

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TAYLOR MADE TRANSPORTATION \*  
SERVICES, INC. \*

and \*

\* Case No. 05-CA-036646

KIMBERLY TUTT, AN INDIVIDUAL \*

\* \* \* \* \*

**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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### CASELAW

*Asheville School, Incorporated*, 347 NLRB 877 (2006)

*Budrovich Contracting Co.*, 331 NLRB 1333 (2000)

*Covanta Bristol*, 356 NLRB 46 (2010)

*Detroit Paneling System, Inc.*, 330 NLRB 1170

*Publishers Printing Co.*, 317 NLRB 933, 938

*Shearer's Ford, Inc.*, 340 NLRB 1093, 1094 fn 4(2003)

*Syncro Corp.*, 234 NLRB 550, 551 (1978)

*Tower Industries, Inc.*, 349 NLRB 1327,1329;

*White Oak Manor*, 353 NLRB 795 (2009)

*Wright Line*, 251 NLRB 1083 (1980), emfd.622 f.2d 899 (1<sup>st</sup> Cir. 1981)

### STATUTES

8(a)(1) of the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.*

## I. INTRODUCTION

Respondent, Taylor Made Transportation Services, Inc. (“Taylor Made”), by its counsel, McKennon Shelton & Henn LLP, respectfully submits this Respondent’s Brief in Support of its Exceptions to the Administrative Law Judge’s Decision (the “Decision”), which Administrative Law Judge Bruce D. Rosenstein (“ALJ”) issued on December 15, 2011. In his Decision, the ALJ concluded that the suspending and discharging of the Charging Party Kimberly Tutt was a violation of Section 8(a)(1) of the National Labor Relations Act (the “Act”). (D.8:29-31)<sup>1</sup> He also found that Taylor Made violated the Act by maintaining in its Employee Handbook provisions that preclude employees from discussing their compensation or pay rates. (D. 8:23-27) Taylor Made hereby excepts parts of the Decision, the respective Conclusions of Law, Remedy, and Order, and request that the National Labor Relations Board (“Board”) overturn and vacate these portions of the ALJ’s Decision.

## II. ISSUES PRESENTED

The ADJ incorrectly found that Taylor Made suspended and discharged Tutt because of her protected and concerted activities and erred in applying the *Wright Line*<sup>2</sup> standard of review. The evidence during the hearing clearly demonstrated that Taylor Made disciplined Tutt and ultimately discharged her because of her cell phone usage, unprofessionalism, solicitation and insubordination. The ALJ failed to give the various reasons for discharge adequate weight, including the testimony of James Kearney her supervisor, which included testimony of disciplinary action.

The ALJ also incorrectly determined that Taylor Made management disciplined and subsequently terminated Tutt, based on Tutt disclosing her pay wage. Taylor Made provided the

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<sup>1</sup> “(D)” references the report by page and line number, “(\_\_\_\_ Transcript.\_\_\_\_)” references cites to the official hearing transcript page.

ALJ undisputed evidence that confirm Tutt was transferred from the Social Security Administration contract to the Centers for Medicare and Medicaid Services (“CMS”) due to her complaining on the job, her lack of professionalism and disciplinary action had taken place prior to Tutt disclosing her pay rate. The ALJ incorrectly found that the General Counsel met his burden in applying the *Wright Line* standard.

The ALJ incorrectly determined that Taylor Made failed to assert its current defense of discharging Tutt for numerous reasons until after May 31. Taylor Made provided evidence to show disciplinary action was taken throughout Tutt’s employment with the company.

Accordingly, the Board should overrule the ALJ’s Decision as described herein.

### **III. FACTS**

Taylor Made provides passenger transportation services to the United States Government under a contract with the Social Security Administration (“SSA”). (D. 2:6-7) On or about March 1, 2011, Taylor Made hired Tutt as a part-time driver under a SSA contract. (D.3:37-38) On or about March 31, 2011, only to accommodate Tutt, Taylor Made transferred Tutt to a new contract with the Centers for Medicare and Medicaid Services (“CMS”) under the supervision of Kearney. (D.3:30-42) During the orientation training session for the CMS contract Tutt and some other employees were found to be engaging in unprofessional behavior and Taylor Made was made aware of this conduct. (D.3:43-45) On or about April 1, 2011, a meeting was held with Tutt, Taylor Made’s management, and Kearney. At this meeting, Tutt was advised to maintain a professional demeanor while working and advised to watch her conduct around clients, supervisors, and co-workers. (Ms. Willis, Transcript page 36; D. 3:46-47; 4:1-2) During Tutt’s tenure under both contracts, Tutt displayed unprofessional behavior including, excessive personal cell phone usage, insubordination, and solicitation of passengers. (Ms. Willis,

