UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KARL KNAUZ MOTORS, INC. D/B/A
KNAUZ BMW

AND **Case 13-CA-46452**

ROBERT BECKER, AN INDIVIDUAL

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

As its own internal termination memo establishes, Respondent Karl Knauz Motors, Inc. terminated its employee Bobby Becker for protected comments and photos on Facebook that criticized its BMW dealership's handling of a sales event, as well as for unprotected postings regarding the conduct of another employee which caused an accident at its Land Rover store. Respondent would not have terminated Becker solely for the Land Rover posts, because it did not terminate the employee who actually caused the serious accident and did not discipline other employees who also posted about the accident on Facebook. Thus, Respondent's discharge of Becker violates Section 8(a)(1). Administrative Law Judge Joel P. Biblowitz decided otherwise by ignoring critical documentary evidence from Respondent's own files substantiating that it terminated Becker for *both* sets of postings, by incorrectly holding that certain evidence introduced by Counsel for the Acting General Counsel did not constitute disparate treatment as a matter of law, and by making credibility determinations that were vague, illogical, and contradicted by both documentary evidence and uncontroverted testimony. Accordingly,

pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel, through his attorney Charles Muhl, files this Brief in Support of Exceptions to the September 28, 2011, ALJ Decision. The Acting General Counsel respectfully requests that the Board reject the Judge's proposed order and instead find that Respondent unlawfully terminated Bobby Becker for his protected, concerted activity in violation of Section 8(a)(1).[1]

This brief sets forth Counsel for the Acting General Counsel's argument that the Judge erred by finding that Respondent's justification for terminating Bobby Becker did not include his protected Facebook posts. The brief is organized into four subsections in support of that argument. The first section addresses how the Judge improperly ignored Respondent's termination memo in Becker's personnel file which indicates that both the BMW sales event postings and the Land Rover accident postings were the reasons for his discharge. The second section addresses the Judge's legal error of disregarding disparate treatment evidence introduced by Counsel for the Acting General Counsel. The third section explains why the ALJ's credibility determinations were not properly supported and should be overturned. The fourth section explains how, if the Judge properly had completed the *Wright Line* analysis for this case, Respondent did not sustain its burden of showing it would have terminated Becker absent his protected Facebook posts about the BMW sales event.

[1] In this Brief in Support of Exceptions, the Administrative Law Judge will be referred to as "the ALJ" or "the Judge"; Knauz BMW will be referred to as "Respondent"; and the National Labor Relations Board will be referred to as "the Board". Citations to the ALJ's Decision will be referred to as "ALJD" followed by the page and line numbers specifically referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The Acting General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent did not enter any exhibits at the hearing.

I. THE JUDGE ERRED BY HOLDING THAT RESPONDENT TERMINATED BECKER SOLELY FOR HIS FACEBOOK POSTINGS CONCERNING AN ACCIDENT AT THE KNAUZ LAND ROVER DEALERSHIP.[2]

The ALJ properly framed the two legal questions presented in this case as whether Becker's Facebook posts on the BMW sales event were protected, concerted activity and, if protected, whether Respondent terminated him in whole or in part for that activity. (ALJD, p. 7, lns 45-47) As to the first question, the Judge properly concluded that Becker's conduct constituted protected, concerted activity as an outgrowth of earlier complaints by multiple employees to management about Respondent's food and beverage offering at the BMW sales event, because the salespeople were concerned that a poorly-run event would negatively effect their sales commissions, and thus their pay. (ALJD, p. 7, lns 49-52; p. 8, lns 1-31) The ALJ also correctly held that Becker did not lose the protection of the Act based upon the tone of his comments in these Facebook posts. (ALJD p. 8, lns 33-52; p. 9, lns 1-6)

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[2] The First Amended Complaint in this case alleged that Respondent terminated Bobby Becker in violation of Section 8(a)(1) because of his June 14, 2010, postings to Facebook criticizing the dealership's handling of a sales event, which constituted protected, concerted activity. Although a Section 8(a)(1) discharge is alleged, a *Wright Line* analysis is appropriate in cases such as this one where the employer disputes its motive for discharging an employee, as Respondent does here. *Alton H. Piester, LLC*, 353 NLRB 369, 373 (2008); *Holder Construction Co.*, 327 NLRB 326, 328 (1998). The *Wright Line* standard requires Counsel for the Acting General Counsel to establish, by a preponderance of the evidence, that Becker's protected activity was a motivating factor in Respondent's discharge of him. *Wright Line*, 251 NLRB 1083, 1089 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983). To meet this initial burden, the Acting General Counsel must show that Becker engaged in protected, concerted activity, Respondent knew of the concerted nature of Becker's activity, and the discharge was motivated—at least in part—by that activity. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). A discriminatory motive is shown where an employer's proffered explanation for the adverse action is a pretext. *Wright Line*, 251 NLRB at 1088, fn12. Evidence of pretext includes the employer's disparate treatment of the alleged discriminatee, *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); providing shifting explanations for the adverse action, *Seminole Fire Protection, Inc.*, 306 NLRB 590, 592 (1992); and offering a non-discriminatory explanation that simply is false, *Cincinnati Truck Center*, 315 NLRB 554, 556-67 (1994). After Counsel for the Acting General Counsel meets his initial burden, as was done here, the burden then shifts to Respondent to present evidence that it would have terminated Becker even in the absence of his protected Facebook posts regarding the BMW sales event. *United Rentals*, 350 NLRB 951 (2007); *Wright Line*, 251 NLRB at 1089. Respondent's burden on rebuttal is not met by showing merely that it had a legitimate reason for its action. Rather, it "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Id*., citing to *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). In this case, the Judge improperly concluded that Counsel for the Acting General Counsel did not establish a discriminatory motive for Respondent's discharge of Becker and thus did not meet his initial *Wright Line* burden.

