

NOT TO BE INCLUDED
IN BOUND VOLUMES

PBH
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

C.F. TAFFE PLUMBING CO., INC.

and

Case 13-CA-45890

MICHAEL SCHMIDT

DECISION AND ORDER REMANDING IN PART

On November 8, 2010, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent, the General Counsel and the Charging Party each filed exceptions, supporting briefs, and answering briefs. The Charging Party also filed a motion to reopen the record in order to present further evidence, and the Respondent filed a brief in opposition.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, briefs, motion to reopen the record, and opposition, and has decided to affirm the judge's rulings, findings,¹ and

¹ Each of the parties has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings as to all matters except those relating to an alleged May 6, 2010 text message that Schmidt sent to another employee, which issue we are remanding to the judge for further proceedings, as set forth below.

conclusions as modified. Further, for the reasons set forth below, we shall remand the case to the judge to reopen the record, and, if warranted, to analyze whether Charging Party Michael Schmidt engaged in postdischarge misconduct that caused him to forfeit his right to full reinstatement and backpay.²

I. INTRODUCTION

We agree, for the reasons set forth by the judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging plumber Michael Schmidt on February 9, 2010,³ because of his complaints to his Union (Chicago Journeyman Plumbers' Local Union No. 130, U.A.) about the Respondent's diversion of plumbers' work to laborers, in alleged violation of the plumbers' collective-bargaining agreement. We also agree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening Schmidt with reprisal if he filed a charge with the Board, and by telling Schmidt that he was no longer a part of the Respondent's family.

² Member Hayes would not remand. He agrees with the judge that backpay should be tolled as of May 6, 2010, and that the Charging Party should not be ordered reinstated. The Charging Party's message to a coworker that "[y]our days are over starting tomorrow," which followed several hostile messages, sufficiently establishes that the Charging Party is unfit for further service, as the message "may reasonably be interpreted as a threat of physical harm." *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992) (denying reinstatement to discharged employee whose statement to nonstriking coworker, "[w]ell, if you valued your life," could reasonably be interpreted as a threat, and thus established that the discriminatee was unfit for future service), *enfd.* 996 F.2d 1219 (7th Cir. 1993) (table), cert. denied 510 U.S. 965 (1993). Member Hayes would also deny the Charging Party's Motion to Reopen the Record, as it fails to adequately explain why the proffered evidence was not previously submitted at the underlying hearing, as required by Section 102.48(d) of the Board's Rules and Regulations, nor why the Charging Party did not file his motion for more than two months after the close of the hearing.

³ Dates are in 2010 unless otherwise noted.

To remedy these violations, the judge recommended an order requiring the Respondent to cease and desist from these unfair labor practices. The judge further found, however, that Schmidt was not entitled to reinstatement or backpay as of May 6, 2010, because on that date he engaged in postdischarge misconduct that cost him the Act's protections. The General Counsel and Charging Party Schmidt except to the judge's tolling of backpay and his denial of reinstatement. First, they except to the judge's finding that Schmidt sent a May 6 text message to employee Joe O'Brien. Second, the General Counsel contends that, even had Schmidt sent the alleged text message, it did not warrant his forfeiture of the traditional make-whole remedies of full reinstatement and backpay. For the reasons set forth herein, we find that both exceptions raise issues necessitating a remand to the judge for further appropriate action.

II. MOTION TO REOPEN THE RECORD

When filing exceptions to the judge's decision, Charging Party Schmidt appended to his brief certain phone records to support his claim that he did not text O'Brien on May 6. The Respondent filed a motion to strike those phone records and other portions of the exceptions filed by Schmidt. On January 14, 2011, the Board issued an Order granting the motion "regarding the two pages of text messages attached to Mr. Schmidt's Exceptions because they are not part of the record and are not among the exhibits accepted at the hearing."

On January 25, 2011, Charging Party Schmidt filed a motion to reopen the record to receive into evidence the two pages of text messages. The

Respondent filed an opposition. Having carefully considered the issue, we grant the Charging Party's motion.

Section 102.48 of the Board's Rules and Regulations states: "A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing." Under all of the circumstances, we find that the *pro se* Schmidt has met the requirements of Section 102.48 and that his motion should be granted.

Initially, we note that Schmidt's proffered exhibit potentially could rebut the Respondent's claim that he sent the May 6 text message, which text the administrative law judge found dispositive of whether Schmidt was entitled to reinstatement and backpay after May 6. Thus, this evidence, "if adduced and credited . . . would require a different result."

Second, the proffered evidence was not available to Schmidt at the time of the hearing. Indeed, neither the General Counsel nor Schmidt were put on notice that Schmidt's postdischarge conduct (i.e., his conduct after February 9) was an issue in the hearing. It was neither pled as a defense by the Respondent in its answer, nor raised by the Respondent in its opening statement. Instead, the May 6 text message was among a set of text messages introduced - over the General Counsel's objections - in Respondent's Exhibit 3, to support its claim

that Schmidt was discharged for, among other things, his poor working relationships with other employees. As the May 6 text message and the February 19 text messages that constituted the remainder of Respondent's Exhibit 3 all post-dated Schmidt's discharge, they were not relevant to whether the Respondent unlawfully terminated the Charging Party.⁴ Although the Respondent's counsel made fleeting references to Schmidt's post-termination activity, the Respondent's witnesses and counsel never asserted that the Respondent would have terminated Schmidt for this alleged text message, or – if proven – that this conduct caused Schmidt to forfeit relief to which he would otherwise be entitled. Nor is it evident that the General Counsel or Charging Party understood that this issue was being litigated.