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<sup>2</sup> *Wright Line*, 251 NLRB 1083 (1980), emfd.622 f.2d 899 (1<sup>st</sup> Cir. 1981)

Transcript pages 16-17.) On April 20, 2011, Tutt was again reprimanded regarding the use of her personal cell phone by Kearney, which was documented in a memorandum to Taylor Made dated April 22, 2011. (Mr. Kearney, Transcript pages 161-163; D. 4: 15-22) Kearney also suggested that Tutt silence her ringtone due to the graphic nature of the ringtone. Tutt was warned that she needed to keep the phone provided by Taylor Made plugged into the van, and not her personal cell phone. (Ms. Tutt, Transcript pages 93-94.) The company issued cell phone was the only means that Taylor Made had to communicate with Tutt. It was during this time that Tutt's unprofessional behavior was noticed by others at CMS. Tutt shared personal information with passengers, solicited them to make purchases and failed to maintain a professional working relationship with CMS. (Mr. Kearney, Transcript page 163.)

On or about April 25, 2011, Tutt was suspended for unprofessional behavior. (Ms. Willis, Transcript page 16; D. 4:31-42) During this time, Taylor Made's management evaluated Tutt based on her performance. On or about April 29, 2011, Ms. Tutt was terminated. After Tutt's termination she filed for unemployment insurance with the State of Maryland's Department of Labor, Licensing and Regulation Office of the Unemployment Insurance (the "Unemployment Insurance Board"). (D. 5:11-13) On an uncontested appeal the Hearing Examiner granted Tutt unemployment benefits. (D. 5:33-34)

On or about May 31, 2011, Tutt filed a charge with National Labor Relations Board for a violation of the Act. According to Taylor Made's Employee Handbook (the "Handbook"), all new employees are under a probationary period for the first 90 calendar days after the date of hire, and during this period it is within Taylor Made's discretion to terminate an employee with or without cause or advance notice. Tutt was hired on or about March 1, 2011 and was therefore still in her probationary period of employment at Taylor Made. A hearing in this matter was held on October 26, 2011 before Administrative Law Judge Rosenstein.

## IV. ARGUMENT

### A. The ALJ's Failure To Apply The Facts To The *Wright Line* Standard Of Review

#### 1. *The General Counsel Failed To Establish A Prima Facie Case*

Taylor Made reasserts its contention that the General Counsel did not establish a *prima facie* case as to Tutt, because he did not show any connection between Tutt's alleged protected activity and the subsequent suspension and discharge.

In applying the *Wright Line* standard, the Board must first prove, by preponderance of evidence, that the employee conduct protected by the Act was the motivating factor in the employer's decision to terminate the employee. *Wright Line* provided that "To meet this burden, the Board must offer evidence showing that the employee engaged in protected activity, that the employer was aware of the activity, that the employer had animus against the activity and that there was a causal connection between the activity and the termination." If this burden is met, then employer that must show evidence sufficient to establish that it would have discharged the employee even in the absence of the protected activity.

In *Wright Line* the employer failed to meet its burden that it would have taken the same action against the employee despite the involvement in a protected activity because it was found that the reasons for termination were a part of a "predetermined plan to discover a reason to discharge" that stemmed from the protected activity. Here, Taylor Made was engaged in disciplinary action throughout the term of Tutt's employment. Taylor Made met with Tutt on April 1, 2011 to discuss her lack of professionalism (D. 3:46-47; 4:1-2), which was more than 20 days prior to Tutt's termination and prior to any alleged protected activity. In fact, during Tutt's orientation period the CMS supervisor Maria Fowlkes complained about her conduct. (D.3:43-45) Contrary to the ALJ's finding that "the timing of the suspension and termination demonstrates animus" the record reflects several in fractions and verbal reprimands against Tutt