However, as to the second legal issue presented in this case, the ALJ mistakenly concluded that Becker's BMW sales event postings played no role in his termination, by providing little explanation for the conclusion and ignoring all of Counsel for the Acting General Counsel's evidence to the contrary. While he gave a specific, detailed, almost page-and-a-half explanation for his findings about how Becker was engaged in protected conduct, the Judge instead provided a short, nonspecific explanation for why he concluded that Counsel for the Acting General Counsel did not establish a discriminatory motive.[3] (ALJD, p. 9, lns 23-29) The conclusory and incomplete analysis for this legal conclusion easily crumbles under the weight of the disregarded evidence, including Respondent's contemporaneous documentation explaining that Becker was terminated for both sets of Facebook postings and substantial evidence of disparate treatment.

A. The ALJ Ignored Respondent's Own Contemporaneous Documentation Stating the Reasons for Becker's Termination, Which Included *Both* the Protected BMW Sales Event Facebook Postings and the Land Rover Accident Postings. (Exceptions 3 through 5)

The Judge found that Respondent terminated Becker solely for his Facebook postings about the Land Rover accident and that his postings critical of the dealership's handling of the BWM sales event played no part in the decision. (ALJD p. 9, lns 17-33) However, the ALJ's finding cannot be upheld in light of Respondent's own contemporaneous memorandum to Becker's personnel file, written the same day he was informed of his discharge, which explained the reasons he was terminated. The memorandum unquestionably included as one of

[3] In the decision, the Judge's facts section does not contain any factual findings, but rather consists of a recitation of the testimony of witnesses at the hearing and of certain documents introduced into evidence. The ALJ does not resolve any conflicts in testimony or documentary evidence until the "Analysis" section beginning on page 7. The ALJ's factual findings and legal conclusions regarding Respondent's discriminatory motive are contained in one paragraph of the decision on page 9.

Respondent's justifications the "negative comments about the company" which Becker posted regarding the dealership's handling of the BMW sales event.

Respondent, through its Vice President and General Manager Barry Taylor, informed Becker by phone call on June 22 that he was terminated. Taylor told Becker that the dealership's supervisors had taken a vote and none of them wanted Becker back; he also asked that Becker never set foot on the premises again. (ALJD p. 5, lns 23-26) No mention was made by Taylor of the reasons for Becker's termination during the phone call. However, shortly thereafter, Taylor typed an internal memorandum documenting the discussion he had with Becker on the phone, then placed the memorandum and copies of *both sets* of Becker's Facebook postings in his personnel file. (Tr. 186; GC 7) As to why Becker was terminated, Taylor's memorandum states:

> I told [Becker] it was a unanimous decision to terminate his employment **because he had made negative comments about the company in a public forum *and* had made light on the internet of a very serious incident (Land Rover had jumped the curbing and ended up in the pond) that embarrassed the company**.

(ALJD p. 6, lns 4-8, emphasis added) This is the only explanation contained in Taylor's contemporaneous memo for the company's termination of Becker.

Without question, Taylor's memorandum establishes conclusively that Becker was terminated for *both* sets of Facebook postings, not just the Land Rover postings. The stated justification contains two pieces and is conjunctive based upon Taylor's use of the word "and." The first justification offered is that Becker was terminated because "he had made negative comments about the company in a public forum…" The second justification is that Becker "had made light on the Internet of a very serious incident (Land Rover had jumped the curbing and ended up in the pond)..." Taylor's first justification clearly refers to the BMW sales event postings, where Becker criticized the dealership's handling of that event. The second

justification just as clearly identifies Becker's Land Rover postings as the other reason for his discharge. If Respondent terminated Becker only for the Land Rover postings, the only justification Taylor needed to put in his memo was the second one, which provides all of the detail necessary to describe the Land Rover postings. Taylor's first stated justification is superfluous if Respondent did not terminate Becker in part for his BMW sales event postings. Moreover, putting copies of both sets of Becker's Facebook postings in his personnel file immediately following the termination memo likewise was unnecessary if Respondent terminated him only for the Land Rover accident postings.

A specific examination of each set of Becker's postings further supports the conclusion that Taylor's "negative comments about the company in a public forum" remark must refer to the BMW sales event postings. In those postings, Becker repeatedly criticized the dealership's choice of food for the Event and even mocked a comment made by his direct supervisor, Phillip Ceraulo, in response to employees expressing concerns about the dealership's choice of refreshments. In the introductory page to his "BMW 2011 5 Series Soiree" photo album, Becker commented:

> I was happy to see, that Knauz went "All Out" for the most important launch of a new BMW in years …the new 5 series. A car that will generate tens of millions of dollars in revenue for Knauz, over the next few years. The small 8oz. bags of chips and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges, were such a nice touch… But to top it all off… The Hot Dog Cart. Where our clients could attain an over cooked wiener and a stale bun…

(ALJD p. 3, lns 30-35; GC 4, p. 1) The multiple references to the "Knauz" dealership and Becker's criticism of the substandard refreshments provided by Respondent's management to "clients" at the Event are "negative comments about the company." In another post, Becker included a picture of a BMW promotional banner on display at the Event which stated "Power and Beauty in Perfect Balance. The All-New BMW 5-Series." (ALJD, p. 4, lns 6-8; GC 4, p. 6)

Beneath this photo, Becker commented " 'This is not a food event' What ever made you realize that?" *Id*. Becker quoted a statement his supervisor, Phillip Ceraulo, made at a staff meeting preceding the Event. At that meeting, Becker and fellow salesperson Greg Larsen both told Ceraulo that the planned refreshments for the Event were inadequate. They did so because they feared an improperly run launch of the new 5-series would have a negative impact on the vehicle's sales, and thus their pay. In response to their expressed concerns, Ceraulo said "This is not a food event." Thus, Becker's Facebook post criticized Ceraulo's reaction to the employees' concerns and was a "negative comment about the company."

