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3 UNITED STATES OF AMERICA  
4 BEFORE THE NATIONAL LABOR RELATIONS BOARD  
5 REGION 20  
6

7 DESIGN TECHNOLOGY GROUP, LLC  
8 dba BETTIE PAGE CLOTHING

9 and

10 VANESSA MORRIS, an individual  
11

Case 20-CA-35511

12 **RESPONDENT'S REPLY**  
13 **TO ACTING GENERAL COUNSEL'S**  
14 **ANSWERING BRIEF**  
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1 unemployment proceedings as evidence of Bettie Page’s intent in relation to  
2 termination? A party’s post-termination admissions regarding motive are direct  
3 evidence of their intentions, and here the Charging Parties’ evil laughter and “fell into  
4 my crutches” statements directly contradict their claim that their Facebook posts were  
5 “for the purpose of the mutual aid and protection” of their fellow employees.

6 **REPLY ARGUMENT**

7 **A. Post-Termination Admissions by the Charging Parties Illuminate the**  
8 **False Purpose of Their Conduct**

9 There is no dispute an employee’s purpose must be considered in determining  
10 whether conduct constitutes “protected concerted activity.” Section 7 of the NLRA  
11 requires such consideration, and General Counsel does not argue otherwise. But in its  
12 Answering Brief, General Counsel suggests the Board should try to assess the Charging  
13 Parties’ purpose in their November 4th - 5th Facebook posts in a vacuum, without  
14 considering any context whatsoever. Doing so would be error. The Board must  
15 consider all relevant facts and circumstances surrounding the “concerted activity” at  
16 issue in order to determine whether the conduct truly falls within the parameters of the  
17 NLRA.

18 In its original brief, Bettie Page outlined the reasons why the November 4-5 posts  
19 were simply a pretext without any “honest and reasonable belief” that they were made  
20 for the purpose of mutual aid and protection of workers. These posts were only made  
21 on the advice of Vanessa Morris’s mother after Morris determined she would be leaving  
22 the company. These are the posts that General Counsel contends were the reason for  
23 Charging Parties’ termination. (*See* Complaint, ¶6; Resp. Ex. 10.)

24 General Counsel now wants the Board to consider these posts in isolation  
25 without looking at later statements made by Morris or any other Charging Party solely  
26 because Bettie Page would not have seen subsequent posts before it decided to fire the  
27 employees. But Bettie Page has never claimed it considered these posts as part of its  
28 termination calculus. Rather, the November 10th posts *are party admissions*

1 *demonstrating the Charging Parties' intent at the time they made their earlier posts.*  
2 (e.g., "Muhahahahaha," "the most AMAZING thing just happened!!!!", "we both  
3 laughed and said see yaaah and hugged each other while giggling".)

4 It is General Counsel who bears the burden of proving that an employee was  
5 acting in good faith, and when an employee "merely seeks to entrap the employer into  
6 committing an unfair labor practice...no unfair labor practice has been committed."  
7 *Sunland Const. Co.*, 311 NLRB 685, 701 (1993). Here, General Counsel did not  
8 demonstrate good faith on the part of Charging Parties, as it has not and cannot contest  
9 the meaning of the November 10th Facebook posts. Merely calling the posts  
10 "preposterous" or "nonsensical" does not satisfy this burden. The only explanation that  
11 has ever been offered throughout this entire proceeding regarding "Muhahahahaha!!!  
12 'So they've fallen into my crutches'" was that it was a random line from a television  
13 show that had no connection to events that occurred just hours before and that it had no  
14 connection to the events that are expressly referenced just above in the same Facebook  
15 thread. This explanation defied logic and common sense, and General Counsel has now  
16 even abandoned that defense.

17 Bettie Page's Exceptions Brief explained in detail how this phrase could only  
18 mean that the employer was entrapped. The Exceptions provided a thorough analysis  
19 of the comments, citing to dictionaries, common usage of the phrases in social media  
20 postings, as well as the origin and use of the phrase in the television show cited at trial.  
21 Moreover, the context of the statement makes it impossible to conclude that the  
22 comment could have meant anything else.

23 In addition, these posts clearly demonstrate that the reinstatement remedy  
24 requested by General Counsel is entirely inappropriate. Why should Charging Parties  
25 be rewarded with reinstatement to jobs they were ecstatic to leave? These posts  
26 demonstrate their intent and the true nature of their desire with respect to  
27 reinstatement.

