

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCKHEED MARTIN INFORMATION
SYSTEMS & GLOBAL SOLUTIONS, A
SEGMENT OF LOCKHEED MARTIN
CORPORATION

Case 4-CA-37627

and

RICHARD POWER, an Individual

Elana R. Hollo, Esq., for the General Counsel.

Matthew Coyle, Esq. (Lockheed Martin Corporation, Bethesda, Maryland),
for the Respondent.

Ronald H. Surkin, Esq. (Gallagher, Schoenfeld, Surkin, Chupein & DeMis, Media, Pennsylvania)
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 12 and 13, 2011. Richard Power filed the charge in this matter on August 16, 2010. The General Counsel issued his complaint on October 28, 2010. The General Counsel alleges that Respondent terminated Power on February 18, 2010 in retaliation for concerted complaints Power and others had made regarding changes in their work schedules, in violation of Section 8(a)(1) of the Act.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, provides computer software support, primarily to the U.S. Government, from its facility in King of Prussia, Pennsylvania.² Respondent annually purchases and receives goods valued in excess of \$50,000 at this facility directly from locations outside of Pennsylvania. 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.

¹ The General Counsel's motion to correct the transcript, as set forth in an attachment to his brief, is granted.

² The location of the facility is also described as Valley Forge, Pennsylvania.

II. Alleged Unfair Labor Practices

Richard Power worked for Respondent and its predecessors at Respondent's King of Prussia, Pennsylvania facility from May 1986 until February 18, 2010. Respondent terminated his employment on the latter date. At that time Power's title was Electrician Maintenance Specialist. His performance appraisals for the two years prior to his termination were very favorable. Other than a one-week suspension in 2007 for conduct unrelated to this case, the record establishes that Power was a good employee.

At the time of his termination, Power worked on a maintenance crew in Building 100 of Respondent's King of Prussia facility. His immediate supervisor was Ray Helverson. Helverson reported directly to John Keevill, Respondent's Construction and Maintenance Manager. Prior to the fall of 2009, three members of this crew, Power, Earl Olinger and Jeff Braus, had been working a schedule of four ten-hour days each week for some time.

In October 2009, Keevill held a meeting with these employees and informed them that Respondent was considering changing their schedules to either 5 eight-hour days (5/40) or 80 hours in 9 days every two weeks (9/80). Keevill testified that the change in schedules was necessary in part because his maintenance department lost 8 employees due to a reduction in force in the fall of 2009.

On January 6, 2010, Keevill emailed Power to inform him that starting on January 11, 2010, he would be working either a 9/80 or 5/40 schedule. At some point, Keevill indicated to his crew that the initiative for the change in their schedules was coming from Respondent's human relations department. On Thursday, January 7, 2010, Power sent an email to Doreen Dwyer, a human resources specialist at the facility, requesting a meeting with her. Power, Olinger, Braus and Helverson met with Dwyer that same day. Power, Olinger and Braus strongly objected to the change in their work schedules. Helverson supported their position. Dwyer told the crew that it didn't matter to her what schedule they worked but that Keevill wanted the crew on a different schedule. She promised to speak to Keevill about the matter and did so.

Afterwards, Keevill held another meeting with the crew. He was angry with the crew because as a result of their meeting with Dwyer, she was apparently upset with him for saying that she was behind the schedule change. As the result of the crew's meeting with Dwyer and Dwyer's conversations with Keevill, Respondent did not implement the change in the crew's work schedules on January 11, as scheduled. However, it did so in March 2010, after it had terminated Richard Power.

On Friday, January 8, 2010, Power's supervisor, Ray Helverson, asked Power to help another maintenance employee, Lonnie Stroble, move a large refrigerator out of the Building 100 cafeteria. Power and Stroble moved the refrigerator out to a loading dock. Stroble took the refrigerator to a recycling/scrap yard. Scrap yard employees gave Stroble \$83 in cash in exchange for the refrigerator. When he returned to Building 100, Stroble put the \$83 in his locker.