Additional postings by Becker again condemn the company's handling of the food and drink at the Event. Becker included a photo of fellow salesperson Fadwa Charnitski holding two bottles of water over the water cooler in the showroom. (ALJD p. 4, lns 39-41, p. 5, lns 1-3; GC 4, p. 5) Beneath this photo, Becker commented:

> No… that's not Champagne or Wine… It's… water. 8oz. water. Pop or Soda… Would be out of the question… In this photo, Fadwa, is seen coveting the rare vintages of water that were available for our guests…

Two additional photos by Becker showed a table of meager looking food offerings inside the dealership showroom, with Becker commenting under one of them that "[t]hese cookies came from the Club, you know… Sam's Club…" Beneath the other, Becker stated "[a] table filled with delicacies… from Sam's Club… As you can see, the line to hit the table went way back…" [No one was in line in the photo.] (ALJD, p. 3, lns 39-40; GC 4, p. 4 and 7) These posts likewise were "negative comments about the company."

The ALJ did not explain how he could conclude that Respondent did not terminate Becker for his Facebook posts regarding the BMW sales event, even though those posts

undeniably were "negative comments about the company" and Taylor included that as the first listed justification for terminating him in his contemporaneous memorandum.

The conclusion concerning Taylor's memo is further solidified when examining the content of Becker's postings regarding the Land Rover accident, because none of those postings were "negative comments about the company." Rather, the Land Rover postings were critical of the salesperson, Jaime Johnson, whose conduct caused the accident. Taylor's introductory Land Rover post states:

> This is what happens when a Sales Person sitting in the front passenger seat (Former Sales Person, actually). Allows a 13 year old boy to get behind the wheel of a 6000lbs truck, built and designed to pretty much drive over anything. The kid drives over his fathers foot, and into the pond all in about 4 seconds and destroys a $50,000 truck. OOOPS!

(ALJD p. 4, lns 15-19) The plain text of this posting obviously is critical of Johnson's conduct which caused the accident. It contains no reference to the dealership or any Knauz supervisor, and thus is not a "negative comment about the company." If anything, an objective reading of the text suggests that Respondent took appropriate action by terminating the "former Sales Person" who caused the accident. Becker's other Land Rover comment sarcastically described the photo of the vehicle in the pond with the 13-year-old boy nearby:

> I love this one…The kids pulling his hair out…"Du, what did I do?...Oh no, Is Mom gonna give me a time out"

(GC 5, p. 2) As with the first post, this comment does not refer to the dealership or any Knauz supervisor. These were the only two comments Becker posted with the Land Rover photos. Accordingly, then, Taylor could not be referring to these postings when he cited "negative comments about the company" as a justification for Becker's termination.

Although the Judge detailed the contents of Taylor's memorandum in his recitation of the facts of this case (ALJD, p. 6, lns 4-8), he made no mention of it when explaining how he concluded that Respondent terminated Becker solely for the Land Rover posts. The ALJ also ignored the undisputed fact that Taylor put hard copies of *both* sets of postings in Becker's personnel file immediately following Taylor's termination memo. The ALJ's decision cannot be reconciled with this evidence and thus cannot stand.

Additional evidence disregarded by the ALJ further supports the conclusion that Respondent terminated Becker in part for the BMW sales event posts. After his termination but several months before filing his charge with the NLRB, Becker filed for unemployment compensation with the Illinois Department of Security. IDES deemed Becker to be eligible for benefits, because the action which resulted in his discharge was not deliberate and willful. (GC 10) In its decision, IDES stated that Becker "was discharged from KARL KNAUZ BMW because HE USED POOR JUDGMENT WHEN HE POSTED PICTURES AND COMMENTS **OF A COMPANY EVENT** ON FACEBOOK." *Id*. (emphasis added) If the Land Rover postings were the sole reason for Becker's discharge, IDES's conclusion that Becker was discharged for his BMW sales event postings is illogical. That determination was made long before Becker filed his charge with the NLRB and before he had any idea that his conduct might be protected. Yet the Judge gave no explanation in his decision how IDES could find that Becker was terminated for the BMW sales event posts, but he could conclude that those posts had nothing to do with Becker's termination. The lack of consideration given to IDES's conclusion contradicts Board law. *Whitesville Mill Service Co.,* 307 NLRB 937, 945 fn. 6 (1992) (proper to enter and consider State unemployment compensation decisions).

The ALJ's conclusion that Becker was terminated solely for the Land Rover accident posts cannot be sustained in light of Taylor's termination memorandum, which constitutes conclusive documentary evidence to the contrary.

