

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

THE TM GROUP, INC.

Respondent

and

Case 7-CA-52730

KIMBERLY GROVER, An Individual

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

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Counsel for the Acting General Counsel (hereinafter “GC”), Darlene Haas Awada and Patricia A. Fedewa, respectfully submit Counsel for the Acting General Counsel’s Answering Brief to Respondent’s Exceptions.

I. SUMMARY OF ARGUMENT¹

The ALJ correctly found, in accordance with the record evidence and well-established Board law, that Respondent violated Section 8(a)(1) of the Act by discharging the Charging Party and issuing an email discouraging employees from talking to each other about wages, hours, and conditions of employment.

In its Exceptions, Respondent challenges the factual findings of the ALJ, which are based on sound credibility determinations and a careful review of the evidence admitted in to the record during the hearing. Notably, Respondent did not except to any of the ALJ’s conclusions of law or to the remedy.

The record and relevant case law support the ALJ’s findings and conclusions that Respondent violated Section 8(a)(1) when it issued an email to employees and by discharging Charging Party Kimberly Grover for engaging in protected concerted activities. Respondent cites no case law, nor could it, to counter the ALJ’s findings and conclusions.

¹ “ALJ” refers to Administrative Law Judge Earl E. Shamwell, Jr. “ALJD” refers to the ALJ’s decision. “Br.” refers to Respondent’s Brief in Support of Exceptions to the ALJD. “Tr.” refers to the transcript of the administrative hearing; “JX,” “GCX,” and “RX” refer to joint exhibits, the General Counsel’s exhibits, and Respondent’s exhibits, respectively.

ARGUMENT

I. The ALJ's Credibility Determinations and Factual Findings are Properly Supported and the Board Should Defer to Them.

Respondent excepts to the ALJ's crediting of GC witnesses, particularly Grover, over Respondent witnesses, and making factual findings based, in part, on those credibility determinations. Respondent also excepts to the ALJ's reliance on what it incorrectly asserts is hearsay testimony, and excepts to evidence relied upon as irrelevant. All of Respondent's exceptions are without merit.

A. Credibility and Factual Findings (*Exceptions 4, 6, 13, 15, 16-18, 19, 20, 21, 22 24, 25 27-30, 32-40*)

Respondent admits that "the vast majority of the exceptions deal with the assignment of credibility between the parties by the ALJ . . ." (p. 10, Respondent's Brief). Consequently, the Board should defer to those findings. See *Standard Drywall Products, Inc.*, 91 NLRB 544 (1990). It is well-established that, under *Standard Drywall Products*, the Board defers to the credibility findings of the ALJ unless a clear preponderance of all of the evidence convinces the Board that they are incorrect. Respondent has failed to meet the high burden to overturn the ALJ's well-founded credibility determinations and the resulting findings of fact, and thus, the ALJD should be affirmed in its entirety.

The ALJ, consistent with long-established Board law, made credibility determinations based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). In finding that Grover was an “eminently credible witness,” the ALJ appropriately noted her demeanor, stating that she appeared calm and forthcoming, and that the substance of her testimony was corroborated by other witnesses.² (ALJD p. 29, lines 30-32) After seeing all of the GC’s and Respondent’s witnesses and hearing their testimony, the ALJ made sound decisions on their credibility, which he thoroughly explained, based on a variety of factors including their respective memories of the chronology of events, internal consistency, corroboration of other witnesses on key points, and demeanor. Respondent has not met its burden in showing that any of the ALJ’s credibility determinations should be overturned. *Standard Drywall Products*, supra.

B. Misguided claims of hearsay (*Exceptions 1-3, 5-11*)

Respondent excepts to numerous statements in the ALJ’s findings of facts as inadmissible hearsay. First, to the extent Respondent failed to object to these statements at hearing, Respondent has waived its right to object to the consideration of such evidence on hearsay grounds. *Livermore Joe’s, Inc.*, 285

² Respondent asserts that Grover “lied to a state agency” (pages 10 and 12 of its Brief). This is such a reckless accusation, referencing documents not in evidence, that Counsel for the GC is filing a separate Motion to Strike to address it.

NLRB 169 n.3 (1987); *Alvin J. Bart & Co.*, 236 NLRB 242, 243 (1978). But assuming Respondent preserved its right to appeal the admittance of the statements it now excepts to, in doing so, Respondent is showing a misunderstanding of their significance. The statements at issue were not offered for the truth of the matter asserted. Rather, the statements were offered, and entered into the record, to establish that the statements were in fact uttered. For example, in Exception One, Respondent excepts to the finding that Keller told Grover that she had a promissory note from Scott in her desk drawer. This statement was not offered to establish the fact that Keller had a promissory note in her drawer—it is offered to show that the subject of loans to Scott Thomas (true or untrue) was discussed amongst employees. All of the statements excepted to by Respondent are similarly not offered to establish their veracity, but to establish that these statements were made. Accordingly, none of the statements excepted by Respondent are hearsay under Federal Rule of Evidence 801.³

C. Relevance (*Exceptions 12, 25*)

Respondent argues that the ALJ relied upon irrelevant evidence when making his finding regarding an upcoming bank audit that occurred after August 31, 2009. The ALJ did not allow testimony about what happened after August 31,

³ In addition, because Mark Thomas is an admitted supervisor and agent within the meaning of the Act, his statement that Judy and Scott [Thomas] were codependent on one another and that Scott had a gambling problem and frequented go-go dance venues statement is an admission by a party-opponent under Federal Rule of Evidence 801(d)(2) and does not constitute hearsay.