On Monday, January 11, John Keevill asked Helverson if the refrigerator had been scrapped and if so, was any money received for it. Helverson asked Stroble for the money, but Stroble was allowed to leave work that day because he was ill. The next day, Tuesday, January 12, 2010, Stroble gave the money to Richard Power who took it to Helverson, or Stroble took the money to Helverson himself. Helverson took the \$83 to George White, a rank and file

employee who is responsible for recycling and scrap recovery in Building 100, and placed the money on White's desk.

5 Shortly thereafter, Power entered White's office and left White's office with \$43, leaving two twenty dollar bills on White's desk. There is conflicting testimony as to whether Power simply picked the money up off White's desk or whether White handed it to him. There is also conflicting testimony about what Power said to White. I believe the differences in the accounts of White and Power are immaterial to this case.³

10 According to Helverson's uncontradicted testimony, shortly afterwards, White came to his office very upset. Helverson testified that White complained that two members of Helverson's crew, Stroble and Earl Olinger, had called White a rat. There is no evidence in this record as to why these employees were angry with White, although one could surmise, in the absence of any other reason, that this had something to do with the proceeds from the disposal
15 of the refrigerator.

A short time later, Helverson went to White's office. White again complained that Stroble and Olinger had called him a rat and told Helverson that Power had taken \$43 off his desk. Helverson then contacted Power and told him to return the money.

20 Some time later on January 12, maybe within an hour of taking the money, Power returned the \$43 to Helverson, who returned the money to White. White informed his supervisor, Mario Salas, as to what transpired regarding the \$43. However, there is no evidence as to when he did so.

25 A week later, on January 19, 2010, Salas contacted Respondent's ethics office, R. Exh. 5. There is no evidence as to the reason for this hiatus. Kevin Reilly, a facilities manager to whom Keevill and Salas report, testified that he told them to report the incident to the ethics office, but there is no evidence as to when Salas and Keevill talked to Reilly about the incident.

30 Salas' email to Ethics Investigator Bonnie Griffin-Staskin focused on what he considered a departure from proper procedure in disposing of the refrigerator and the fact that the proceeds from the refrigerator were not turned over to George White immediately. Salas did not mention the fact that Richard Power took money from these proceeds from White's office.

35 On the basis of Salas' emails and after meeting with Salas and Doreen Dwyer on January 20, Griffin-Staskin initiated an investigation of the incident. She then submitted a report, R. Exh. 6, to an Executive Review Committee (or Executive Review Board) at Respondent's headquarters in Gaithersburg, Maryland.

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45 ³ As the General Counsel points out, White's testimony is not consistent. However, even if Power's version is correct, it would not affect the outcome of this case. Power's testimony suggests that White was initially agreeable to whatever plans Power had for the \$43 but then changed his mind. Even assuming this is so, White did report the fact that Power had taken the money and Power would not have returned it unless told to do so by Helverson.

50 The General Counsel does not allege that White is or was a statutory supervisor or agent of Respondent. In this regard, the General Counsel at page 20 of his brief states that, "Respondent failed to show that Power took the \$43 without permission." However, there is no evidence that Power had *Respondent's* permission to take the \$43.

Griffin-Staskin interviewed Power, Stroble, Helverson, Earl Olinger, Salas, White, Kevin Reilly and John Keevill in preparing her report. Her report does not contain any details regarding her interview of Keevill or Reilly. However, Griffin-Staskin testified that during her investigation that the schedule change issue was not mentioned by anyone other than Power. She testified that during an interview, Power asked her if she knew Respondent was trying to change his schedule. Griffin-Staskin responded that management had the right to do so and in fact she had changed her schedule fairly recently to accommodate the needs of Respondent's business, Tr. 244. There is no evidence that contradicts Griffin-Staskin's testimony that Respondent did not consider the schedule changes or the employees' January 7 meetings with Dwyer and Keevill in deciding to terminate Power.

