

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PHILIPS ELECTRONICS NORTH AMERICA
CORPORATION

Respondent

and

Case No. 26-CA-085613

LEE CRAFT, AN INDIVIDUAL

Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY
BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE

Respectfully Submitted by:

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel ("General Counsel") submits this Reply Brief in Support of Exceptions. General Counsel respectfully submits that Respondent, in its Answering Brief, misstates evidence, distorts the record and fails to substantively respond to or rebut the arguments advanced by General Counsel in its exceptions. This Reply Brief will address Respondent's responses to General Counsel's arguments and issues with Respondent's distortions of the record evidence will be addressed within the appropriate argument section.

I. RESPONDENT FAILS TO ESTABLISH THAT THE JUDGE'S CREDIBILITY FINDINGS SHOULD NOT BE OVERTURNED

Respondent argues that the credibility determinations of Judge Brakebusch should not be overturned as the Judge had the opportunity to observe the witnesses and credited the testimony of Respondent witnesses Sherry McMurrian, Kim Coleman, Thelma Halbert and Rolita Turner. The General Counsel's argument that the testimony of Respondent's witnesses on which the Judge relied in making her findings was not supported by the record evidence is discussed at length in General Counsel's Brief in Support of Exceptions and will not be revisited here.

The General Counsel recognizes that, pursuant to *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (C.A. 3 1951), the Board is reluctant to overturn the credibility findings of administrative law judges. However, the Board has deviated from this general proposition in certain circumstances in the past. For example, the Board recently, in *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 (2011), overturned the credibility findings of the administrative law judge where there was record evidence which contradicted the judge's findings; there was additional record evidence which the judge did not address in the decision and the judge did not specifically refer to the demeanor of any specific witnesses. *Id.* at 5-6. In this case, the Judge failed to discuss, consider or even reference the testimony of General

Counsel witnesses Lexie Campbell, Sherry Grey and Markus Bernard despite all three witnesses offering relevant testimony which bears directly on the alleged misconduct for which Respondent discharged Lee Craft and which contradicts the testimony of Respondent's witnesses.

Campbell and Grey offered testimony to corroborate the testimony of Respondent witness Lester Peete that Craft did not disrupt pre-shift meetings during the "Minute to Shine" and that Craft made statements in the pre-shift meetings which would constitute protected activity. (Tr. 32-6; 160-4). Grey further testified that, during the time that Craft was a lead, she observed a dispute between Craft and Coleman where Coleman was speaking on her cell phone while standing at her work station and Craft, as lead, asked Coleman to stop talking on the phone and attend to her work. (Tr. 158-9). Grey testified that, after Craft left the area, Coleman stated to her that she was going to inform McMurrian that Craft was harassing her by telling her to stop talking on her phone and by telling Coleman what to do (which was part of the responsibilities of the lead employees). (Tr. 158-9).

As to Markus Bernard (referred to by Respondent only as "Mr. Barkus"), he testified specifically that he did not witness Craft come to the Ballast area between January 20, 2012 and January 25, 2012 and make any of the statements attributed to Craft by Coleman and Halbert. (Tr. 147-9). Bernard further testified that he did not observe Craft in the Ballast area at any time after January 20, 2012. (Tr. 147-9). Respondent contends that Bernard's testimony is irrelevant as Bernard admitted that he started his shift four hours after Craft and the other employees started their shift and implies that Bernard was not present when the incident occurred. (R. Ans. Br. 15). However, both Coleman and Halbert, the only two witnesses who testified that Craft came to the Ballast area between January 20 and 25, testified specifically and clearly that

Bernard was present when Craft made statements that he was untouchable and glad that he was transferred to the Professional department. (Tr. 384, 499). Thus, Bernard's testimony on this issue was both directly relevant and vital on this factual issue.

In this case, the Judge's findings are directly contradicted by credible record testimony and evidence. Nevertheless, the Judge has failed to address these contradictions and ignored the testimony of three witnesses that was directly relevant to the issues in the case. In addition, while the Judge makes a general reference to witness demeanor at the start of the decision, the Judge does not specifically refer to the demeanor of any specific witness as a basis for her credibility findings. The General Counsel's request that the Board overturn the credibility findings of the Judge and perform an independent evaluation of credibility in this case is therefore well supported by the evidence and Board precedent.

