. 19). There is indeed record evidence that this phrase does not convey a threat and is understood in a non-literal sense. (*See* GC Exc., p. 21).

Respondent's attempt to distinguish *AT&T Broadband*, 335 NLRB 63 (2001), fails, most notably based on Respondent's effort to rely on facts unsupported by the record. (Resp. Opp., p. 20). First, Respondent's assertion that, during the investigation, Grosso never denied the fact

that RIP was a threat is irrelevant given the objective nature of the test, as well as misleading given the fact that Grosso was never asked during the investigation whether he intended the phrase as a threat. Second, and as stated above, Respondent's attempt to characterize Grosso's explanation that he was "looking out for the little people" as inconsistent with his hearing testimony is without merit.

Respondent's assertions about the standards of conduct at the Chester facility are unsupported by the record. Respondent's allusion to the Judge's credibility findings concerning its witnesses disregards the record evidence that those credited witnesses gave testimony that discredited other Respondent witnesses and, furthermore, that those witnesses gave testimony that profanity and vulgarity were used in the facility. (*See* GC Exc., p. 24-25, 34-35). Moreover, Respondent relies on the fact that it presented eleven witnesses at trial, in contrast to the three witnesses presented by General Counsel. (Resp. Opp., p. 23). However, Board law is clear that credibility determinations do not turn on the number of witnesses presented by a party.

C. Respondent's Opposition to General Counsel's *Wright Line* Arguments Mischaracterizes the Law and the Record Evidence

Respondent's attempt to argue that General Counsel must present direct evidence of animus on the part of the decision-maker in order to make a prima facie case under *Wright Line* is flatly incorrect as a matter of law, and unsupported by the cases cited by Respondent. (Resp. Opp., p. 32-33). The proposition cited by Respondent in *Sunrise Health Care*, 334 NLRB 903 (2001) comes from the ALJ decision and was not adopted by the Board; the finding in *Alexian Brothers Medical Center*, 307 NLRB 389 (1992), was based on the record evidence in that case and not on any general principles about imputing animus to a decision-maker.

Respondent argues that the "Don't be a dick" sticker was not analogous to the newsletter comments because it was not displayed in the warehouse. (Resp. Opp., p. 36; *see also* Resp.

Opp., p. 26). However, the credited testimony about the sticker illustrates that it was arguably more deserving of discipline because the sticker was on a piece of equipment brought into customer's facilities and homes. (ALJD p. 17, ln 20-39; *see also* GC Exc., p. 34-35). Moreover, the credited testimony establishes that the piece of equipment on which the sticker was placed was kept in the warehouse. (*Id.*).

Contrary to Respondent's attack on General Counsel's professionalism and integrity, Respondent cannot cite to any record evidence contradicting General Counsel's statement that there is no evidence that dishonesty was an independent ground for Grosso's discharge. (Resp. Opp., p. 36). Instead, Respondent cites to evidence that Grosso was terminated for both his comments and for dishonesty, but Respondent does not and cannot cite to any evidence that Grosso would have been terminated even if he had not written the newsletter comments. (Resp. Opp., p. 36-37 (citing Tr., 78:24-25 ("The reason for his discharge were these three specific [comments] as well as the dishonesty in the investigation"))).

D. Respondent's Opposition to General Counsel's Arguments about an Appropriate Remedy Mischaracterizes the Record Evidence

Respondent's assertion that an intranet posting is not appropriate in this case is inconsistent with recent Board law. (Resp. Opp., p. 49). The Board has recently held that an electronic posting is appropriate where a respondent customarily communicates with its employees through electronic means, *J&R Flooring, Inc.*, 356 NLRB No. 9 (2010), as is clearly the case here. (*See* GC Exc., p. 41). To the extent that Respondent has the technical capability of limiting dissemination of the electronic posting to the employees in the Chester Facility, General Counsel would not object to such a limitation to the remedy.

E. Conclusion

For the reasons set forth above, the undersigned respectfully requests that the Board reverse the ALJ on the findings and conclusions asserted in General Counsel's Exceptions to the Administrative Law Judge Decision, and issue an order including an intranet posting, compound interest, and any and all other appropriate remedies.

Dated: November 10, 2010
New York, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Julie Y. Rivchin". The signature is fluid and cursive, with a large initial "J" and a long, sweeping tail.

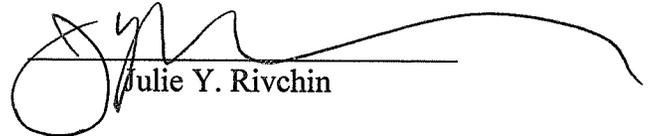
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CERTIFICATE OF SERVICE

This is to certify that on November 10, 2010, I caused the foregoing Reply Memorandum of Law in Support of General Counsel's Exceptions to the Administrative Law Judge Decision to be served, via electronic mail, addressed as follows:

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Dated this 10th day of November, 2010