

**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
REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The Administrative Law Judge's conclusion that Respondent Knauz BMW did not terminate Bobby Becker for his protected Facebook posts concerning the dealership's handling of a major sales event was erroneous, because Respondent's own contemporaneous termination memorandum states that those posts were one of its justifications; disparate treatment evidence also establishes that the protected posts played a part in the discharge; and Respondent's witnesses did not testify credibly about why they terminated Becker. In response to the Acting General Counsel's exceptions, Respondent relies upon colorful language and unfounded accusations, tactics that do not refute sound legal argument. Nothing in Respondent's Answering Brief alters the conclusion that the Board should find merit to the Acting General Counsel's exceptions and conclude Respondent terminated Bobby Becker in violation of Section 8(a)(1).

I. RESPONDENT'S JUNE 22 TERMINATION MEMO CONCLUSIVELY ESTABLISHES THAT IT TERMINATED BECKER IN PART FOR HIS PROTECTED FACEBOOK POSTS ABOUT THE BMW SALES EVENT.

Immediately *after* terminating Bobby Becker, Respondent supervisor Taylor wrote a note to Becker's personnel file, which stated the discharge was due to "negative comments about the company in a public forum" and Becker making "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." (GC 12) In its Answering Brief, Respondent does not dispute that the memo references both sets of postings when justifying the termination. That concession alone is enough to support the Acting General Counsel's exception to the Judge's lack of discriminatory motive finding.

Rather than contesting the obvious, Respondent instead attempts to suggest the Judge considered, but discounted, the memorandum in reaching his legal conclusion regarding Respondent's motivation. Nothing in the opinion remotely suggests this. While Taylor's memorandum is described in the Judge's "Facts" section, the text of that section, in its entirety, reveals that the Judge merely was reciting all of the facts presented by both parties at the hearing. The Analysis section is where the Judge resolves conflicts in those facts, and that section is critically silent on Respondent's termination memorandum. (ALJD p. 9, lns 17-31) Even the language specifically cited by Respondent does not reference the memorandum:

The 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 his discharge.

(ALJD p. 9, lns 27-29) This language does nothing more than confirm the undisputed fact that both sets of postings were discussed at the June 16 and 21 meetings. What "necessarily establishes" that Respondent used "both incidents" to justify its termination of Becker is their own, contemporaneous, post-termination memo. Neither the cited language nor anything else in the Judge's opinion gives any indication for how he made the determination that the BMW Sales Event posts were not a reason for Becker's discharge when the memorandum says they were. The ALJ gives no indication that the termination memorandum was considered at all.

The bottom line is, Respondent's termination memo explains that it terminated Becker for both sets of postings—a fact Respondent now does not dispute—and that memo is the one controlling piece of evidence in this case on that issue. Counsel for the Acting General Counsel is not, as Respondent suggests, relying on the termination memo to show that Respondent was aware of both sets of postings when it made the decision to terminate Becker. No dispute about that exists. The purpose of the memorandum, as it was at the time Taylor wrote it, is to establish the reasons that Respondent had just terminated Becker, which included his protected Facebook postings regarding the BMW Sales Event.

Respondent contends that “[t]he General Counsel is putting too much probative value” on the only, post-termination, contemporaneous document detailing the reasons for Becker's discharge that was not created at a time when Respondent knew the termination was being alleged as unlawful. What other piece of evidence could be more critical in an unlawful discharge case where the employer's motive is disputed than the employer's own, self-prepared, contemporaneous memorandum which states the justifications for the employee's discharge?

II. RESPONDENT'S DISCHARGE OF BOBBY BECKER CONSTITUTED DISPARATE TREATMENT PURSUANT TO BOARD LAW.

The ALJ erred by summarily rejecting the Acting General Counsel's substantial evidence of disparate treatment in this case, which included the undisputed facts that Respondent did not terminate the employee who caused the accident at the Land Rover dealership and did not terminate or otherwise discipline in any manner other employees who, just like Becker, posted sarcastic remarks about that accident on Facebook. Respondent resorts to inflammatory language and unfounded accusations in its attempt to distract from the Acting General Counsel's sound legal argument on this issue. On the substantive merits of the law, where the focus should be, Respondent's discriminatory motive is established by this disparate treatment.