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1 In response to this argument, General Counsel is silent. Silence, in this case, is an  
2 admission that the phrase is indisputable evidence that the Charging Parties entrapped  
3 the employer and lacked good faith in their actions. Accordingly, the Board must  
4 consider these post-termination statements by Charging Parties and must consider the  
5 absence of any response whatsoever from General Counsel or Charging Parties  
6 themselves in determining their effect.

7 **B. Whether the Employees' Conduct Was Certain to Result in Termination**  
8 **Is Not Relevant**

9 General Counsel illogically claims that the entrapment discussion is  
10 "preposterous" because the employees could not have known beforehand that their  
11 conduct was certain to result in their termination. This argument assumes that one can  
12 never entrap an employer unless the employee absolutely knows she will be fired  
13 beforehand. One can attempt to entrap, however, regardless of whether she knows she  
14 will succeed. And if an employee is not actually fired after engaging in bad behavior,  
15 this does not mean they did not scheme to be fired. For example, an undercover police  
16 officer may attempt to persuade a citizen into committing a crime even without a  
17 guarantee that the citizen will fall for the trap. If the citizen does not fall for the trap,  
18 there is no crime and there is no entrapment. But if the officer successfully induces the  
19 act, entrapment may have occurred.

20 Here, it was possible that the employees would not succeed in being fired. It was  
21 possible that Bettie Page would have seen the Charging Parties' bad conduct and either  
22 ignored the conduct or decided it did not rise to the level of termination. But this does  
23 not mean that Charging Parties had a pure purpose when they made the disputed  
24 Facebook posts. In fact, with respect to the Facebook posts, there is essentially no  
25 downside for an employee who wishes to be fired, as they can simply post  
26 inflammatory comments with no real intent of effecting change, and if the comments  
27 are ignored there is no harm, but if the comments result in termination, the employee  
28 can claim violation of the NLRA. It is a heads-I-win, tails-you-lose scenario for the

1 employee. Thus, the certainty of success in termination is irrelevant to the inquiry as to  
2 whether sham conduct has actually occurred.

3 **C. General Counsel Is Pointing to the Wrong Conduct**

4 As an ancillary point to the entrapment question, General Counsel confusingly  
5 states that Morris’s transmission of resumes to competitors via email and Thomas’s  
6 unapproved closing of the store early constituted the entrapping conduct. This is  
7 inaccurate. General Counsel brought this case because it claims the Facebook posts  
8 were the problem. The Facebook posts were the entrapping conduct, as they created  
9 the false patina of an NLRA violation in the event that the employees were fired. Once  
10 the employees made their Facebook posts, they had their “insurance policy” and could  
11 move forward with their poor performance and rule-breaking conduct on the job. And  
12 if Morris and Thomas were unsuccessful in their plan to be fired, they could simply  
13 continue on in their job.

14 **D. Charging Parties’ Refusal to Respond to Subpoenas**

15 Interestingly, the Charging Parties themselves did not respond to Bettie Page’s  
16 argument regarding their failure to comply with the subpoenas at issue. Instead,  
17 General Counsel takes up the argument for them, stating that there should be no  
18 adverse inference imposed because all “relevant” documents were produced. Under  
19 General Counsel’s theory, the Charging Parties should be allowed to unilaterally decide  
20 what they believe is relevant, and then they should be allowed to withhold anything  
21 else they decide is irrelevant (even though the subpoenaed parties agreed in their  
22 Motion to Quash to produce responsive documents). Were such self-selected  
23 limitations on discovery condoned, there would be little benefit to the process.

24 General Counsel argues that the subpoenaed Facebook posts requested are  
25 irrelevant because they were made “before and after the time period Respondent made  
26 the decision to fire the discriminatees.” (Ans. Brief, p. 14.) This argument illogically  
27 ignores the fact that Facebook posts evidencing the Charging Parties’ sham conduct  
28 would be expected to be found both “before and after” the Parties were fired. In fact,

1 the last page of the posts in question includes only partial inclusion of yet another  
2 “Muhahahahaha” entry, which demonstrates that this expectation is accurate.