B. The Judge's Rejection of Disparate Treatment Evidence Was Incorrect as a Matter of Law. (Exception 6)

Respondent's discriminatory motive was also demonstrated by the pretextual nature of its claim that it discharged Becker only for his Facebook postings about the Land Rover accident. Pretext was established by Counsel for the Acting General Counsel's evidence of disparate treatment by Respondent of other employees who engaged in either the same or more egregious conduct than Becker. In particular, Respondent did not terminate the employee who caused the accident at the Land Rover dealership, conduct that objectively is far more serious than Becker's Facebook posts. In addition, Respondent did not terminate or otherwise discipline in any manner other employees who, just like Becker, posted sarcastic remarks about the Land Rover accident on Facebook. The ALJ treated this substantial showing of disparate treatment as an afterthought in his decision, either summarily rejecting or ignoring this evidence in an abbreviated footnote. (ALJD, p. 9, lns 48-51, fn 4) The ALJ's disregard of this evidence is improper pursuant to Board precedent.

1. Respondent's Termination of Becker for Objectively Less Serious Conduct Than A Co-Worker Arising Out of the Same Land Rover Accident Is Valid Evidence of Disparate Treatment Pursuant to Board Law.

The ALJ found "no similarity" between the conduct of the employee who caused the Land Rover accident and Becker's Facebook postings about the same accident, as well as that it was not "unreasonable" for Respondent to terminate Becker while giving the employee who caused the accident a slap on the wrist. (ALJD, p. 9, lns 48-51, fn 4) An examination of the

specific conduct of each employee, and Board law on disparate treatment applicable to the employees' conduct, establishes that the Judge's conclusion is incorrect.

At the hearing, Counsel for the Acting General Counsel learned for the first time that Respondent had not terminated the employee whose conduct caused the Land Rover accident to occur, a fact not previously disclosed during the investigation of this case. On June 14, Knauz Land Rover Finance Manager/Assistant Sales Manager Jaime Johnson was demonstrating the features of a new Land Rover vehicle to a woman and her 13-year-old son. (ALJD p. 3, lns 17-19; Tr. 136, 140, 168; GC 18) The vehicle was parked against a curb adjacent to a pond located at the Auto Park. (GC 5) With the woman and her son standing outside the vehicle, Johnson said "Get in;" the 13-year-old boy got in and sat down in the driver's seat and his mom stood outside the driver's door. (ALJD p. 3, ln 18; Tr. 140; GC 18) Either Johnson started the vehicle herself or told the 13-year-old to do so. (Tr. 141; GC 18) Johnson then began demonstrating the transmission system on the Land Rover. (Tr. 140; GC 18) She told the 13-year-old to put his foot on the brake and Johnson put the vehicle in gear. (Tr. 141; GC 18) However, the 13-year-old then hit the accelerator, causing the vehicle to jump the curb and the front of the vehicle to end up in the pond. (ALJD p. 3, lns 19-22; Tr. 141, GC 5 and 18.)

The dealership did not terminate Johnson as a result of her inexcusable conduct. Rather, she was disciplined in a manner that only could be described as a minor inconvenience. Johnson was almost wholly responsible for putting the car in the pond with a 13-year-old at the wheel, exposing her clients to injury, and damaging a very expensive vehicle. Yet Respondent did nothing more than take away her access to a new company demo vehicle for her own personal use, which previously had been part of her compensation package. (ALJD p. 3, lns 43-44, fn 2) Even that punishment was tempered further—Johnson was permitted to continue to use a pre-

owned company demo vehicle for 30 days until she could secure her own car. (*Id*. at lns 45-46; Tr. 145; GC 18) And that tempered, insignificant punishment was lightened to almost nothing when Respondent also provided Johnson with a $500 per month "demo allowance," a stipend not previously part of her compensation package that was designed to pay for the personal vehicle she now had to obtain and associated expenses such as insurance and fuel. (*Id*. at lns 45; Tr. 144, 146) Other than that, Respondent's management simply counseled Johnson to slow down, utilize good judgment and common sense when completing work tasks, and to follow such tasks through to completion. (ALJD p. 3, lns 46-47, fn 2; Tr. 144-45; GC 18) That latter counseling of Johnson aptly could be described as stating the obvious to her.

In contrast to causing the accident by putting a 13-year-old at the wheel of an expensive, brand-new vehicle and directing him to hit the vehicle's pedals, Becker played no part in causing the accident. (ALJD p. 4, lns 10-24; Tr. 55-61, 95; GC 5) Rather, he took four photos of the Land Rover in the pond, understandable given the unique nature of what happened. When he put the photos up on his Facebook account, Becker's introductory comments accurately described what occurred (other than to identify the foot that was run over by the vehicle as the father's, rather than the mother's, foot). In addition, by saying "This is what happens when a Sales Person….(Former Sales Person, actually)," Becker suggested to any non-Knauz-affiliated reader of the comment that the Sales Person—not the dealership—was at fault for the accident and that the dealership in turn had terminated the Sales Person for the conduct (even though that did not, in fact, occur). Furthermore, even though the dealership had no policy restricting the Facebook postings of employees, Becker immediately complied and removed the Land Rover posts when Ceraulo directed him to do so, resulting in the posts only being up for 24 hours. In any event, the postings were not accessible to everyone on the Internet, but only to Becker's Facebook friends,

and friends of his friends. Whatever that number actually was, no question exists that it was limited and not the entire universe of Internet users. Then, after his meeting with Taylor and Giannini to discuss the Facebook posts, Becker made two calls to supervisors to apologize and sent an e-mail to the two highest-level supervisors at the Auto Park also to apologize.