Respondent contends that no disparate treatment can be shown because it did not terminate the other employee, Greg Larsen, who along with Becker complained to management about Respondent's choice of refreshments for the BMW Sales Event at a staff meeting. In so arguing, Respondent again ignores Board law. To demonstrate an unlawful termination based upon union or protected, concerted activity, the Acting General Counsel need not demonstrate that every employee who engaged in the protected activity was terminated by the employer. *Audobon Regional Medical Center*, 331 NLRB 374, 376 (2000), citing to *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) (“[A] discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents”); *The George A. Tomasso Construction Corp.*, 316 NLRB 738, 742 (1995) (adopting ALJ finding of unlawful failure to recall, including Judge's finding that “an employer's failure to eliminate all union adherents does not prove that its actions toward a few were untainted by antiunion bias”). Thus, it is irrelevant under Board law that Respondent did not discharge Larsen for making the same complaints that Becker did. Even if it was relevant, Respondent's argument fails to account for the fact that Becker, unlike Larsen, took those complaints a step further when he vocalized them through his Facebook posts. It is not the “height of intellectual dishonesty” to pay no heed to facts that are immaterial pursuant to Board law when making a legal argument.

Respondent's argument regarding its non-action towards Larsen also evidences an attempt to have it both ways with respect to disparate treatment. On the one hand, Respondent argues that fellow employee Jaime Johnson was not similarly situated to Becker because her causing of the Land Rover accident is not similar to Becker commenting about the Land Rover accident on Facebook. On the other, Respondent attempts to equate the conduct of Larsen, who complained about Respondent's handling of the BMW Sales Event but did not post on Facebook

about it, with Becker, who both complained and posted on Facebook about it. Respondent cannot compare Larsen with Becker, but then insist that Becker cannot be compared to Johnson.

Respondent's suggestion that *SCA Tissue*, 330 NLRB 1130, 1137 (2003), is inapplicable to this case misses the point of that decision with respect to disparate treatment. With the Board's approval, the judge in *SCA Tissue* evaluated how an employer treated employees who engaged in "fairly significant offenses" where no "really analogous situations" were present. *Id.* Thus, it is appropriate for the Board here to compare Johnson's "fairly significant offense" which resulted in no termination to Becker's objectively less serious offense which resulted in his discharge. The distinguishing characteristic between the two employees was that Becker was the only one who criticized the dealership on Facebook about its handling of the BMW Sales Event. In addition, Respondent's contention that Johnson's conduct was merely negligence and failure to use good judgment discounts the undisputed fact that Johnson let an unlicensed 13-year-old boy operate the gear controls on a huge SUV parked next to a pond, leading to, as the supervisors described it, a "dangerous situation" that could have seriously injured Johnson and the dealership's customers. Finally, Respondent's comparison of the seriousness of Johnson's conduct with that of the employees in *SCA Tissue* also is immaterial. The proper comparison on the issue of disparate treatment here is the conduct, and discipline, of Becker and Johnson. Thus, the *SCA Tissue* decision is directly on point.