2009, on the basis of lack of relevance. However, Grover testified that when she was discharged on August 24, 2009, Judy Thomas stated, “This couldn’t be a worse time. I’m expecting an audit and I need you, but I’ve got to let you go.” (Tr. 60) Further, Judy Thomas testified that she was aware of an impending bank audit when she discharged Grover.⁴ (Tr. 250) Obviously, Respondent’s admissions and thoughts at the time of discharge are relevant. Similarly, Kim Keller and Mark Thomas also testified about the upcoming bank audit. This is one more frivolous argument that evidences the weakness of Respondent’s Exceptions.⁵

II. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) by Discharging Grover for her Protected Concerted Activities and Disseminating an Email to Employees that Discouraged Employees from Engaging in Protected Concerted Activities

A. Respondent Failed to Except to the ALJ’s Conclusions of Law and Remedy

Section 102.46 requires that exceptions be set forth with specificity. Namely, each exception must set forth the questions of procedure, fact, law, or policy to which exception is taken, with designations to the relevant part of the ALJD, and citations to supporting portions of the record. Exceptions failing to meet those specifications are deemed waived and should be disregarded. Section

⁴ Although the GC attempted to question Judy Thomas with regard to a replacement hired to assist with the bank audit after Grover was discharged, Respondent’s objection to the questioning was sustained. The GC’s request to make an offer of proof through questioning Judy Thomas on the issue was also denied. (Tr. 242-243)

⁵ Similarly inconsequential are Respondent’s exceptions regarding Grover’s belief as to why she was fired and that she was a law student who took a labor law class. (Exceptions 14, 31)

102.46 (b)(1) and (2). See *W-L Molding Co.*, 272 NLRB 1239 (1984); *Valentine Painting and Wallcovering*, 331 NLRB 883, n.2 (2000), enfd. mem. 8 Fed. Appx. 116 (2d. Cir. 2001); *Howard K. Sipes Co.*, 319 NLRB 30 (1995). Accordingly, to the extent Respondent failed to except to the ALJ's legal conclusions—including his conclusions that Grover was engaged in protected concerted activities, that Respondent unlawfully discharged Grover for engaging in protected concerted activities, and that Respondent unlawfully discouraged employees from talking to each other about wages, hours, and conditions of employment by disseminating the August 24, 2009 email to employees—and to the remedy, any objections to those legal conclusions and to the ALJ's remedy should be deemed waived. In any event, the ALJ's legal analysis, conclusions of law, and recommended remedy are consistent with established Board law.

B. Pretext (*Exception 23, 26, 43*)

The ALJ correctly found that Respondent's defenses that it discharged Grover for economic reasons and for violating the Employer's confidentiality policy were pretextual, and that Respondent's actual motive was Grover's protected concerted activities. (ALJD p. 31, lines 28-29, 34-36). Respondent excepts only to the ALJ's finding of pretext. As the ALJ noted, "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive." (ALJD p. 26, lines 13-15, citing *Limestone Apparel Corp.*,

255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). The ALJ's conclusion of pretext is well-supported by ample record evidence and Board law.

In finding that Respondent's asserted reasons for discharging Grover were pretextual, the ALJ relied upon Judy Thomas' inconsistent testimony with regard to the date she made the decision to terminate Grover; the lack of evidence showing Respondent made prior indications that Grover was in danger of losing her job; the impending bank audit; and the admission in Judy Thomas' August 24 email that business was picking up. The ALJ further relied upon the statements made by Judy and Mark Thomas when they terminated Grover regarding what was said on August 14 about Grover's protected concerted activities, and their lack of investigation into the allegations. In sum, the ALJ's analysis and application of law are well-founded and should be upheld.

CONCLUSION

Based upon the entire record in this case and upon the arguments recited above, it is respectfully requested that the Board deny Respondent's exceptions in their entirety. It is further requested that the Board affirm the ALJ's findings of facts, conclusions of law, and Recommended Remedy and Order as discussed herein.

Respectfully submitted this 10th day of June, 2011.

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CERTIFICATE OF SERVICE

I certify that on the 10th day of June, 2011, I electronically served copies of the Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions on the following parties of record to the listed email addresses:

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