II. A FINDING THAT RESPONDENT DEMONSTRATED ANIMUS TOWARD CRAFT PRIOR TO HIS JANUARY 25, 2012 DISCHARGE IS LAWFUL AND WOULD NOT VIOLATE THE DUE PROCESS RIGHTS OF RESPONDENT

General Counsel argues that uncontroverted record testimony and evidence establishes that Craft engaged in protected concerted activities prior to January 20, 2012; that Respondent exhibited animus toward Craft because of these earlier protected concerted activities; and that Respondent's initial decision to discharge Craft on January 16, 2012 and its decision to issue Craft a final warning on January 20, 2012 was motivated in part by animus toward Craft's protected concerted activities. This evidence is fully discussed on pages 33-35 of General Counsel's Brief in Support of Exceptions.

Respondent contends that this argument should not be considered as the Complaint did not allege that Craft had engaged in protected activities prior to January 20, 2012 and because General Counsel did not seek to amend the Complaint at the hearing. Respondent asserts that

any finding that Respondent had exhibited animus toward Craft's protected activities which predates January 20, 2012 would violate its due process rights. Respondent however misconstrues General Counsel's position. The position of the General Counsel is that Respondent discharged Craft because, following receipt of the January 20, 2012 final warning, he showed and discussed this warning with other employees; that, but for these protected concerted activities, Respondent would not have discharged Craft; and that Respondent's asserted reasons for Craft's discharge were pretextual. The General Counsel is not asking the Board to specifically determine that the January 20, 2012 final warning violated the Act and attempt to remedy such a violation as General Counsel recognizes that any allegation concerning the final warning was time-barred pursuant to Section 10(b) of the Act at the time that Craft filed the original charge in this case. However, because the Judge stated that Craft had not engaged in protected activities prior to January 20, 2012, the General Counsel is asking the Board to recognize that, based on the credible evidence, Craft had engaged in protected activities prior to January 20, 2012 and that, as admitted by Respondent's own witnesses and documented in Respondent's exhibits, Respondent exhibited animus toward Craft's earlier protected activities and disciplined him in part because of these earlier protected activities.

The Board cases cited by Respondent in support of its proposition are inapplicable to this case. In *International Baking Company & Earthgrains*, 348 NLRB 1133 (2006), after a judge concluded that a manager committed several 8(a)(1) violations, the Board reversed these finding as none of the independent 8(a)(1) allegations were alleged in the complaint or amended into the complaint at the hearing. *Id.* at 1133-4. In *United Mine Workers of America*, 338 NLRB 406 (2002), the Board majority found that a union violated the Act for the reasons as alleged in the complaint and rejected the dissenting Board member's argument as it would have required that

the Board decide the case on a theory neither alleged in the complaint or litigated at the hearing. *Id.* at 406. In this case, the General Counsel is not asking the Board to find that the January 20, 2012 final warning violated the Act and is not relying on a “new” argument to support its position that Craft’s discharge violated the Act. Instead, the General Counsel asserts that, contrary to the Judge’s findings, Craft had engaged in protected activities prior to January 20, 2012 and that Respondent demonstrated animus toward these protected activities as these earlier events shed light on the true character of the events which occurred within the limitations period.

III. RESPONDENT FAILS TO ESTABLISH THAT IT DID NOT MAINTAIN AN UNLAWFUL RULE PROHIBITING EMPLOYEES FROM DISCUSSING DISCIPLINE WITH OTHER EMPLOYEES

General Counsel’s argument concerning Respondent’s maintenance and enforcement of an unlawful rule is discussed in full in its Brief in Support of Exceptions and will not be restated here. Respondent first argues that General Counsel is somehow attempting to change the Complaint allegation by noting that the Complaint alleges only that Respondent maintained and enforced against Craft an unlawful rule prohibiting employees from showing or discussing discipline with other employees. Respondent cites the language of Complaint paragraph 4 and focuses on the language, “Since January 19, 2012,” and argues that, by stating that the evidence supports a finding that Respondent had maintained an unwritten rule prohibiting employees from discussing or showing discipline to other employees prior to January 19, 2012, General Counsel is changing the Complaint allegation and presenting an argument which would violate Respondent’s due process rights. This argument is wholly without merit. The length of time during which Respondent had maintained this unwritten rule is irrelevant to these proceedings; the only issue is whether, since January 19, 2012, Respondent, through its actions or statements, provided evidence to support a finding that such a rule was maintained by Respondent. In her

