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7
8 UNITED STATES OF AMERICA
9 NATIONAL LABOR RELATIONS BOARD
10 REGION 20

11 DESIGN TECHNOLOGY GROUP, LLC dba
BETTIE PAGE CLOTHING,

12
13 Employer,

14 and

15 VANESSA MORRIS, an individual,

16 Charging Party

No. 20-CA-35511

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

17 The Charging Party, Vanessa Morris, is generally satisfied with the decision of the
18 Administrative Law Judge (“ALJ”). There are, however, a few particular points which need to be
19 made with respect to the decision and the Board’s treatment of these kinds of cases. Some of
20 these points address the inadequacy of the remedy.

21 1. Cross-Exception No. 1: The ALJ commented upon a pretrial motion upon which
22 he did not rule. See fn. 2. The statement regarding the pretrial motion for more definite
23 statement should be stricken. The fact is the motion sought to have the complaint clarify that the
24 book referred to on the Facebook page, which lead to the discharge of the three employees, is
25 entitled, California Workers’ Rights. Since the ALJ was not asked to rule on the motion, the
26 comment in footnote 2 was unnecessary.

27 2. As the ALJ correctly noted, the same handbook that contained the offending rule
28

1 regarding wages and salary disclosure (see ALJD 3:28-32), also contains a rule that prohibited the
2 previous employees from disclosing “personal information, price and client list, contractual
3 agreement, intellectual property and marketing/sales strategies.” See ALJ Decision 4:1-8; see
4 also Respondent’s Exhibit, p. 30, p. 15 (rule offered into evidence by employer to justify its
5 enforcement of policy).

6 Employees have the right to engage in protected concerted activity including striking and
7 boycotting to support their demands for better working conditions. They have a right to ask
8 customers to boycott the store. They have the right to criticize their employer in public. *Jolliff v.*
9 *NLRB*, 513 F.3d 600 (6th Cir. 2008). In order to effectively boycott, employees need to disclose
10 to other employees or union representatives the names of, for example, clients or other
11 information which might otherwise be considered “intellectual property and marketing/sales
12 strategies.” For example, the workers would have the right to disclose an upcoming sale as the
13 best time to engage in boycotting or picketing activity. They would have the right to disclose
14 vendors and suppliers who may be the subject of a lawful boycotting activity. The prohibition in
15 the handbook would effectively render any effort to engage in that kind of activity risky at best
16 because the Employer would use this language to terminate an employee or otherwise discipline
17 employees who disclose this information to other workers who might want to help the employees
18 or to union representatives who also seek to help the employees or to organize them.

19 In *Ridgely Manufacturing Co.*, 207 NLRB 193, 196-197 (1973), an employee engaged in
20 concerted activity requested a list of employee names from management. The request was denied,
21 and the employee was subsequently seen copying the names of coworkers from the timecards.
22 The employee was subsequently discharged for pretext, but the Board found the true reason to
23 have been the above protected activity.

24 The Board found that employees are entitled to use, for self-organizational purposes,
25 information which comes to their attention in the normal course of work activity and association,
26 but are not entitled to their employer's private or confidential records. The Board indicated that
27 information available to all employees in the course of their “normal work relationship” is
28 generally non-confidential. *Id.* at 197. The Board also noted that the employer could rightly deny

1 an employee any proprietary information and the employee would not be protected if they obtain
2 such information from the employer's records surreptitiously.

3 This notion is supported in *Bell Federal Savings & Loan Association*, 214 NLRB 75
4 (1974), which limits the dissemination of employer information to that which is "openly
5 available" to employees in general. *Id.* at 78.

6 The Board found that an employee switchboard operator was lawfully discharged for
7 disclosing confidential call history to a third party union, since the information released was
8 private and not openly available to employees. The Board found that the employer had a right to
9 rely on the switchboard operators not to disclose information about his telephone calls,
10 particularly those from his legal counsel. The employer was therefore entitled to consider such
11 conduct a breach of trust justifying discipline. The Board found that such conduct "cannot be
12 equated with that of employees who use information obtained at work such as the names and
13 addresses of other employees, openly available from timecards, for organizational purposes." *Id.*

14 These cases support the view that information which is at least available to employees
15 may be disseminated for purposes of engaging in protected concerted activity including
16 boycotting or other economic activity directed at the employer.

17 The Board has to face the issue that this kind of restriction, which goes beyond limiting
18 discussion of wages and hours, is also unlawful because it restricts the right of employees to
19 engage in concerted economic activity including lawful boycotting.¹

20 3. The ALJ expressly refused to note the name of the book involved. See ALJ
21 Decision, p. 5:45-47. It is undisputed that the book is entitled California Workers' Rights and the
22 Decision should reflect the correct name.

23 4. The Employer's "conspiracy theory" to quote the Judge is "frivolous and simply
24 [a] waste time and resources".

25 5. The ALJ applied *Wright Line*, 251 NLRB 1083 (1980), enforced, 662 F. 2d 899
26 (1st Cir 1091). It is time that that the Board reject *Wright Line* and apply the test which it has

27 ¹ The employer has the right to use this information in planning and executing any lawful
28 strategy directed at employees. For example, it could time a lockout based on sales
information. It could prolong a strike in evaluating the same data.

1 used in the past; that is, mainly whether the unlawful motivation was in part a cause of the
2 discipline determination.