Respondent's argument that the disparate treatment analysis in *Donelson Packing*, 220 NLRB 1043 (1975), does not apply to this case again is based upon an improper focus on legal issues in that case that are not present here. The fact that *Donelson Packing* involved the discharge of a supervisor is irrelevant to this case. The decision was cited solely for the proposition, found elsewhere in Board law, that the Board may objectively compare an

employer's discipline of employees who committed offenses of different degrees of seriousness in order to find disparate treatment and a discriminatory motive for a termination. That is exactly what happened here. Respondent did not terminate Jamie Johnson for causing the Land Rover accident, yet discharged Becker simply for posting about it on Facebook.¹

Respondent also inexplicably contends that "the record is devoid of anyone who engaged in the same conduct" as Becker. Fellow BMW salesperson Casey Felling did engage in the same conduct. He took Becker's original Facebook post concerning the Land Rover accident and copied it to his own Facebook page, with the comment "Finally some action at our Land Rover store." Yet Felling was not terminated or otherwise disciplined by Respondent. In addition, the other employees who commented and posted about the Land Rover accident in response to Becker clearly were engaged in similar conduct, but were not disciplined by Respondent.

The multiple components of disparate treatment evidence concretely establish Respondent's discriminatory motive in discharging Bobby Becker. The Judge erred in disregarding this evidence.

III. THE JUDGE'S CREDIBILITY DETERMINATIONS ARE NOT SUPPORTED.

In his decision, the ALJ stated the following about conflicting witness's testimony:

- While I found Becker to be a generally credible witness, I also found the Respondent's witnesses to be more credible and can find no reason to discredit their testimony.

¹ Respondent also asserts that the Board subsequently overruled *Donelson Packing*, making it inapplicable to this case. In *Parker-Robb Chevrolet*, 262 NLRB 402, 403 (1982), the Board altered the ways in which the General Counsel could prove that an employer's termination of a supervisor violated Section 8(a)(3), specifically eliminating the "integral part" or "pattern of conduct" violations where supervisors themselves were active in union or protected, concerted activity and were discharged for it. Obviously, this holding has no bearing on the Board's and the Judge's analysis of disparate treatment evidence in *Donelson Packing*, or in the other cases cited by Counsel for the Acting General Counsel on disparate treatment. The legal question of what constitutes disparate treatment is not dependent on whether the unlawfully discharged individual is a supervisor or an employee. Thus, Respondent's reference to "professional obligations" is inflammatory, unfounded, and an attempt to distract from the merit of the Acting General Counsel's legal argument.

- Further, considering the nature of the June 16 meeting, I do not credit Becker’s testimony that Giannini downgraded the serious nature of the Land Rover posting while stressing the seriousness of the posting of the Event.
- The 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 his discharge.

(ALJD p. 9, lns 23-29) As fully detailed in Counsel for the Acting General Counsel’s exceptions brief, these three sentences are not supported and should not be adopted by the Board.

With respect to the first finding, the Judge provided no specifics to support his general conclusion. Those specifics are necessary as part of “the Judge’s role under *Standard Drywall Products* and progeny” to discuss and discount any evidence introduced to the contrary. Taylor’s June 22 termination memorandum clearly is a “reason to discredit [the supervisors’] testimony.” That memo is a far more reliable piece of evidence than the self-serving, conclusory testimony given by Respondent supervisors Taylor, Giannini, and Ceraulo at the hearing. Taylor wrote the memo on the same day Becker was terminated, immediately after speaking to him about why he was terminated and before any question about the legality of the discharge had arisen at the NLRB. In contrast, the three supervisors essentially provided one lone piece of testimony at the hearing—we fired Becker for his Land Rover postings, not for his BMW Event postings—even though that conflicts directly with the justifications provided in the termination memo. Taylor gave no explanation on the stand for why he changed his position on the justifications for Becker’s termination, or how he could list both justifications in the termination memo but later claim that only one of the justifications was truly relied upon. Furthermore, the ALJ gave no explanation in his decision explaining how he credited the supervisors’ testimony even though the termination memorandum directly contradicted it.

With respect to the second conclusion, the Judge provided no clarification for what the “nature of the...meeting” meant. However, it is undisputed that Becker’s supervisors held the meeting to discuss his Facebook posts, including the ones regarding the BMW Sales Event. Giannini certainly could have stated to Becker that he was more concerned about the Event postings than the Land Rover accident postings at the meeting. Just because both sets of postings were discussed does not mean that Giannini was equally upset about both. Thus, the ALJ’s credibility holding in this regard is illogical, especially since Giannini did not deny making the statement to Becker.