January 24, 2012 investigation memo, McMurrin wrote, “These employees **are aware** that discipline forms are confidential and **should not be shared** on the warehouse floor, at anytime. (RX 14)(emphasis added). Then, in Craft’s January 25, 2012, discharge notice, McMurrin wrote that Craft was being discharged in part for sharing confidential documentation and information during work hours and that Craft was informed of confidentiality of the form and discussion during the January 20 meeting. (GCX 7). By these statements by McMurrin, Respondent established that it maintained the unlawful rule alleged in the Complaint and enforced the rule against Craft by discharging him on January 25, 2012.

Respondent then states that General Counsel cannot be allowed to create a rule based on an interpretation of an investigation memo and a termination notice, which were not circulated among employees. (R.A.Br. 16). Respondent notes that no employee testified that he or she knew of any written policy prohibiting employees from sharing or discussing discipline with other employees. (R.A.Br. 16). In response, General Counsel would again note that it has not alleged that Respondent implemented or promulgated among employees the rule as written in the Complaint. Instead, General Counsel has argued, and continues to argue, that, based on the testimony of Respondent’s witnesses and the reasons cited by Respondent for its discharge of Craft for sharing and discussing his final warning with other employees, the evidence supports a finding that Respondent maintained the rule alleged as unlawful in the Complaint and enforced this rule against Craft.

IV. RESPONDENT FAILS TO ESTABLISH THAT IT WOULD NOT HAVE DISCHARGED CRAFT ABSENT HIS PROTECTED CONCERTED ACTIVITIES

Respondent asserts that the Judge correctly found that Respondent had legitimate business reasons to discharge Craft for Craft’s alleged harassment of Coleman. To support this argument, Respondent first contends that the undisputed evidence at the hearing establishes that

Respondent's management team in Memphis had decided to discharge Craft prior to his protected activities following receipt of the January 20, 2012 final warning. (R.A.Br. 17). However, as explained at length in the Brief in Support of Exceptions, Respondent's prior decision to discharge Craft and its decision to issue him the January 20, 2012 final warning was motivated in large part on Craft's earlier protected concerted activities, specifically his statements to other employees critical of management and promoting change at the Memphis facility and the response of employees to Craft's entreaties. As explained in the earlier Brief, the Judge's finding that Craft had not engaged in protected activities prior to January 20, 2012 and her failure to find that Respondent harbored animus toward Craft because of these protected activities and disciplined him because of these activities was in error.

Respondent then argues that the Judge's decision is correct in that Respondent had an obligation under its own policies to discharge Craft based on Coleman's allegations of harassment. (R.A.Br. 17-18). Respondent states that, pursuant to its Harassment-Free Workplace Policy, it had an obligation to protect Coleman after she made the allegations of harassment against Craft, including discharging Craft. (R.A.Br. 10-11, 17-18). This *post hoc* rationalization of its decision to discharge Craft should be rejected. During Respondent's investigation of Craft and in Craft's discharge notice, McMurrin did not state that Craft was being discharged pursuant to Respondent's Harassment-Free Workplace Policy or reference the policy in any manner. Instead, her decision to discharge Craft was based in large part on Craft's actions in showing and discussing his final warning with other employees and continuing to make intimidating statements toward management, even where such statements constituted protected

activity.¹ Respondent's belated attempt to rationalize its decision to discharge Craft based on these policies should be rejected.