Third, after the judge relied, in his decision, on the May 6 text message to find that the Charging Party forfeited his right to reinstatement and backpay, the Charging Party promptly secured the proffered rebuttal evidence and appended it to his brief on exceptions. Although the Board appropriately rejected the evidence because it was not part of the record, Schmidt thereafter promptly filed the instant motion to reopen the record.

In these circumstances, we find that Schmidt's motion to reopen the record should be granted. Accordingly, we shall direct the judge to admit into evidence and consider Schmidt's rebuttal evidence, reopening the hearing if necessary to admit further evidence or testimony on this limited point. The judge

⁴ Because the May 6 text message was not relevant to whether the Respondent had committed the alleged unfair labor practice, but only to the Respondent's compliance obligations, it should have been left for consideration at that latter phase of the Board's proceedings.

shall thereafter issue revised findings of fact and conclusions of law as to whether Schmidt sent O'Brien the text message on May 6. In the event that the judge determines that Schmidt did not send O'Brien the May 6 text message, he shall issue a supplemental decision containing the Board's traditional make-whole remedy, including reinstatement and full backpay. If the judge concludes that the Charging Party's new evidence does not warrant a reversal of his finding regarding the May 6 text message, the judge is directed to reconsider the Charging Party's fitness for future service in light of our recent decision in *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011).

III. EVALUATING SCHMIDT'S ALLEGED POSTDISCHARGE MISCONDUCT

In *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011), slip op. at 2, the Board clarified the applicable standard for evaluating whether a discriminatee's postdischarge misconduct warrants forfeiture of the right to traditional remedies of reinstatement and backpay. Acknowledging that an "evaluation of postdischarge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge,"⁵ the Board stated in *Hawaii Tribune-Herald* that an "unfit for further service standard" applies in cases alleging postdischarge misconduct.

The Board in *Hawaii Herald-Tribune* quoted *O'Daniel Oldsmobile, Inc.*⁶:

When seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original

⁵ Id., quoting from *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enf'd. 548 F.2d 91 (1st Cir. 1977).

⁶ 179 NLRB 398, 405 (1969).

discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.

Here it is uncontroverted that Schmidt's alleged misconduct on May 6 occurred postdischarge. And although *Hawaii Tribune-Herald* involved the postdischarge disparagement of the employer's product, rather than conduct directed to a co-worker, we find that difference insignificant in the circumstances. At its core, *Hawaii Tribune-Herald* recognizes that distinct standards should be applied to pre-discharge and postdischarge misconduct.⁷ That principle is applicable here. Upon remand, we shall direct the judge – in the event he finds that Schmidt sent O'Brien the May 6 test message – to apply the appropriate postdischarge standard, as it was reaffirmed in *Hawaii Tribune-Herald*.⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, C.F. Taffe Plumbing Co., Inc, Chicago Illinois, its officers, agents, and representatives shall take the action set forth in the Order, subject to potential modification of the remedy following remand.

⁷ As stated in *Hawaii Tribune-Herald*, in the case of postdischarge misconduct “[t]here can be no issue whether it did or could have justified that discharge. [The] discharge was unlawful. The only question is whether [the discriminatee] can still be denied reinstatement and have his backpay tolled because of [his postdischarge conduct].” 356 NLRB No. 63 at 2.

⁸ In evaluating Schmidt's alleged misconduct under *Hawaii Tribune-Herald*, the administrative law judge is directed to take into account the context in which the alleged May 6 message was sent, specifically, Schmidt's repeated claims, both pre and postdischarge, that laborers, including O'Brien, were performing plumbers' work and three prior postdischarge text messages that Schmidt sent to O'Brien that the judge found, and we agree, were not threatening.

Member Hayes does not join his colleagues in directing the judge to re-evaluate previously considered record evidence.

IT IS FURTHER ORDERED that this matter is remanded to the administrative law judge for reconsideration of his recommended order to deny Charging Party Schmidt reinstatement and to toll backpay as of Schmidt's alleged May 6, 2010, text message.

IT IS FURTHER ORDERED that, if the administrative law judge finds that Charging Party Schmidt sent the May 6, 2010 text message, he shall consider that message in light of the record as a whole, including all findings previously made and adopted by the Board, and whether that text message, if sent, rendered Charging Party Schmidt unfit for future service under the standard explicated in *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011).

IT IS FURTHER ORDERED that, upon remand, the administrative law judge shall have discretion to decide the limited issue of whether Charging Party Schmidt sent the May 6, 2010 text message, with or without rehearing.

IT IS FURTHER ORDERED that the judge shall issue a supplemental decision on the remanded issue. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 1, 2011.

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD