

**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
ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS**

Bobby Becker and his fellow auto salespersons complained to management about the subpar refreshments the dealership planned to serve to customers at a major sales event. Becker then posted comments and photos on Facebook expressing the group concern, and Respondent terminated him for doing so. At the hearing, Becker succinctly explained why the employees had this concern:

Everything in life is perception. BMWs a luxury brand and...what I've talked about with all my co-workers was the fact that what they were going to do for this event was absolutely not up to par with the image of the brand, the ultimate driving machine, a luxury brand. And we were concerned about the fact that it would...affect our commissions, especially in the sense that it would affect...how the dealership looks and, how it's presented...when somebody walks into our dealership...it's a beautiful auto park...it's a beautiful place...and if you walk in and you sit down and your waiter serves you a happy meal from McDonald's. The two just don't mix...we were very concerned about the fact...that it could potentially affect our bottom line...

(ALJD p. 2, lns 34-42; Tr. 38-39) The wages of Becker and all other salespersons were based entirely upon commissions determined by the volume of cars sold and the satisfaction that

customers had when they visited the dealership and, hopefully, purchased a vehicle. Because of that undisputed fact, the employees' concern about the refreshments was directly linked to their terms and conditions of employment, and thus protected. Furthermore, the employees were not trying to affect the sales and marketing strategy of the company. Becker and the other employees had no interest in becoming event planners or managing future sales events. They simply were concerned that shoddy food and drink for customers ultimately would have a negative impact on their pay. As a result, Respondent's Cross Exceptions contending Becker's activity was not protected because the employees' complaints were unrelated to their pay fail.

In addition, Respondent's argument that it had no unlawful motivation in discharging Becker because it did not know that Becker's Facebook postings constituted protected conduct misstates long-standing Board law. In a Section 8(a)(1) discharge case such as this one, the burden of proof for the Acting General Counsel with respect to employer knowledge requires a showing that the employer knew of the concerted—but not protected—nature of the conduct. Respondent concedes that Becker and Larsen shared the group complaint about the refreshments at a staff meeting held by their direct supervisor. Thus, Respondent knew of the concerted nature of the complaint. It is completely irrelevant that employees did not tell management their concerns were tied to their commissions, because the Acting General Counsel has no obligation to prove this for the employees' activity to be protected.

Judge Biblowitz properly held that Becker's Facebook comments and photos concerning the BMW Sales Event were protected, concerted activity. Accordingly, the Board should deny Respondent's cross exceptions.

I. THE JUDGE PROPERLY FOUND THAT THE ACTING GENERAL COUNSEL IS NOT REQUIRED TO PROVE RESPONDENT KNEW OF THE *PROTECTED* NATURE OF BECKER'S CONDUCT. (Respondent Cross Exceptions 2-3)

In his decision, Judge Biblowitz rejected Respondent's contention that Becker was not engaged in protected conduct "because neither Becker nor any other employee made Respondent aware that their complaints about the food being served [at the BMW Sales Event] was (sic) really about their commissions." (ALJD, p. 8, lns 28-31) On appeal, Respondent argues that it had no knowledge of the *protected* nature of Becker's conduct, and that the Judge misapplied *Wright Line* in reaching his conclusion as a result. Respondent misstates the law applicable to an unlawful discharge due to protected, concerted activity. The element of knowledge is established in this case simply by showing that Respondent knew of the *concerted*, not protected, nature of the activity.

The Board's decision in *Kysor/Cadillac*, 309 NLRB 237, 237-38 (1992) specifically addresses, and rejects, the identical argument made by Respondent here. In that case, the judge dismissed a Section 8(a)(1) complaint concerning discipline issued to employees for alleged protected, concerted activity. The judge's basis was the same as Respondent's argument here—that the employer had no reason to know that the employees' conduct was protected under the NLRA. The Board reversed the Judge and succinctly stated the burden of proof as follows:

Section 8(a)(1) is violated if the Respondent knows of its employees' *concerted* activity, if the activity is protected by the Act, and if adverse employment action is motivated by the employees' protected concerted actions.

Id. (emphasis added), citing to *Amelio's*, 301 NLRB 182 (1991) (a case Respondent claims somehow supports its argument in its Cross Exceptions brief). The Board further clarified that:

[a]s soon as Respondent was factually aware or put on notice that the employees were making a *concerted* inquiry, the Section 7 protections of the Act attached to the employee

conduct...notwithstanding the fact that the Respondent may not have been aware of the legal significance of the conduct.

Id. (emphasis added).

With the proper legal standard articulated, it is plain to see that the Judge came to the proper conclusion here. The ALJ was not engaged in “bald speculation” when he found that Respondent was aware of the concerted nature of the employees’ conduct. Respondent itself admits, even details in its brief, how employees Becker and Larsen expressed their complaints about the dealership’s handling of the BMW Sales Event at a staff meeting at which the employees’ supervisor, Phillip Ceraulo, was present. (Resp. Cross Ex. Brf., p. 2-3; see also ALJD, p. 7, lns 49-52, p. 8, lns 1-2) As soon as the two employees did so, Ceraulo, and therefore Respondent, knew of the *concerted* nature of the employees’ conduct and the protections of Section 7 attached from that point on. The fact that the employees did not inform Respondent that their concerns were related to their commissions or that Ceraulo was not aware of the legal significance of the employees’ conduct is irrelevant.

Respondent’s reliance on the Board’s decisions in *Reynolds Electric* and *Amelio’s* is misplaced, since both decisions actually support ALJ Biblowitz’s conclusion. The Board dismissed the complaint in *Amelio’s*, because the General Counsel “failed to establish that the Respondent knew of the *concerted* nature of [the employee’s] activity.” 301 NLRB 182, 182 (1991) (emphasis added) The General Counsel’s burden again was described to include a showing that “the employee engaged in protected, concerted activity...the employer knew of the *concerted* nature of the activity, and the discharge was motivated by the employee’s protected concerted activity.” *Id.* (emphasis added) Likewise in *Reynold’s Electric*, the Board dismissed the complaint due to a lack of evidence that the employer knew an employee “was acting for others as well as for himself” and thus that the employer “knew of this *concerted* activity.” 342

NLRB 156, 156 (2004) (emphasis added) Accordingly, the Board repeatedly has set forth that, while the employees' activity must be protected and concerted, the employer need only know of the concerted—not the protected—nature of the activity to establish knowledge. These cases distinctly refute the notion that Counsel for the Acting General Counsel must prove Respondent here knew of the protected nature of Becker's Facebook posts on the BMW Sales Event, which grew out of the earlier, concerted complaints that Becker and Larsen made directly to the Respondent in a staff meeting. Thus, the Judge's decision in this regard was proper.

Respondent also argues that the Judge erred in concluding that the employees' complaints were valid and could have an actual effect on compensation, contending that such speculation is not a substitute for a showing that it actually knew the employees' conduct was protected. Respondent's argument misses the point, since the validity of the employees' concern about the impact that a poorly-run sales event would have on sales and ultimately their commissions is irrelevant to the question of whether the concern constitutes protected activity. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at *4 (Sept. 30, 2011) (agreeing with the Judge that employees' activity was protected even if they were mistaken about their concern that their employer had reneged on an agreement to implement layoffs by seniority); *Wagner-Smith Co.*, 262 NLRB 999, 999 fn. 2 (1982) (the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as a complaint is not made in bad faith); *Chas. Ind. Co.*, 203 NLRB 476, 479 (1973) (Board adopts ALJ's conclusion that "the wisdom or unwisdom of men who are complaining and their justification or lack of it are irrelevant to the question of whether employees are engaging in protected concerted activity").

In this case, it is not relevant, as Respondent contends, whether any actual customer did not buy a car or gave a poor response to a Customer Satisfaction survey because the dealership rolled out the hot dog cart at the sales event. What matters is that Becker and the other employees thought it was possible, and that Becker made his Facebook posts because of that concern. (ALJD p. 2, lns 34-42; Tr. 38-39) The fact that Becker was motivated to complain at the staff meeting and on Facebook due to concern over his commissions is sufficient, standing alone, to establish that the complaints were related to employees' terms and conditions of employment and thus protected. In addition, absolutely no evidence of bad faith exists on the part of Becker, Larsen, and the other employees who were concerned about the dealership's handling of the Event. Becker and Larsen raised their concern spontaneously at the meeting to discuss the planning for the Event, and Becker followed up with his Facebook posts to further express his and the other employees' frustration with management's rejection of their concern.

Respondent's contention that proving an employer's knowledge of employees' protected activity and proving its knowledge of concerted activity is a "distinction without a difference" flies in the face of decades of Board precedent, including the very cases Respondent itself relies upon. As the Judge here did, the Board can reject in short form Respondent's argument and Cross Exceptions 2 and 3 upon which it is based.

II. THE JUDGE CORRECTLY DETERMINED THAT BECKER'S FACEBOOK POSTS CONCERNING THE BMW SALES EVENT WERE PROTECTED ACTIVITY. (Respondent Cross Exception 1)

The Judge appropriately held that the salespersons' group complaints about the dealership's handling of the sales event, and Becker's Facebook postings which logically grew out of the prior conduct, were protected, because the employees were concerned about the potential affect on their compensation. (ALJD p. 8, lns 16-22) On appeal, Respondent argues

that the complaints of Becker and the other salespeople regarding the Event refreshments were “unrelated to employee interests” and thus do not constitute protected activity. However, the Board should reject this argument because it ignores how employees’ pay was calculated and relies upon inapplicable case law.

It is unmistakable that the employees’ complaints about the dealership’s planned refreshments for the Event, including as expressed by Becker in his Facebook posts, directly related to their pay and thus their terms and conditions of employment. No dispute exists that Respondent’s salespersons worked entirely on commission and performance-based bonuses. (ALJD p. 2, lns 5-11; Tr. 29-31) The dealership paid a commission for each vehicle sold, based on a percentage of the profit made on the sale. The performance-based pay included a bonus for meeting a certain volume of sales each month, as well as the “Customer Satisfaction Index” (CSI) bonus. The CSI bonus was awarded based upon the experience that customers had at the dealership when purchasing a vehicle and was the largest component of auto salespersons’ salaries. Accordingly, employees were concerned that, if Respondent’s choice in refreshments created a poor perception among customers about the Event or the manner in which Respondent conducted its business, it could lead to less sales and, in turn, less commissions and volume bonuses for them. Likewise, if instead a customer bought a vehicle anyway despite the cheap food, any dissatisfaction the customer had with the refreshments could have been reflected in CSI survey responses concerning the dealership experience. Lower survey scores would mean lower CSI bonuses for Becker and other salespeople. Accordingly, worried that their pay was in the balance, the salespersons raised with management their concern about Respondent’s use of the hot dog cart at a major sales event where they were responsible for completing vehicle sales. That concern, as the Judge properly concluded, clearly and logically was tied to the potential

impact it would have on the commissions of the Knauz BMW salespeople, given that the pay of salespeople was directly linked to customers having a positive experience at the dealership.

In contrast, the cases which Respondent relies upon to support its argument all involve situations where the employees' complaints had no direct link to their pay or other terms and conditions of employment. In *Harrah's Casino*, an employee pushed a proposal to have the Employee Stock Ownership Plan purchase controlling interest in the employer's parent company. 307 NLRB 182, 182 (1992). The principal purpose of the employee's proposal in that case was to put "employees in the role of owners with ultimate corporate control, and thus fundamentally to change how and by whom the corporation would be managed..." *Id.* As a result, the conduct was designed to "advance employees' interests as entrepreneurs, owners, and managers" and not "employees' interests as employees." *Id.* In contrast, Becker and the other employees in this case had no interest in assuming corporate control of the dealership or changing how it was managed. They simply wanted to improve the customer experience at a sales event so that their pay would not suffer.

Five Star Transportation likewise does not support Respondent's argument. In that case, the two employees raised "general safety concerns" that did not deal with their own personal safety in operating school buses. The Board noted that "merely raising safety or quality of care concerns on behalf of nonemployee third parties is not protected conduct under the Act." 349 NLRB 42, 44 (2007). In this case, Becker's and other employees' pay was tied to the experience that customers had at the dealership. Their concern about customers' reactions to the food and beverage offered at the Event was due to the impact it would have on their own terms and conditions of employment. It is certainly safe to say that the salespeople hardly would be

concerned with their customers having to eat a hot dog and wash it down with bottled water if they did not think the customers' experience would impact the employees' bottom line.

Good Samaritan Hospital, 265 NLRB 618 (1982), and *Orland Park Health Care Center*, 341 NLRB 642 (2004), involved situations where employees expressed concerns about patient care. The quality of the patient care had no impact on the employees' pay or other terms and conditions of employment, as customer satisfaction does in this case, and thus those decisions are irrelevant to the matter at hand. *Damon House*, 270 NLRB 143 (1984), involved employees' expressing concerns to their employer about a supervisor's ethics and impact on adolescent residents, again topics that had nothing to do with employees' pay as the complaints here did.

Finally, Respondent argues that the employees' complaints really were about Respondent's sales and marketing strategy, and not their own compensation. No evidence supports this contention. Neither Becker nor any other salesperson complained about the dealership's handling of the BMW Sales Event because they wanted to become sales event planners for Respondent or manage the food and refreshments at future events. He and other employees simply wanted Respondent to improve the food and refreshments at the BMW Sales Event, because they were concerned the planned offering would be perceived negatively by customers and make it more difficult to sell cars and earn commissions.