3 This case illustrates precisely why the *Wright Line* test is outdated and ossified.
4 Employers can create any flimsy excuse and do so. Here, from the beginning, it is plain that the
5 conduct of the discriminatees in engaging in protected concerted activity was in part a motivating
6 factor for determinations. The Employer’s effort to establish a *Wright Line* defense shows how
7 that defense can be abused and is constantly abused. It is time for the Board to come out of the
8 dark ages and use a more reasonable standard. See *The Youngstown Osteopathic Hospital*
9 *Association*, 224 NLRB 574, 575 (1976) and other cases cited in *Wright Line* at pages 1084-1086.
10 In *Wright Line*, the Board erroneously adopted a test which is inapplicable to the industrial
11 setting. The Supreme Court made it clear in *NLRB v. Transportation Management*, 462 U. S. 393
12 (1983) that the Board’s *Wright Line* test was a permissible but not the only possible interpretation
13 of the Act. The Board should return to an “in part” or similar standard.

14 6. The ALJ correctly found that Mr. Glazer engaged in shifting reasons for
15 the termination of employees. See ALJ Decision at 10:20-22. What the Judge really meant was
16 that Glazer lied. The Board should stop clothing and masking perjury in meaningless words. The
17 Decision should be modified to reflect the fact that Glazer lied rather than describing his conduct
18 as “morph[ing]” his reasons for the terminations. In this context where Mr. Glazer was testifying
19 under oath, “morphing” is the same as engaging in perjury.

20 7. There are a number of deficiencies in the Judge’s order and remedy. First, the
21 language at page 15:8-26 should be incorporated in the Order.

22 Second, the ALJ correctly found that there was an unlawful rule in the Handbook which is
23 used throughout all the stores. Therefore, the notice should be posted in all the stores. See *Fresh*
24 *& Easy* 356 NLRB No 85 (2011) and subsequent Decision 356 NLRB No 145 (2011), enforced,
25 2012 U.S. App. LEXIS 4769 (D.C. Cir. 2012).

26 Third, as illustrated by this case, employees use their Facebook accounts and social media
27 accounts. The notice should be provided electronically to the employees by the employer so that
28 they can circulate and post the notice on their social media sites.

1 Fourth, the Notice should delete any reference to the right to refrain language since there
2 was no interference with such rights.

3 8. Once again, it is time for the Board to recognize that its remedies are oftentimes
4 inadequate. Here, these workers were terminated in 2010. It is not likely there will be any
5 remedy until 2013 or 2014 at the earliest. To post a notice 60 days after 4 years from the events
6 is virtually meaningless. In order to have an effective remedy and to discourage employers from
7 delaying proceedings, the Board should adopt a new rule that notices should be posted for the
8 length of time from the beginning of the commission of the unfair labor practices until the notice
9 is actually posted. Thus, the posting period should last the equivalent time from when the
10 unlawful conduct began (or when the Complaint issued) and when it was remedied by the posting
11 of the appropriate notice.

12 Alternatively, the Board should extend the period of notices from 60 days to a minimum
13 of 1 year.

14 9 As part of the remedy, the Employer should be required to post the Board's
15 proposed notice to employees, which was the subject of rulemaking proceedings for 5 years. See
16 <http://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights>

17 The employer should be required to mail and send by email the notice to all employees
18 employed from the date the unfair labor practices were committed until the Board's notice is
19 actually posted. Many employees will have come and gone. They will be exposed to the unlawful
20 rule. They will have heard about the termination of the three discriminatees. Unless they receive
21 notice of the Board's decision, they will assume the illegal conduct went unremedied. They will
22 believe that protected activity leads to discharge and that such discharged will go unremedied.
23 They too need to the notice so that they will not be coerced into refraining from similar conduct at
24 other worksites. They are entitled to know that the illegal conduct was remedied by the Board.
25 The notice should be mailed to their last know address and sent by email to the extent the
26 employer has such addresses.

27 10 As part of the remedy, the employer should be required to participate in a
28 meaningful program to educate workers about their rights. It should be ordered to purchase one

1 hundred (100) copies of California Workers Rights and to distribute those copies to libraries and
2 schools. Each copy should include a copy of the Board's decision in this matter.

3 11. The employer's assertion of conspiracy theory is ludicrous and insulting. The
4 Charging Party should be awarded her legal fees in this case. This is truly frivolous litigation.

5 **CONCLUSION**

6 For the reasons stated above, the Cross-Exceptions should be granted and the Decision
7 modified accordingly.

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9 Dated: June 20, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

10 /s/ David A. Rosenfeld
11 By: DAVID A. ROSENFELD
Attorneys for Charging Party

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1 **PROOF OF SERVICE**
2 **(CCP §1013)**

3 I am a citizen of the United States and resident of the State of California. I am employed
4 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
5 at whose direction the service was made. I am over the age of eighteen years and not a party to
6 the within action.

7 On June 20, 2012, I served the following documents in the manner described below:

8 **BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE**
9 **ADMINISTRATIVE LAW JUDGE**

- 10 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
11 through Weinberg, Roger & Rosenfeld's electronic mail system from
12 jwatkinson@unioncounsel.net to the email addresses set forth below.

13 on the following part(ies) in this action:

14 David R. Koch
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19 I declare under penalty of perjury under the laws of the United States of America that the
20 foregoing is true and correct. Executed on June 20, 2012 at Alameda, California.

21 /s/ Joanna Son
22 JOANNA SON