3 General Counsel claims that nothing is relevant unless it was or could have been  
4 considered by the employer in deciding whether to terminate the employees. Thus,  
5 even damning admissions by an employee before or after the fact would have no  
6 bearing under General Counsel’s theory. And if Morris went to Facebook on November  
7 11th and posted the following statement:

8 *“I hated my job and really wanted to just quit. But my mother*  
9 *told me I should make some complaints on Facebook and bring in*  
10 *a worker’s rights book so it would look like I was trying to help*  
11 *my co-workers (even though I didn’t really care about them).*  
12 *Then if I were fired (and I was, hooray!), I could sue Bettie Page*  
13 *for firing me based on these Facebook posts. My plan worked!!!”*

14 General Counsel would claim this post was entirely irrelevant because it was made  
15 after the termination. This makes no sense. A party’s admissions made at or around  
16 the time of termination are compelling evidence of the motivation of that party. Here,  
17 Morris’s November 10th post that Bettie Page “fell into my crutches” demonstrates her  
18 intent. Bettie Page believes that other posts made at or around the same time would  
19 clearly demonstrate the insincerity of the purported “protected concerted activity.”

20 Since General Counsel utterly fails to address the purpose of the suggested  
21 “concerted protected activity,” it also fails to understand how party admissions factor  
22 into this analysis. But this evidence is directly on point and must be addressed by the  
23 Board here.

24 Finally, General Counsel argues that since neither Charging Parties nor General  
25 Counsel used at trial any Facebook posts that Respondent did not already have, then  
26 Respondent was not harmed. (Ans. Brief, 15.) The logical fallacy of this statement is  
27 apparent. The only reason to serve the subpoena was to obtain copies of documents  
28 that Respondent did not already have. General Counsel cannot condone a party’s

1 refusal to search for and produce documents merely because Counsel does not plan to  
2 use other documents that are likely to undercut their case. And here, where the ALJ  
3 already made up his mind that searching for other documents would be “fruitless” after  
4 Morris stated that she believed no relevant documents would be found, it would also  
5 have been fruitless to adjourn the proceeding to seek enforcement through the ALJ. The  
6 adverse inference is required when a party fails to comply with a subpoena, *McAllister*  
7 *Towing*, 341 NLRB 394, 396 (2004), and Bettie Page was not required to adjourn and  
8 further delay the proceeding in order to require the very party who initiated this case to  
9 respond to a basic subpoena. A respondent has such limited options to obtain  
10 documents or information from a claimant in these proceedings that it should not be  
11 completely stonewalled when a claimant refuses to even look for responsive materials.  
12 An adverse inference should have been applied here, resulting in a finding of sham  
13 conduct not constituting protected activity.

14 **E. Testimony Regarding Troy Suggs Was Undisputed. It Was Not**  
15 **Necessary to Call Additional Witnesses**

16 General Counsel claims that the ALJ’s deletion of the “I haven’t heard back from  
17 Troy [Suggs] yet” reference in the November 6th email was not important because no  
18 additional witnesses testified about this statement. It is true that no additional  
19 witnesses were called to bolster Jan Glaser’s undisputed testimony at trial. It was not  
20 necessary to do so. Glaser testified that Troy Suggs “was my employment attorney at  
21 the time” and he was expecting to hear back from him regarding his decision to  
22 terminate Thomas and Johnson. (Trans. 155:14-156:21.) And though this point was  
23 critical in establishing the timing of the termination chronology, the ALJ ignored this  
24 discrepancy in General Counsel’s case.

25 It was not necessary to call Mr. Suggs from Southern California to testify at the  
26 trial, as this point was undisputed—General Counsel never asked Glaser a single  
27 question on this issue, and though Jan Hutto was sitting in the hall during the entire  
28 first two days of trial in response to General Counsel’s subpoena, General Counsel

1 never called her to testify nor challenged the reference to prior attempts to contact  
2 Suggs before the November 6 email. Hutto was available to testify if General Counsel  
3 desired, but the fact that Hutto was not called to testify to support un rebutted  
4 testimony by Glaser has no bearing on the import of the evidence that was presented.  
5 For the ALJ to have intentionally omitted this portion of a key document constitutes  
6 error.

7 **F. Johnson's Termination**

8 General Counsel's theory regarding Johnson's termination remains puzzling.  
9 Though General Counsel alleged in its Complaint that Johnson was terminated because  
10 of her November 4th Facebook post (Complaint, ¶6), General Counsel now claims  
11 Johnson was terminated in order to sever the "nexus" between her and the "concerted  
12 activity." This aspect of the decision completely fails to explain: (1) why Johnson was  
13 not terminated on November 10 at the same time as other employees, if it were truly her  
14 Facebook posts that were the issue, and (2) why Johnson was not reprimanded during  
15 November and pre-termination December for her tardiness, if this was in reprisal for  
16 her "concerted activity." Instead, the ALJ and General Counsel rely heavily upon the  
17 fact that "no employee had ever been fired for tardiness despite the widespread,  
18 continuing tardiness of the employees." But the evidence demonstrated that Johnson  
19 was extraordinarily late on the day of termination, that she was defiant when she  
20 arrived, and that Griffin made the decision to terminate on her own without any  
21 consultation with management.

