

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TAYLOR MADE TRANSPORTATION
SERVICES, INC.

and

Case 05-CA-36646

KIMBERLY TUTT, AN INDIVIDUAL

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
CROSS-EXCEPTIONS
AND
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

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Pursuant to Section 102.46(e) of the Board's Rules and Regulations, the Acting General Counsel files the following cross-exceptions to the decision of Administrative Law Judge Bruce D. Rosenstein:

I. STATEMENT OF THE CASE

Upon a charge filed on May 31, 2011, by Kimberly Tutt, an Individual, the Regional Director for Region 5 issued an Amended Complaint alleging that Respondent Taylor Made Transportation Services, Inc. (Respondent) violated Section 8(a)(1) of the Act. The case was tried before ALJ Bruce D. Rosenstein on October 26, 2011, in Baltimore, Maryland. On December 15, 2011, Judge Rosenstein issued his decision finding that Respondent had committed the violations alleged in the Amended Complaint, and recommended an order requiring Respondent to remedy the effects of its unlawful conduct.

Specifically, the judge found that Respondent violated Section 8(a)(1) of the Act by: (1) maintaining handbook provisions that preclude employees from discussing their compensation or pay rates; (2) by issuing a memorandum on April 20, 2011 to employees that restricted the exercise of Section 7 rights and threatened discipline if employees discussed or disclosed their compensation or pay rates among themselves or with other employees; and (3) by suspending and discharging Kimberly Tutt for engaging in protected concerted activity based on Respondent's overbroad Employee Handbook rules that precluded employees from discussing or disclosing their compensation or pay rates. (ALJD at 8)

On January 12, 2012, Respondent filed Exceptions and a Brief in Support of Exceptions to Judge Rosenstein's decision and recommended order.

II. FACTS

The Acting General Counsel incorporates by reference the statement of facts from the Answering Brief to Respondent's Exceptions. (GC Answering Brief, p. 5-21)

III. CROSS-EXCEPTIONS

As stated above, the ALJ found that Kimberly Tutt was suspended and discharged in violation of Section 8(a)(1) as alleged in the Amended Complaint because she violated Respondent's admittedly unlawful rules that prohibit employees from discussing their wage rates.¹ However, the Acting General Counsel pled alternative theories of liability, and the judge did not make specific findings on these alternate theories. Therefore, the Acting General Counsel excepts to the following findings and conclusions of the Administrative Law Judge:

Exception #1: The ALJ's failure to find that Respondent suspended and discharged Kimberly Tutt because it believed that she engaged in protected concerted activity, namely, discussing her rate of pay with other employees. (GCx 1-H, ¶ 14)

Argument

The judge's decision states that "I find that Tutt's discussions, on her own and the employees' behalf, about their compensation fall within the ambit of protected concerted activity." (ALJD 6:43-7:2) The judge further stated, "I find that the Respondent terminated Tutt for disclosing confidential financial information in violation of its Employee Handbook policy." (ALJD 8:7-8) Tutt, however, when questioned by Respondent at the time of her suspension and discharge denied that she disclosed her rate of pay to other employees. (See e.g. Tr. 73:11-21)

¹ Respondent has not excepted to the ALJ's findings that its Handbook rules or April 20 memo violate the Act.

Tutt was not asked at the hearing whether, in fact, she had discussed her rate of pay with other employees, and the Acting General Counsel's position is that under the facts of this case, whether she did or didn't discuss her pay rate is irrelevant to the question of whether Respondent violated the Act. This is because regardless of whether Tutt *actually* disclosed her pay rate to other employees, there is abundant evidence that Respondent believed that she engaged in this protected conduct, and suspended and discharged Tutt based on this belief.

A mistaken belief by an employer that an employee engaged in union or protected activity is tantamount to knowledge and is sufficient for finding a violation. *CGLM, Inc.*, 350 NLRB 974, 979-980 (2007); *Superior Micro Film*, 201 NLRB 555 (1973), enf. 485 F.2d 681 (3rd Cir. 1973).