prior to her April 25 suspension. The ALJ fails to state any facts to support the disclosure of Tutt's pay rate to be a "motivating factor" and the General Counsel failed to make a prima facie showing. The evidence presented by General Counsel during the hearing was full of credibility issues. General Counsel had Ms. Willis testify to the suspension and termination of Tutt based on excessive cell phone usage, insubordination, and solicitation of passengers. (Ms. Willis, Transcript page 16.) Ms. Willis's testimony was later corroborated by Mr. Taylor and Mr. Kearney in the Respondent's case. The General Counsel also called Tutt, who testified to not having any explanation or prior notice of any concerns about her insubordination, cell phone usage, and solicitation. (Ms. Tutt, Transcript pages 73-75.) The General Counsel's case only provided conflicting testimonies with no reconciliation. The ALJ also erred in placing weight on the Insurance Board's JAVA Hearing Report. The record reflects that the JAVA Hearing Report was not complete in nature since it lacked the leading questions asked of Taylor Made, the notes of the hearing officer and certification that the report included the entirety of the hearing. The JAVA Hearing Report does not purport to be a full and complete detail of the hearing. Ms. Willis disputed the factual nature of the report. The General Counsel's witness admitted that the hearing was more than an hour and that the report was not complete. (Mr. Krysiak, Transcript pages 62-63.)

Reviewing case law we find there needs to be a connection between the termination and the protected activity. In *Covanta Bristol*, 356 NLRB 46 (2010) the charging party was an employee subject to a probationary period that submitted reports regarding employee safety, which was found to be a protected activity. The employer in *Covanta Bristol* used such reports as one of the reasons for termination. Here, there is no evidence to suggest Taylor Made terminated Ms. Tutt for engaging in a protected activity. In fact Allen Taylor the ultimate decision maker testified that the discussion of pay wages was never a factor. Mr. Taylor had a

meeting with the administrators of the CMS contract and from that meeting he made the determination that a termination of Tutt was the only option to protect his contract. (Taylor, Transcript page 197.)

Our case can be distinguished from *White Oak Manor*, 353 NLRB 795 (2009), where the charging party and witnesses were found to be credible and the General Counsel established a prima facie case. In *White Oak Manor* it was clear that the charging party was engaged in a protected activity and for that reason alone the employee was terminated. Here, the General Counsel's case fails prove that Tutt was engaging in any protected concerted activity or that Tutt was a credible witness. Again, General Counsel did not offer any evidence to dispute Tutt's poor performance, lack of professionalism, or insubordination. Tutt denies discussing her pay rate and Taylor Made never reprimanded Tutt for discussing her pay. Taylor Made was not proven to have animus against Ms. Tutt activity because it was not a factor in determining her employment status. (Ms. Tutt, Transcript page 73.)

Further, the ALJ failed to show that Taylor Made exhibited any animus toward such protected activity. Prior to being terminated Taylor Made conducted a thorough investigation and reprimanded Tutt for other violations of company policy. The Board has consistently held that an employer's failure to conduct a fair and complete investigation gives rise to an inference of unlawful animus. *Publishers Printing Co.*, 317 NLRB 933, 938, *Syncro Corp.*, 234 NLRB 550, 551 (1978). In our case such investigation was completed and termination was necessary based on the reasons presented herein.

The burden of *Wright Line* was not met by the General Counsel, and the burden of the test only shifts if the General Counsel establishes that the protected conduct was a "substantial or motivating factor in the employer's decision". *Budrovich Contracting Co.*, 331 NLRB 1333 (2000).

2. *Taylor Made Would Have Discharged Tutt Even In The Absence of Her Protected Activity*

Assuming arguendo, that General Counsel satisfied his burden of proof under *Wright Line*, Taylor Made met its rebuttal defense by proving that it would have discharged Tutt absent her protected activity. The Board has noted that “The existence of protected activity, employer knowledge of the same, and animus, may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action.” *Shearer’s Ford, Inc.*, 340 NLRB 1093, 1094 fn 4(2003).

At the outset, Taylor Made has stressed that Tutt engaged in unprofessional behavior which was subject to disciplinary action from the violation of the company’s cell phone policy, soliciting of passengers, insubordination and general lack of professionalism. Tutt was directed to refrain from using her personal cell phone and plug in the company phone but she continued to plug her personal cell phone into the vehicle system. (Ms. Tutt, Transcript pages 93-95 and Mr. Kearney, Transcript page 175.) Mr. Kearney testified to his concerns and his verbal reprimand of Ms. Tutt while performing an observation when he personally heard the explicit ringtone and saw the personal cell phone being charged. (Mr. Kearney, Transcript page 159.) Insubordination has been viewed as an offense for which an employee may be terminated immediately. The consistent nature of the verbal reprimands and unprofessional behavior rebuts the ALJ’s contention that the reasons for the termination were pretextual. That facts clearly indicate Tutt was a difficult employee that had to be transferred to a new location, displayed disruptive behavior during her orientation period, and was asked to meet with management on April 1 regarding her conduct. This point should be emphasized in the Board’s analysis, Tutt was called into Taylor Made’s offices within a month of employment to discuss her performance.