22 In reality, the only pretext at issue here is pointing to the Facebook posts as a  
23 pretextual basis for termination. If, as was argued at trial, Bettie Page wanted to do  
24 something "right away," why was nothing done for a month and then only by the store  
25 manager and not the store owner who made the other termination decisions? And why  
26 was no adverse action taken as to other employees, such as Allison Jones, who  
27 participated on the same Facebook posts and would have the same "nexus" to the  
28 conduct at issue? These questions have no logical answer, and absent such answers,

1 there should have never been any finding of an NLRA violation with respect to  
2 Johnson. The mere fact that Johnson and Griffin did not get along does not give  
3 Johnson additional rights under the NLRA solely because of a single Facebook post that  
4 was made a month earlier. Employee/manager discord is common in the workplace,  
5 and creating additional rights and protections here based on a single Facebook post  
6 from weeks earlier would establish an unsettling precedent.

7 **G. Credibility Requires Consideration of Facts as Well as Subjective**  
8 **Assessments**

9 The ALJ essentially began his opinion with credibility determinations of the  
10 witnesses, and then considered all of the facts through his subjective credibility lens.  
11 He found that Morris “credibly explained” the origin of the “crutches” statement and  
12 that Thomas “credibly explained” her incorrect Social Security number with statements  
13 that defy any logical sense. And when Morris adamantly testified that on the night of  
14 November 4 (the night of the disputed early store closing) she “closed” with Thomas,  
15 but then later admitted she actually left two hours earlier and roamed the dangerous  
16 streets that the employees hoped to avoid by closing early, (Trans. 518-523), the ALJ  
17 should have actually considered these conflicting facts, rather than relying solely upon  
18 subjective perceptions of how a witness looked on the stand in determining credibility.  
19 When Johnson admitted she lied on her employment application regarding her criminal  
20 background, the ALJ should have considered this fact in determining her credibility –  
21 but instead he simply dismissed the issue because Bettie Page supposedly ignored all  
22 criminal convictions in the hiring process.

23 Credibility does not determine the facts; rather, the facts should determine  
24 credibility. And here, where numerous factual discrepancies undercut the Charging  
25 Parties’ story, the ALJ should have considered these conflicting facts rather than issuing  
26 wholesale credibility determinations that resulted in ignoring key evidence that  
27 undercut Charging Parties’ stories and exposed the sham nature of their conduct.

28

1 CONCLUSION

2 *How many legs does a dog have if you call the tail a leg?*

3 *Four. Calling a tail a leg doesn't make it a leg.*

4 -Abraham Lincoln

5 Rather than respond to the assertion that Charging Parties' "concerted activity"  
6 was a sham, General Counsel resorts to tossing out disparaging adjectives to downplay  
7 the "conspiracy theory." But pejoratively calling this argument a "conspiracy theory"  
8 ignores the facts and gives credence to incredible explanations offered by Charging  
9 Parties to excuse their conduct. There can be no dispute that Charging Parties'  
10 Facebook posts were aimed at entrapping their employer, and they should not be  
11 rewarded by awarding reinstatement and back pay for a job that they wanted to leave.

12  
13 DATED this 3rd day of July, 2012

Respectfully Submitted,

14 /s/ David R. Koch

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1 CERTIFICATE OF SERVICE

2 I HEREBY CERTIFY that pursuant to 29 CFR 102.114, I caused to be served  
3 a true and correct copy of the foregoing **RESPONDENT'S REPLY TO ACTING**  
4 **GENERAL COUNSEL'S ANSWERING BRIEF** by electronic mail to the following  
5 parties in this action:  
6

7 Christy J. Kwon  
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18 I declare under penalty of perjury that the above is true and correct.

19 Executed on July 3, 2012 at Henderson, Nevada.

20  
21 /s/ Andrea Eshenbaugh  
22 Andrea Eshenbaugh, an employee of  
23 Koch & Scow LLC  
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25  
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27  
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