The Executive Review Board met in Gaithersburg to consider whether any disciplinary action should be taken against Power, Stroble and Helverson. Griffin-Staskin and Doreen Dwyer attended this meeting via video conference from Pennsylvania. It is unclear whether any managers from the Valley Forge facility, such as Keevill or Kevin Reilly, participated in the meeting either in person or by telephone or video conference.⁴

The Board consisted of three voting members: Marty Stanslov, a vice-president of finance and business, Linda Olin Weiss, a vice-president of human resources and a security official named McCantz. Also in attendance were several non-voting members of the Board and/or participants including Samuel Charnoff, from Respondent's legal department and James Burnes, Respondent's director of ethics.

There is no evidence as to the date the Board met and very little evidence as to what transpired at the meeting other than the fact that Board members asked Griffin-Staskin questions about matters in her report. There is, for example, no evidence as to whether the Board considered imposing discipline other than termination on Power and Stroble.⁵

Griffin-Staskin testified that the sole reason Power was terminated was for taking the \$43 out of George White's office. However, Stroble was also terminated and he had no involvement in taking the money from White.⁶

On February 18, 2010, John Keevill summoned Power to a conference room and handed him a termination letter signed by Keevill. The termination letter, Exh. G.C. -2, states:

As a result of an investigation into your misconduct and a review of the facts, it has been determined that you engaged in conduct which violates CPS-001, "Ethics and Business Conduct." The IS&GS Executive Review Board concurred with the findings of this investigation.⁷

⁴ The General Counsel's brief at page 14 states that at least one of Power's direct supervisors, either Reilly or Keevill, participated in the meeting by telephone, citing Tr. 177-78 and 181-82. I find the record does not establish this to be so, see Tr. 181, line 15 and Tr. 182, lines 2 and 3.

⁵ Helverson was not disciplined.

⁶ Griffin-Staskin's report, Exh. R-6, states:

"Griffin-Staskin asked Stroble if he was aware that Power had went back to get some of the money back and Stroble stated he has a bad memory but does recall Power wanted to do something with the money."

⁷ This policy, which is very general, is G.C. Exhibit 4.

Both Power and Stroble appealed their terminations internally. Respondent reduced Stroble's discipline to what amounted to a 3 ½ month suspension without pay.

Respondent did not replace Power and did not replace Stroble during his suspension.
 5 Respondent states that the work schedules of Earl Olinger and Jeff Braus were changed from 4
 ten-hour days to 9 days/ 80 hours in March 2010. However, Olinger testified that he voluntarily
 switched to the 9 day schedule on February 18, the day Power was fired. There are no
 documents in this record indicating whether Respondent's testimony or Olinger's is correct on
 this point. However, the following testimony by Olinger regarding a conversation with Keevill,
 10 that I infer occurred on February 18, 2010, is uncontradicted and I therefore credit it:

He said, what do you think? I said – said I'm pretty pissed off, I said. I don't like what
 happened. And he goes – he looked at me, at that particular moment and says, I want
 you to go on a 9/80's. And I said, what? He goes I want you to go on 9/80's. And I
 15 remember throwing my hand in the air and say, you know what, I'm done talking about
 this. I said I'll go 9/80's and I'll make this work. And then he looked at me, after that and
 he said, I get you running scared. I'll have them all running scared.

Tr. 119-20.⁸

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Analysis

Protected Concerted Activity

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor
 25 practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed
 in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to
 form, join, or assist labor organizations, to bargain collectively through representatives of their
 own choosing, and *to engage in other concerted activities for the purpose of collective*
bargaining or other mutual aid or protection... (Emphasis added)"
 30

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)*
 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are
 those "engaged in with or on the authority of other employees, and not solely by and on behalf
 35 of the employee himself." However, the activities of a single employee in enlisting the support
 of fellow employees in mutual aid and protection is as much concerted activity as is ordinary
 group activity. Individual action is concerted so long as it is engaged in with the object of
 initiating or inducing group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom*
Transportation Co., 330 F.2d 683, 685 (3d Cir. 1964).