The Act cannot and should not be used by Tutt to insulate her from the consequences of her disruptive conduct, the record reflects several instances of insubordination by Tutt in addition to her use of her personal cell phone, including her complaints regarding Taylor Made, and the solicitation of passengers. Tutt complained on several occasions to other employees regarding her displeasure with Taylor Made. (Ms. Tutt, Transcript pages 101-103.) It was this constant disruption and lack of professionalism that caused issues with other Taylor Made employees and forced the management to engage in “damage control.” (Mr. Taylor, Transcript page 205.) It is the normal use of a probationary period to determine if an employee is a good fit both in terms of skill and professionalism. Ms. Tutt engaged in solicitation of dinners with passengers and employees which caused passengers to complain about her work performance. (Ms. Tutt, Transcript pages 87-90.) The solicitation of dinners in violation of Taylor Made’s and CMS’s policies was enough cause for suspension and displayed her lack of professionalism to Taylor Made’s management.

Our case can be distinguished from several Board decisions where the terminated charging party’s employment record was “devoid of disciplinary or other records showing a history of such difficulties”. See *Tower Industries, Inc.*, 349 NLRB 1327,1329; and *Detroit Paneling System, Inc.*, 330 NLRB 1170, where the employee had a good work record.

In *Tower Industries, Inc.*, where the disciplinary warning was lawful and the employee was insubordinate, the Board found that “the respondent met the standard by demonstrating that it has a rule regarding insubordinate and rude behavior,” that had previously been violated and that the rule had been applied to employees in the past.<sup>3</sup> Taylor Made maintains rules and policies regarding cell phone use and insubordination and acted pursuant to such rules in suspending and discharging Tutt.

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<sup>3</sup> *Tower Industries, Inc.*, 349 NLRB 1327; 1332-1333.

Taylor Made first asserted its defenses April 1, 2011 when management called a meeting with Tutt to discuss her insubordination. That fact that the Insurance Board's report fails to state this defense is does not preclude its assertion.

B. ALJ's finding of a violation of Section 8(a)(1) of the National Labor Relations Act was flawed

The ALJ erred in finding a violation of the Act because of the termination of Tutt. The Board adopted the standard of review for individual employee's actions to be considered protected in *Diva, Ltd.*, 325 NLRB 822 (1998) as:

“individual employee's activities to be concerted when they grew out of prior group activity; when the employee acts, formally or informally, on behalf of the group; or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected. However, the Board has long held that, for conversations between employees to be found concerted activity, they must look toward group action and that mere “gripping” is not protected”

In the case before us, Tutt testified to complaining to a “whole bunch” of Taylor Made employees regarding her position that Taylor Made lied to her regarding the number of hours she would be working. (Ms. Tutt, Transcript page 102.) Ms. Willis testified that Tutt complained about her wages, not only to employees, but also “folks on the van” and “anyone who would listen.” (Ms. Willis, Transcript page 24.) From the record it is clear to see that Tutt did not approach management on behalf of herself or any employees with respect to wages, nor did Tutt attempt to organize others in any concerted activity.

Similar to *Asheville School, Incorporated*, 347 NLRB 877 (2006), where an employee disclosed confidential wage information and the company maintained a confidential wage policy that was illegal on its face, the Board found that the employee was not looking towards a group action and the employee was merely gripping. The Board dismissed the allegation that the employee was discharged for engaging in protected concerted activity, however the Board

ordered the company to post notice of the change in policy regarding the disclosure of wages. Like in *Asheville School, Incorporated*, Ms. Tutt's griping does not rise to the level of a protected activity.

## V. CONCLUSION

For all the reasons set forth above, Taylor Made respectfully requests that the Board grant the entirety of its exceptions and dismiss the General Counsel's allegations that Taylor Made unlawfully suspended and discharged Tutt.

Dated: January 12, 2012



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and

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Case No. 05-CA-036646

KIMBERLY TUTT, AN INDIVIDUAL

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**CERTIFICATE OF SERVICE**

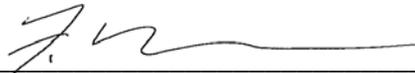
I hereby certify that on this 12<sup>th</sup> day of January, 2012, a copy of the foregoing Respondent's Brief in Support of its Exceptions to the Administrative Law Judge's Decision was mailed by overnight delivery to the following parties:

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