The Judge apparently concluded that "no similarity" existed between Johnson's and Becker's conduct because Johnson did not post about the accident she caused on any Facebook account of hers and Becker did not cause any vehicle accident. But this simplistic view of their respective conduct imputes into Board law a requirement not currently present that employee conduct be *identical* in order to constitute evidence of disparate treatment. While comparing discipline of employees who engaged in identical conduct is the most frequent manner in which disparate treatment is analyzed, it is not the only acceptable method. The standard the Board has applied for decades is that conduct be "similar," not identical. *Air Contact Transport, Inc.*, 340 NLRB 688, 696 (2003) (in assessing the General Counsel's case, one of the factors the Board considers is the "disparate treatment of certain employees in comparison to other employees who engaged in *similar* misconduct"). If the Board required identical conduct in order to compare an employer's disparate treatment of individuals, the word "similar" would not be used to describe the Acting General Counsel's burden of proof.

In this case, Respondent had no policy prohibiting employee Facebook postings. As a result, it had never before disciplined any employee for engaging in such conduct until Becker's Facebook postings. Thus, no method of comparing identical conduct even exists here. In such cases, the Board has recognized that disparate treatment can be found where one employee engaged in conduct of a more serious nature than another, but is given less severe punishment.

SCA Tissue North America, LLC, 338 NLRB 1130, 1137 (2003), involved an unlawful discharge allegation where the General Counsel alleged pretext based upon disparate treatment, but where no ability existed to compare identical conduct engaged in by the terminated employee and other employees. As a result, the Judge compared "fairly significant offenses" which would have constituted violations of the employer's "Code of Conduct," since the company in that case contended that the discharged employee also committed a violation of the Code of Conduct. The Board adopted the Judge's conclusion that the employer's stated justification was pretextual, because it disciplined the discriminatee far more severely and quickly than it had any other employees who engaged in even more serious misconduct. The Board reached a similar conclusion in *Donelson Packing Co., Inc.*, 220 NLRB 1043, 1051-52 (1975). There, the company terminated a pro-union employee for his alleged role in causing the spoilage of 600 pounds of meat processed in the employer's smokehouse. However, the terminated employee did not operate the smokehouse where the spoilage occurred, but rather served as the group leader for three employees who directly operated it. Those three employees were not disciplined in any manner by the company, nor was the Plant Superintendent in charge of the entire operation. The Board adopted the Judge's conclusion that "[s]uch disparate treatment of others intimately and even more directly involved in the same incident gives further indication that the spoilage incident was merely a pretext for [the group leader's] removal…" *Id*. at 1052. See also *Chesapeake Plywood, Inc.*, 294 NLRB 201, 205 (1989) (disparate treatment found based upon more severe discipline for an employee who engaged in less serious conduct, i.e. threat of physical violence versus threat of property damage).

Applying the Board's analysis here, an objective comparison of Becker's and Johnson's conduct, which the ALJ should have done, obviously demonstrates that Johnson's misconduct

was far more serious than Becker's. When claiming that Becker was terminated for his Land Rover postings, Respondent and its supervisors repeatedly characterized what occurred at the Land Rover dealership as an "extremely serious situation," a "serious accident," and a "dangerous situation." (Tr. 134, 138, 178; GC 13, p. 3) Johnson was "intimately and…directly involved" in the accident. She admitted to the nonsensical conduct which caused the accident, endangering customers and damaging expensive dealership property, but did not apologize for her actions. (GC 19) Her conduct violated the "Damage to Property" and "Dealership Property and Vehicles" rules in Respondent's Employee Handbook, which subjected her to possible discipline or termination. (GC 2, pp. 20-21, 29-30) On the flip side, Becker was not directly involved in and did not play any role in causing the incident, much like the group leader in *Donelson Packing*. He also did not violate any company policy in Respondent's Employee Handbook—the equivalent of the "Code of Conduct" in *SCA Tissue*—since Respondent had no policy restricting Facebook posts. Becker's conduct was limited to taking photos and posting truthful comments regarding what occurred on his private Facebook account, immediately removing the postings when instructed, and later apologizing for his conduct. But, in spite of the clear inequality, Becker was terminated and Johnson was not. Rather, Respondent simply replaced Johnson's new demo vehicle with a used demo vehicle for 30 days and then financed her own purchase and operation of a new vehicle by giving her a $500 stipend. Johnson retained her job and suffered nothing more than a token punishment. Accordingly, Respondent imposed more severe punishment upon Becker for less severe conduct.

The ALJ's disregard of this clear disparate treatment evidence was improper pursuant to Board precedent. The only possible conclusion to be drawn from this evidence—and the one the Judge should have drawn as a matter of law—is that Knauz BMW terminated Bobby Becker, and

did not terminate Jaime Johnson, because its supervisors were more upset about Becker's BMW sales event posts, the "negative comments about the company in a public forum," than they were about the Land Rover accident, including the employee who caused it. Respondent treated Becker disparately when compared to Johnson, establishing the pretext of Respondent's contention that it only relied upon Becker's Land Rover accident postings to terminate him.

2. The ALJ Improperly Failed to Consider Evidence of Respondent's Disparate Treatment of Other Employees Who Engaged in the Same Conduct as Becker.

Even assuming arguendo that the ALJ was correct and Respondent's leniency in disciplining Johnson compared with the severe punishment given to Becker after a spotless, 12-year career did not constitute disparate treatment, the Judge still erroneously ignored other evidence of disparate treatment by Respondent of employees who engaged in the *identical* conduct as Becker. Thus, record evidence established that multiple employees besides Becker posted biting, sarcastic remarks about the Land Rover accident on Facebook, yet none of them were terminated. In fact, none of them were even disciplined in any fashion by Respondent.