40 Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a
 prima facie case that an employer has discharged an employee in violation of Section 8(a)(1),
 the General Counsel must establish that the employer knew of the concerted nature of the
 activity.

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⁸ Board law recognizes that the testimony of current employees that contradicts statements
 of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745
 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is
 50 adverse to their employer is "... given at considerable risk of economic reprisal, including loss of
 employment ... and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB
 500, 505 fn. 22 (1977).

5 In order to establish that an employer violated Section 8(a)(1) in discharging or disciplining an employee, the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983) ; *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and animus are often established by indirect or circumstantial evidence.

10 In the instant matter, Richard Power engaged in protected concerted activity by protesting the proposed change in his work schedule with his coworkers in his meeting with Doreen Dwyer on January 7, 2010 and in his meetings with John Keevill. Respondent was aware of this activity and its concerted nature. Some degree of animus towards this activity was expressed by Keevill. The key question is whether the General Counsel established a prima facie case that this protected conduct was a motivating factor in Respondent's decision to discharge Richard Power.

20 If the burden of proof is shifted to Respondent to demonstrate that it would have fired Power even in the absence of his protected activity, I'm not sure it satisfied this burden. There are many unanswered questions surrounding his termination, i.e., why it took a week for Salas to contact the ethics office, why Respondent belatedly focused on the \$43, as opposed to other issues surrounding the disposal of the refrigerator, what was discussed in the deliberations of the Executive Review Board and precisely why it decided to terminate an employee with 24 years of service as opposed to imposing a lesser degree of discipline.

30 Nevertheless, I find that the General Counsel has failed to make an initial showing that the discharge was unlawfully motivated. Most importantly, the nature of Power's protected activity appears to be fairly innocuous. He concertedly objected to a change in his schedule, which Respondent could easily have made over his objection. Secondly, there is no direct evidence that Power's termination was motivated in part by his protected activities or sufficient evidence from which I can infer that this was so. There is no evidence that Keevill played any role in terminating Power, apart from signing his termination letter. Even assuming that Keevill had a role in deciding to terminate Power, there is insufficient evidence from which I can infer that his animus regarding employees' conversations with Dwyer played any role in Power's discharge.

40 I also find that Keevill's statements to Olinger on February 18 are insufficient to establish an unlawful motive. As stated before, there is no evidence that Keevill played any role in Power's discharge. Secondly, there is no logical reason for Respondent to discharge Power simply because he went over Keevill's head and embarrassed him. Regardless of who was pushing for a change in Power's and Olinger's schedules, Respondent had absolute discretion to do so. Keevill's comments on February 18 may well have been simply a matter of his seizing upon an opportunity to lord his authority over Olinger in general.

45 The General Counsel's case seems to be based in part on an assumption that no employer would fire a 24-year employee for conduct such as that of Power, i.e., taking \$43 which he returned within an hour. It may well be true that other factors may have led to the termination, but I deem this insufficient to infer discriminatory motivation. It could be, for example, that Respondent, having already reduced the staff of the maintenance department by

8 in the fall of 2009, was looking for opportunities to reduce this staff even further.⁹ As stated earlier, Respondent did not replace either Power or Stroble.

5 For the reasons stated herein, I find that the General Counsel has not satisfied his burden of showing that Respondent violated Section 8(a)(1) in terminating Richard Power and therefore dismiss the complaint.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The complaint is dismissed.

15 Dated, Washington, D.C., February 25, 2011.

20 _____
Arthur J. Amchan
Administrative Law Judge

45 _____
⁹ On the other hand, if Respondent was simply looking for an excuse to terminate employees, it might have terminated others involved in the disposal of the refrigerator, in addition to Power and Stroble.

50 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.