Here, the judge should have found that even if Tutt did not actually engage in protected conduct, Respondent suspended and discharged her out of a mistaken belief that she had. Both Tutt and Willis confirm that Willis told Tutt during her suspension meeting that word had gotten back to Taylor that Tutt had been discussing her pay rate with other employees. Moreover, the memorandum that Willis wrote about Tutt's suspension explicitly admits Respondent's knowledge. In her own words, Willis states, "I advised [Tutt] that it had been brought to the attention of Mr. Taylor that employees were coming to him upset stating that Ms. Tutt has discussed financial information with them, specifically pay rates." Further, Tutt testified that Willis explicitly told her during her termination meeting that she was being fired for disclosing her pay rate to other employees. Finally, Willis demonstrated that Respondent believed Tutt had discussed her wages when she told the Division of Unemployment Insurance that "it was brought to my attention on 04/12/2011 that claimant disclosed her pay rate to other employees." In its exceptions, Respondent does not even attempt to dispute that it had, at the very minimum, a

belief that Tutt had discussed her wage rate with other employees. Thus, there is ample evidence for the Board to conclude that Respondent believed that Tutt has discussed her pay rate with other employees, regardless of whether it, in fact, happened.

As explained more fully in the GC Answering Brief at 25-37, Respondent's animus toward this protected conduct is demonstrated by its direct statements, its several handbook rules, its April 20 memo, the timing of Tutt's discharge, its shifting reasons for her discharge, and the implausible explanations it has advanced. Moreover, Respondent has failed to demonstrate that it would have taken the same action against Tutt in the absence of its belief that she engaged in protected conduct.

Accordingly, it is respectfully urged that the Board find, in the alternative, that Tutt was terminated by Respondent because it believed she engaged in protected concerted conduct by discussing her wage rate with other employees.

Exception #2: The ALJ's failure to find that Respondent suspended and discharged Kimberly Tutt because it believed that she engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act. (GCx 1-H, ¶ 15)

Argument

In its Exceptions, Respondent argues that Tutt's complaints about her wages and hours were mere individual griping, and were not concerted. (See Respondent's Exceptions Br. at 12-13.) Even if the Board were to accept this argument, the Acting General Counsel respectfully urges that the Board should still find that Respondent violated the Act because Tutt's alleged activity implicates the concerns underlying Section 7 of the Act.

In *Continental Group, Inc.*, 357 NLRB No. 39 (2011) the Board clarified the *Double Eagle* rule² and held that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. 357 NLRB No. 39, slip op at 4. In that decision, the Board held that in situations where an employee is disciplined pursuant to an overbroad rule for conduct that touches the concerns animating Section 7, but is not protected because it is not concerted, the rationale for the *Double Eagle* rule still applies, and it will effectuate the rights guaranteed by the Act to proscribe that discipline.

Here, assuming for the sake of argument that Tutt was simply acting for her own individual reasons and not seeking to engage in concerted activity, Respondent's conduct was still a violation under the *Double Eagle* rule because an employee discussing their own rate of pay is a long-standing activity protected by Section 7. See e.g. *Automatic Screw Products, Inc.*, 306 NLRB 1072 (1992); *Scientific-Atlanta, Inc.*, 278 NLRB 622, 625 (1986); *Triana Industries*, 245 NLRB 1258 (1979). Discussions of working conditions are a classic concerted protected activity, sometimes termed the "grist" or "sinew" upon which and from which more advanced group action develops. As the Third Circuit explained in *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976), in the context of discussion about wages:

dissatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differentials also provides the sinew for persistent concerted action. The possibility that ordinary speech and discussion over wages on an employee's own time may cause 'jealousies and strife among employees' is not a justifiable business reason to inhibit the opportunity for an employee to exercise Section 7 rights.

² *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enf'd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006)

Thus, even if the Board were to conclude that Tutt was not engaged in concerted activity by discussing her wage rate with other employees, the Acting General Counsel respectfully urges that the Board should still find that Respondent violated the Act by applying its unlawfully overbroad rules to suspend and discharge Tutt for engaging in protected conduct that implicates the concerns underlying Section 7 of the Act.³

Respectfully submitted,

/s/ Patrick J. Cullen

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National Labor Relations Board, Region 5

Dated this 26th day of January, 2012.

³ The affirmative defense available to respondents described by the Board in *Continental Group*, 357 NLRB No. 39, slip op. at 4-5 does not save Respondent in this case. Under such a defense, Respondent would have to affirmatively show that the employee actually interfered with production or operations, and that an employer's mere citation of the overbroad rule will not suffice to meet its burden. Here, Respondent cited Tutt's violation of its policies and procedures in both Tutt's termination report and in Willis' testimony to the Department of Unemployment Insurance. (ALJD 8:1-10; GCx5)

STATEMENT OF SERVICE

I hereby certify that on January 26, 2012, copies of the Counsel for the Acting General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions were served by e-mail on the following party:

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and that Kimberly Tutt was advised by telephone of the contents of the Counsel for the Acting General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions and a copy was served by UPS overnight delivery on her at:

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/s/ Patrick J. Cullen

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