Four other Knauz employees also made light of the "serious accident" on Facebook. Knauz BMW salesperson Casey Felling responded to one of Becker's posts by commenting "I've been (sic) wanted to do that for years with some of my customer's cars. Glad those guys at LR finally had enough!" (Tr. 59-60; GC 5, p. 2) He then posted Becker's introductory Land Rover photo album page on his own Facebook account and commented "Finally, some action at our Land Rover store." (ALJD, p. 4, lns 25-28; GC 6) Kristine Buxton-Bartz commented "We did hear there was a Submarine Commander over there…Nice Pics Bobby." (Tr. 60; GC 5, p. 5) Supervisor Steve Kwasman commented "Should be titled: 'New Car Was[h] debuts at Knauz

Land Rover.'" (GC 5, p. 2) Finally, Amanda Sexton/Marescalco asked "How do I miss all the fun stuff?!?!" (ALJD p. 4, ln 21-22; GC 5, p. 1; Tr. 58) None of these employees were disciplined by Respondent. (Tr. 128-29)

Supervisors at Knauz BMW were aware of these Facebook postings by other employees. Respondent's Internet Manager Ray Reilly provided both sets of Becker's full postings containing all of the employees comments to supervisor Peter Giannini via e-mail. (GC 17) It was Giannini's and Ceraulo's review of the postings which led to their June 16 meeting with Becker to discuss them. In addition, Sexton/Marescalco's comment is contained on the Land Rover posting page Respondent had in Becker's personnel file. Nonetheless, Respondent never took any action towards these employees, despite supposedly being so upset with Becker's posts on the Land Rover accident.

The ALJ's conclusion that "no similarity" existed between Becker's and the other employees' postings and comments on Facebook about the Land Rover accident was clearly erroneous. While the other employees may not have initiated the conduct, all of the responding employees posted sarcastic, embarrassing comments on Facebook about the accident, with Felling even re-posting Becker's initial photo and comment on his own page. If Respondent was so upset about only the Land Rover postings and not Becker's BMW sales event postings, it logically should have issued discipline of some sort to the other Knauz employees who engaged in the identical conduct that Becker did. At a minimum, it would have discussed their Facebook postings with them and asked that they remove the postings, in particular Felling's reposting of the same content. The ALJ chose to ignore this evidence in his decision because it did not support his erroneous conclusion.

Based on the multiple pieces of disparate treatment evidence, the Judge erred as a matter of law in concluding that Respondent did not discharge Becker, at least in part, for his protected conduct of posting comments critical of the dealership's handling of the BMW sales event.

C. The Judge's Credibility Determinations Are Vague, Illogical, and Contradicted by Unaddressed Documentary Evidence and Uncontroverted Testimony. (Exceptions 7 through 10)

The ALJ provided three sentences of explanation as to why he credited the testimony of Respondent's supervisors that they terminated Becker only for the Land Rover posts. However, the reasons provided are unclear, irrational, state general conclusions without support, and do not address contradictory evidence or the fact that certain testimony was uncontroverted. A more thorough, clear justification was not provided, because again it would result in the erosion of the ALJ's conclusion regarding Respondent's discriminatory motive.

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 it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). The Board has overruled credibility determinations in cases where a judge has provided no explanation or unclear reasons for why he credited a witness, did not address conflicting documentary evidence, or did not fully consider all of the inconsistencies in the record. *Camelot Terrace*, 353 NLRB 151 (2008) (Board remanded case to ALJ where decision failed to articulate a basis for many credibility determinations and did not address evidence that arguably contradicted a number of factual findings); *E.S. Sutton Realty*, 336 NLRB 405, 405-08 (2001) (noting that overturning a judge's credibility resolutions is proper where, as is the case here, the ALJ did not fully address all inconsistencies in the record and contradictory documentary evidence); *Casino Ready Mix*, 335 NLRB 463, 463 (2001) (overturning ALJ's finding that witness was credible in part because of the total lack of explanation as to why the witness was credited, after judge stated on record

witness was unbelievable). This is one of those cases. The ALJ did not properly justify his credibility resolutions because he provided abbreviated, confusing, or no reasons for his determinations and, as happened with other pieces of evidence introduced by Counsel for the Acting General Counsel, neglected to address documents which conflicted with the resolutions. When examining all of the relevant evidence, the ALJ's conclusion that Respondent's supervisors were credible when testifying that they did not terminate Becker in part for his BMW sales event posts cannot stand.

To begin, the ALJ did not credit Becker's testimony that Giannini told him "the photos at Land Rover are one thing, but the photos at BMW, that's a whole different ballgame" at the June 16 meeting where his supervisors first discussed his Facebook postings with him. (ALJD p. 9, lns 18-19) The initial justification the Judge provided for doing so was the "nature of the June 16 meeting." (ALJD p. 9, lns 27-29) This vague justification does not support, in any way, the ALJ's conclusion. Nothing about the "nature" of a disciplinary meeting discredits Becker's testimony, which Giannini did not dispute at trial, that his supervisor was more upset about the BMW sales event postings than the Land Rover postings.

The testimony from Becker and Respondent's supervisors about the purpose of the meeting did not conflict. The meeting was called by Becker's supervisors so that they could discuss both sets of Facebook posts that he made. Thus, the Judge appears to be concluding that, because the meeting was called to discuss both sets of postings, Giannini would not tell Becker that Giannini was more upset about the BMW sales event posts than the Land Rover accident posts. That conclusion plainly does not follow. No reason exists why Giannini could not discuss both sets of posts at this meeting, but be more upset about the BMW posts than he was the Land Rover posts and express that to Becker. Moreover, if Giannini did not make this statement to

Becker at the meeting, the clear expectation would be for him to deny that he said this to Becker when testifying at the hearing. Yet Giannini did not do so and Becker's testimony thus was uncontroverted. Again, the ALJ did not address this.