Respondent further argues that the Judge correctly found that all the events which formed the basis for Respondent's decision to discharge Craft occurred on January 24, 2012, despite record evidence to the contrary. General Counsel's argument on this issue and full evaluation of the facts which support its argument that the Judge incorrectly determined that Craft returned to the Ballast area on January 24, 2012 are explained in detail in its Brief in Support of Exceptions and will not be repeated here. Respondent states that Coleman's testimony supports the Judge's finding that the harassment occurred on January 24, 2012 but only offers one brief portion of Coleman's testimony to support this position. However, Coleman herself stated that she understood that Craft had received his final warning and was transferred on the day he allegedly returned to the Ballast area to harass her. (Tr. 355:13-23). Respondent conveniently ignores Halbert's testimony (which notably did not corroborate Coleman's version of events) that Craft had been in the office and was carrying and waving a piece of paper when he made statements about his transfer to the Professional area. (Tr. 494-5). Respondent's reference to Craft's testimony about when he showed his warning notice to other employees is misplaced as this testimony does not relate in any way to the claims by Coleman and Halbert that Craft made comments about his transfer when in the vicinity of the Ballast area. Craft testified that he showed his final warning and discussed it with other employees during breaks and before and after work on the days following January 20 but specifically denied that he returned to the Ballast area after his transfer. The only witness to specifically testify that Craft went to the

¹ McMurrian testified that Craft's statements to employees, including "We should not have to kiss butt to move up the ladder," "We have to stop this now," and Craft's statements in the Minute to Shine during pre-shift meetings, showed that he was "working against the company," were "threatening in nature," "threatening in management," and "negative, intimidating and demoralizing to the employee's [sic] environment." (ALJD 7:12-14; Tr. 267-70; RX 11).

Ballast area on January 24 where he harassed Coleman and showed his warning notice to Ballast employees was McMurrin, who did not witness any of the alleged events and did not document that any witness claimed that Craft returned to Ballast on January 24, 2012. Thus, as explained in the Brief in Support of Exceptions, the Judge's findings concerning Craft's alleged misconduct are in error and should be reversed.

Finally, Respondent states that General Counsel's argument that Respondent could not have an honest belief that Craft engaged in any alleged misconduct is nonsense and asserts that General Counsel's only evidence to counter this is Craft's denials. As explained in the Brief in Support of Exceptions, Respondent could not have any "honest belief" that Craft engaged in misconduct because of McMurrin's demonstrated animus toward Craft's earlier protected concerted activities and because she refused to engage in any meaningful investigation of Craft following Coleman's allegations of misconduct. Specifically, McMurrin only spoke directly with Coleman and Halbert, Coleman's close friend and confidante, and relied on a second-hand, undocumented report from supervisor Joe Odum concerning the claim by Professional area employee Fred Smith that Craft came to him during work time to discuss his final warning. McMurrin did not give Craft a chance to rebut the allegations against him; did not attempt to speak with Markus Bernard even after Halbert identified him as a witness; and did not attempt to speak with any other Ballast area employee to corroborate Coleman's accusations. Thus, based on Respondent's animus toward Craft because of his prior protected activities and McMurrin's sham investigation of the allegations which led to Craft's discharge, Respondent cannot assert that it held a reasonable belief that Craft engaged in the alleged misconduct. See *Bantek West, Inc.*, 344 NLRB 886, 895 (2005) citing *K&M Electronics, Inc.*, 283 NLRB 291 fn. 45 (1987); *Midnight Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004).

V. CONCLUSION

Respondent wholly fails to offer any legitimate rebuttal to the arguments posited by General Counsel in its Exceptions and Brief in Support of Exceptions. Thus, as discussed above and in the Brief in Support of Exceptions, General Counsel requests the Board reverse the decision of the Administrative Law Judge and find that Respondent violated the Act by maintaining and enforcing a rule which provides that discipline is confidential and prohibits sharing and/or discussing discipline with other employees and by discharging Lee Craft on January 25, 2012 because of his protected activity and his violation of the unlawful rule. General Counsel seeks an order requiring Respondent to: (1) cease and desist from engaging in such conduct; (2) make Craft whole for his loss of employment with Respondent; (3) expunge the discharge notice from Craft's personnel file; and (4) post a notice containing provisions such as those set forth in the proposed notice attached to its Brief in Support of Exceptions.

Dated: September 9, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2013, a copy of Counsel for the Acting General Counsel's Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on September 9, 2013, a copy of Counsel for the Acting General Counsel's Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge was served via Email on the following:

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