Respondent then takes exception to the significance of Becker’s testimony about what Giannini said to him at this meeting being uncontroverted, by again overlooking Board precedent. The failure of a witness to controvert earlier, conflicting testimony by another witness has long been used as a factor to determine credibility. See, e.g., *Ferguson Enterprises Inc.*, 355 NLRB No. 189, slip op. at *17 (2010) (judge credits the uncontroverted testimony of one employee because one supervisor did not testify at the hearing and another who did testify “did not say anything to controvert [the employee’s] testimony”); *Daikichi Corp.*, 335 NLRB 622, 622-23 (2001) (Board notes the appropriateness of the judge considering the employer’s failure to offer available witness testimony to controvert the employees’ account of a supervisor’s Section 8(a)(1) threat). Beyond that, Respondent also excepts to the proper consideration of uncontroverted testimony in determining credibility by suggesting it was the Judge’s or Counsel for the Acting General Counsel’s responsibility to question Giannini about what he said to Becker at the June 16 meeting. The prosecutor and the Judge have no obligation to help Respondent with its defense in a hearing.

In addition to Becker's testimony being uncontroverted, it also was corroborated by Becker's same-day e-mail to his Facebook friend and work colleague Sandra Hoenig, in which he 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..." (GC 9) Respondent claims the reference to "sarcastic comments" also could apply to Becker's Facebook posts about the Land Rover accident. The entirety of the sentence belies this contention. Becker's reference to sarcastic comments is conjunctive and comes immediately after his reference to the BMW Sales Event posting. No mention of the Land Rover accident postings is made anywhere in the text. Thus, the logical, objective interpretation of this message is that Becker was confirming the statement that Giannini made to him at that June 16 meeting. Moreover, Respondent's claim that the message is not reliable because Becker was seeking to corroborate his own testimony ignores the fact that the message was sent the same day of the meeting, almost immediately after it occurred, and months before Becker knew he would be testifying about what Giannini said to him at an NLRB administrative hearing.

Giannini's statement indicating that he was more upset about Becker's BMW Sales Event posts is not an "insignificant part of the record." Giannini's focus on that set of posts prior to Becker's discharge confirms that Becker's protected conduct played into the termination decision, as corroborated by Taylor's memo written after the discharge.

With respect to the Judge's third finding, it is not disputed that, in theory, Respondent could have discussed both sets of postings by Becker at the meetings on June 16 and 21, but only terminated him for one set of postings. However, Respondent's own contemporaneous termination memorandum refutes that theory and the Judge's finding.

Finally, Respondent asserts that it is an “awful big hill for the General Counsel to climb” to show that Respondents’ supervisors did not testify credibly about the June 21 meeting preceding Becker’s discharge. There is no “awful big hill” here. Respondent incorrectly imputes some importance to the fact that Becker and Larsen were not present for this meeting. A supervisory meeting to decide what adverse action to take against an employee following an investigation is never going to have the employee present, until it is time to inform the employee of the decision. Respondent improperly suggests it can avoid liability for its unlawful termination by holding a meeting of only its own supervisors and then having them later testify that “we terminated Becker for the lawful reason, not the unlawful one.” The supervisors’ self-serving, conclusory testimony about an undocumented, closed-door meeting was not credible, and is directly contradicted by its termination memo written the very next day.

Accordingly and for all the reasons stated herein and in the Brief in Support of Exceptions, Counsel for the Acting General Counsel requests that the Board find merit to the exceptions and conclude that Respondent’s discharge of Bobby Becker for his protected, concerted activity violated Section 8(a)(1).

DATED at Chicago, Illinois, this 22nd day of November, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REPLY 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 November 22, 2011, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

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