The Judge then attempts to discredit Becker's testimony about Giannini's statement by saying Respondent's termination decision was not made until its June 21 meeting. (ALJD p. 9, lns 27-29) Again, this justification does not support the ALJ's conclusion. Counsel for the General Counsel agrees that "[t]he evidence establishes, and reason dictates that both incidents were discussed on June 16 and June 21, but that doesn't necessarily establish that both incidents caused [Becker's] discharge." However, that possibility does not mean that Giannini could not express to Becker at the June 16 disciplinary meeting that he was more upset with the BMW sales event posts than the Land Rover posts. The Judge's decision-making actually works in reverse here—he decided that Respondent terminated Becker at the June 21 meeting for the Land Rover posts and then went back and concluded that Giannini could not have made that statement to Becker at the June 16 meeting in light of his conclusion. Becker's uncontroverted testimony about what Giannini stated to him should have been credited. Reason then dictates that Respondent later terminated him in part for the Facebook postings of the BMW sales event.

In addition, although it is not entirely clear, it appears the ALJ also discredited Becker's testimony that Taylor said to him at the same June 16 meeting that Becker's postings embarrassed his co-workers and everybody working at BMW [not Land Rover]. (ALJD p. 9, lns 17-18) Although the Judge noted this testimony at the beginning of his analysis regarding Respondent's reasons for discharging Becker, he did not specifically state thereafter whether he credited this part of Becker's testimony or not. However, given the Judge's legal conclusion that the BMW sales event postings played no role in Becker's discharge, the presumption to be made

is that he did not believe Taylor told Becker he was embarrassed by Becker's BMW sales event postings.

That conclusion is contradicted directly by documentary evidence which the Judge simply ignored. On the same day that the meeting occurred, Becker sent an e-mail message via Facebook to his friend Shanda Hoenig which stated: "[Taylor] was upstairs saying how I embarased (sic) the company, himself mr. knau mr. madden and all of my co-workers…with the [E]venet's photo's and my sarcastic comments…" This is the exact testimony Becker gave at the hearing which the Judge apparently discredited. How the Judge could do so in light of this documentary evidence, which obviously corroborates Becker's testimony, is unknown. The ALJ also does not explain how Becker's testimony could be discredited when Taylor testified at the hearing—after sitting in the hearing room as Respondent's representative and hearing Becker's testimony—and did not deny stating this to Becker at the June 16 meeting. This contradictory documentary evidence was not discussed, because the credibility determination regarding Taylor's statement to Becker is unfounded in light of it.

The ALJ also suggests, but does not explicitly state, in his analysis that "notes" prepared by Taylor, Giannini, and Ceraulo support his conclusion that Respondent discharged Becker solely for the Land Rover postings. Although again unclear in the decision, the Judge is not referring to Respondent's termination memo to Becker's personnel file. Rather, the "notes" are post-hoc, e-mail statements furnished by Respondent's supervisors during the Board's investigation of Becker's unfair labor practice charge, some five months after the termination occurred. (ALJD p. 6, lns 10-36; GC 13, 14, 16) Unlike Taylor's contemporaneous memo stating the reasons for Becker's terminations, the subsequent "notes" were submitted when Respondent knew Becker was claiming his BMW sale event postings were protected conduct

and that he had been discharged unlawfully because of them. Naturally then, the supervisors changed course and contended that Becker was terminated solely for the Land Rover postings. Rather than supporting the Judge's credibility determinations, these "notes" actually establish that Respondent provided shifting explanations for its discharge of Becker, when comparing these post-hoc statements to Taylor's contemporaneous termination memo. This further supports a finding of pretext and that Respondent had a discriminatory motive. *Ellicot Development*, 320 NLRB 762, 762, 773 (1996) (Board upheld ALJ finding that an employer's shifting explanations for its actions was evidence of pretext).

The only other justification given by the Judge for crediting the testimony of Respondent's supervisors that they terminated Becker only over the Land Rover postings was that the supervisors were "more credible" and Becker was only "generally credible." (ALJD p. 9, lns 23-24) Like the other credibility determinations, no further explanation and no specific reasons were provided for this finding. In any event, the general, conclusive, and evasive testimony of these supervisors about the June 21 meeting at which they decided to terminate Becker establishes that they were not "more credible" than Becker.

Taylor's testimony about what the supervisors talked about at the June 21 meeting provides a fine example of this. He began by stating in conclusory fashion that Becker was terminated "because of what he'd done as far as posting on the Land or the Land Rover postings" and the decision was "based solely on the postings that Becker made regarding the Land Rover store." (Tr. 178, 180) Taylor then offered this textbook, non-responsive answer when questioned about the BMW postings:

> ALJ BIBLOWITZ: And, at that meeting on the 21st with the managers, was there any discussion about the BMW drive event postings?

> TAYLOR: The discussions at that meeting centered on the Land Rover postings.
>
> ALJ BIBLOWITZ: Centered?
>
> TAYLOR: Centered and that was, if you will, 90 percent of the discussion. Yes, the other one was mentioned because, we had that. But, again, nothing more than, you know, hey this is, part of Knauz is the hotdog cart, you know. I mean, we laughed about it. Unfortunately, that's not, that's not why we made a decision to terminate Bobby Becker.

Thus, when initially asked point blank, Taylor refused to mention or acknowledge Becker's BMW Event postings. When pressed further, Taylor remained evasive, still refusing to utter "BMW" or "Ultimate Driving Event" and instead labeling those postings "the other one." Ultimately, Taylor did concede Becker's BMW postings were discussed, but attempted to downplay the role they played in the termination.