The direct connection between customer experience at the dealership and salespersons' salaries renders the employees' complaints, including Becker's Facebook posts, protected.¹

¹ Respondent did not except to Judge Biblowitz's proper legal conclusion that Becker's Facebook posts were concerted activity as a logical outgrowth of the prior, group complaints to management and discussions amongst employees concerning the dealership's planned refreshment offerings for the BMW Sales Event. (ALJD p. 7, lns 49-52, p. 8, lns 1-21) Respondent also did not except to the Judge's correct holding that Becker did not lose the protection of the Act based upon the content of his Facebook posts. (ALJD p. 8, lns 33-52; p. 9, lns 1-6.) Accordingly, the Board should adopt the Judge's conclusions pro forma absent any exception. (NLRB Rules and Regulations, Section 102.48(a).)

III. THE JUDGE PROPERLY CONCLUDED THAT RESPONDENT’S “COURTESY” RULE VIOLATES SECTION 8(A)(1). (Respondent Cross Exceptions 4-6)

Prior to July 19, 2011, Respondent maintained a “Courtesy” rule in its Employee Handbook, which stated:

Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. *No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.*

(ALJD p. 7, lns 1-5) Judge Biblowitz correctly held that this rule could reasonably be interpreted by employees as curtailing their Section 7 rights, based upon the Board’s decision in *University Medical Center*, 335 NLRB 1318, 1321 (2001). (ALJD p. 11, lns 14-21)

The determination as to whether the maintenance of a workplace rule constitutes an unfair labor practice involves “working out an adjustment between the undisputed right of self organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments...” *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945). In determining whether the mere maintenance of a rule such as the one at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Crowne Plaza Hotel*, 352 NLRB 382, 383 (2008); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where the rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice, even absent evidence of enforcement. *Id.*

Respondent’s “Courtesy” rule encompasses all employee language that it deems disrespectful or damaging to the dealership’s image and reputation. The broad scope of this prohibition encompasses a multitude of potential Section 7 activities, including potentially any

complaints by an employee to his or her “fellow employees” about their wages, how supervisors treat them, or other terms and conditions of employment. It also covers any protected, concerted complaints by employees made to federal and state agencies, since such complaints may be public and certainly could be viewed as potentially damaging to Respondent’s image or reputation. As a result, the ALJ’s conclusion that the rule violates Section 8(a)(1) was proper. *University Medical Center*, 335 NLRB at 1320-22 (rule prohibiting “other disrespectful conduct” overly broad and unlawful); see also *Claremont Resort & Spa*, 344 NLRB 832, 832-33 (2005) (rule banning “negative conversations about associates and/or managers” found unlawful); *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989) (ban on “[m]alicious gossip or derogatory attacks on fellow employees, patients, physicians, or hospital representatives” violated Section 8(a)(1)).

Respondent argues that the Judge erred in applying *University Medical Center* to conclude the “Courtesy” rule was unlawful, noting the decision was not enforced by the D.C. Court of Appeals. Of course, the decision is Board law and has not been overturned by the Board. Thus, it applies in this case. Respondent’s ban on “disrespectful language” to other employees is, as the Board previously found, difficult to define and “inherently subjective.” But the Courtesy rule’s ambiguity is not based solely on the word “disrespectful” being in it and its unlawfulness is not dependent on a parsing of the rule’s language to focus solely on that word. The additional ban on “any other language which injures the image or reputation of the Dealership” also is “inherently subjective” and so expansive that it clearly would encompass protected, concerted activity by employees. Any public complaints made by groups of employees concerning their working conditions could damage the dealership’s image or reputation, but nonetheless be protected. See, e.g., *Mastec Advanced Technologies*, 357 NLRB

No. 17, slip op. (July 21, 2011) (mass employee participation in Orlando, Florida area television news broadcast was protected); *Alaska Pulp Corp.*, 296 NLRB 1260, 1273-74 (1989) (employee letter printed in newspaper that criticized employer was protected). Thus, the Judge's proper conclusion that Respondent's "Courtesy" rule violated Section 8(a)(1) was not contingent on a parsing of the language in that rule. When the rule is read in its entirety, any reasonable employee would read it to cover activities protected by Section 7.²

IV. CONCLUSION

For all of these reasons, Counsel for the General Counsel requests that Respondent's Cross Exceptions be denied in their entirety.

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

Respectfully submitted,



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² Respondent also did not except to Judge Biblowitz's proper legal conclusion that Respondent's subsequent rescission of its three unlawful handbook provisions was inadequate as a matter of law pursuant to the Board's decision in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). (ALJD p. 11, Ins 23-38) Thus, the Board also should adopt that conclusion pro forma absent any exception.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS** 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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