Giannini's testimony about the June 21 meeting was equally non-specific. The entirety of his testimony about the Land Rover postings was a statement that "[t]he discussion, basically, was about an employee, Mr. Becker, posting a dangerous situation that occurred on our premises on his Facebook and, it being damaging to the company as well as to the individuals involved personally and, kind of making light of it." (Tr. 138) No other details were provided. Again, this broad, non-specific testimony provides no detail as to what exactly the supervisors found objectionable about the Land Rover accident postings compared to the BMW sales event postings.

Finally, Ceraulo's testimony regarding what was discussed at the meeting was even more vague, with him initially admitting that he did not recall exactly what Taylor said other than to ask those in attendance their opinions on Becker and whether he should still be employed. (Tr. 173) Ceraulo later acknowledged that the BMW sales event postings were discussed at the

meeting, but only that the postings were about the food. *Id*. Ceraulo concluded by reiterating the blanket statement that "the basis of the decision to terminate was the posting of the accident at the [Land] Rover store." (Tr. 174) His testimony accurately could be summarized by saying Ceraulo could remember almost nothing—except that Becker was fired for the Land Rover postings.

Not one of the three supervisors provided any testimony about what they or anyone else specifically said at the June 21 meeting either about the Land Rover postings or the BMW sales event postings. In addition, Respondent produced no documents, notes, or file memos concerning what happened at this meeting to corroborate the supervisors' contention that the Land Rover postings were the sole reason for Becker's discharge. In contrast, Giannini took detailed notes concerning their meetings with Becker and Johnson on June 16, and Taylor immediately documented his phone call to Becker on June 22 to inform him of the reasons for his termination. (GC 11 and 12)

The logical inference to be made was that the brief, conclusory, and evasive testimony of Respondent's supervisors at the hearing, which was designed to comply with Respondent's pretextual justification for discharging Becker it created during the underlying investigation of the charge, was simply not credible.

In his decision, the ALJ states that he could find "no reason" to discredit the testimony of Respondent's supervisors concerning the June 16 and June 21 meeting. The "reason" to discredit their testimony was the documentary evidence he ignored or improperly cited and the lack of specific examination of other, conflicting evidence. As a result, the credibility determinations should be overturned pursuant to Board precedent.

D. The Judge's Holding that Counsel for the Acting General Counsel Did Not Sustain His Initial Burden Pursuant to *Wright Line* Was Erroneous. (Exceptions 1 and 2)

For all the reasons stated above, Counsel for the Acting General Counsel submits he has met his initial burden under *Wright Line* of establishing that Becker engaged in protected, concerted activity; Respondent was aware of the concerted nature of that activity; and Respondent discharged Becker, at least in part, because of his protected conduct. Contrary to what the ALJ held, Respondent's discriminatory motive was established concretely by Respondent's own contemporaneous memo documenting its reasons for discharging Becker; its disparate treatment of the employee who caused the Land Rover accident and of other employees who posted on Facebook about the accident; and its shifting explanation, first articulated five months after Becker's discharge, that the BMW sales event postings played no role in his discharge.

Despite this showing, the Judge did not conduct the second portion of the *Wright Line* analysis as he should have. If it had been done, Respondent could not carry its burden of demonstrating it would have terminated Becker only for the Land Rover postings, given that Respondent did not terminate the employee who caused the Land Rover accident and did not terminate or otherwise discipline multiple other employees who also posted sarcastic remarks about the Land Rover accident on Facebook. Respondent offered nothing but its word that it terminated Becker solely for his Land Rover postings, an insufficient showing pursuant to the Board's preponderance of the evidence standard. If Respondent's claim met that burden, any employer could defend a mixed-motive, unlawful discharge case by saying it had a private, undocumented meeting of its supervisors where it decided to terminate an employee only for lawful reasons.

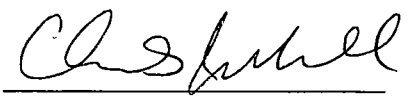
Accordingly, the ALJ's legal conclusion that Counsel for the Acting General Counsel did not meet his initial *Wright Line* burden and thus that Respondent did not violate Section 8(a)(1) was in error.

II. CONCLUSION

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board find merit to the Exceptions to the Decision of the Administrative Law Judge, conclude that Respondent discharged Bobby Becker for his protected, concerted activity in violation of Section 8(a)(1), and provide all appropriate remedies to Mr. Becker for Respondent's unlawful conduct, including offering Mr. Becker reinstatement to his position and providing any backpay owed.

DATED at Chicago, Illinois, this 26th day of October, 2011.

Respectfully submitted,



Charles J. Muhl
Counsel for the Acting General Counsel
National Labor Relations Board, Region 13
209 S. LaSalle St., Suite 900
Chicago, IL 60604
Phone: 312-353-7599
Fax: 312-886-1341
E-mail: charles.muhl@nlrb.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **BRIEF IN SUPPORT OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on October 26, 2011, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

E-MAIL

Mr. James Hendricks
Mr. Brian Kurtz
Ford and Harrison
55 E. Monroe St., Suite 2900
Chicago, IL 60603
jhendricks@fordharrison.com
bkurtz@fordharrison.com

Mr. Robert Becker
1094 Blackburn Dr.
Grayslake, IL 60030
huskytripower@yahoo.com

Charles J. Muhl
Counsel for the General Counsel
National Labor Relations Board, Region 13
209 S. LaSalle Street, Suite 900
Chicago, Illinois 60604
Phone: (312) 353-7599
Fax: (312) 886-1341
E-mail: charles.muhl@nlrb.gov