

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUTLER MEDICAL TRANSPORT, LLC

and

MICHAEL RICE, AN INDIVIDUAL

Case 05-CA-097810

WILLIAM LEWIS NORVELL, AN INDIVIDUAL

Cases 05-CA-094981
05-CA-097854

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF
TO ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS**

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Pursuant to Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, the General Counsel files the following Reply Brief to Respondent's Answering Brief to Acting General Counsel's¹ Cross-Exceptions to the decision of Administrative Law Judge Arthur J. Amchan:

I. STATEMENT OF THE CASE

On September 4, 2013, Administrative Law Judge Arthur J. Amchan (herein ALJ) issued his decision in this case. On September 30, 2013, Respondent filed Exceptions and a Brief in Support of Exceptions to the ALJ's decision and recommended order. On November 1, 2013, Counsel for the Acting General Counsel filed Cross-Exceptions and a Brief in Support of Cross-Exceptions to the ALJ's decision and recommended order.² On November 15, 2013, Respondent filed an Answering Brief to the Acting General Counsel's Cross-Exceptions to the ALJ's decision.

II. ISSUES PRESENTED

In the Brief in Support of Cross Exceptions, Counsel for the General Counsel argues that the ALJ erred in dismissing the complaint allegations concerning Michael Rice's discharge. Therein, Counsel for the General Counsel demonstrates that the credited record evidence supports a finding that Respondent unlawfully discharged Rice because he engaged in, or Respondent believed he engaged in, protected concerted activity by posting a message on Facebook. Furthermore, Counsel for the General Counsel argues that the ALJ erred by failing to address the complaint allegations that Respondent discharged both Michael Rice and William

¹ The current General Counsel, Richard F. Griffin Jr., was sworn into office on November 4, 2013. Prior to that date, Lafe Solomon held the office of Acting General Counsel.

² Exceptions were originally due on October 2, 2013. However, beginning on October 1 and extending for sixteen days, the Board's offices were closed due to a lapse in appropriated funds. Accordingly, the Board extended the due date for the filing of exceptions to October 18, 2013. Pursuant to Section 102.46(e) of the Board's Rules and Regulations, cross-exceptions are due within fourteen days from the last date on which exceptions may be filed. As such, the due date for cross-exceptions was November 1, 2013, and the cross-exceptions and supporting brief were timely filed.

Norvell pursuant to an unlawfully overbroad social media policy. Counsel for the General Counsel argues that under *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), the discharges of both Rice and Norvell pursuant to the unlawful policy violated the Act because both individuals engaged in protected concerted activity or at least activity that touched the concerns underlying Section 7 of the Act.

The majority of arguments raised by Respondent's Answering Brief are sufficiently addressed and rebutted by the Brief in Support of Cross-Exceptions. However, Counsel for the General Counsel offers this supplemental discussion to address the following questions raised by Respondent's Answering Brief:

- 1) For what reason did Respondent discharge Michael Rice?
- 2) Does Michael Rice deserve a remedy?
- 3) Did the Facebook activity of Michael Rice and William Norvell at least touch the concerns of Section 7?

III. REASON FOR MICHAEL RICE'S DISCHARGE

In the Brief in Support of Cross-Exceptions, Counsel for the General Counsel set forth the facts and arguments to support a finding that Respondent discharged Rice because he used profanity and inappropriate language in his Facebook post. In its Answering Brief, Respondent claims it discharged Rice for posting knowingly false information about Respondent in a public forum. This claim is not supported by record evidence.

As argued in the Brief in Support of Cross-Exceptions, Ellen Smith cited profanity and inappropriate language in his Facebook post as the reasons for Rice's discharge. (GC Ex. 11).³ Smith did not make any mention of the truth or falsity of Rice's post in that affidavit.

³ Citations to the Administrative Law Judge's Decision will be noted as (ALJD page number). Citations to the hearing transcript will be noted as (Tr. page number). Citations to the hearing exhibits will be noted as (GC Exh. number). Citations to Respondent's Answering Brief will be noted as (Ans. Br. page number).

Respondent attempts to explain away Smith's affidavit by blaming a Board agent's questioning of Smith. (Ans. Br. 13, fn. 7). The fatal flaw to Respondent's argument is the fact that Smith's affidavit containing a discussion of Rice's discharge, GC Exhibit 11, is not a Board affidavit and was not prepared by a Board agent. Rather, Respondent prepared and submitted Smith's affidavit during the investigation of Rice's charge. This is obvious when one compares GC Exhibit 11 to GC Exhibit 12. Exhibit 12 is Smith's Board affidavit taken in the presence of and signed by a Board agent in January 2013, prior to the filing of Rice's charge. Exhibit 11 is a separate affidavit of Smith that was completed by Respondent, not by a Board agent, in March 2013, after Rice filed his charge in February 2013. Exhibit 11 bears no signature of a Board agent. That Smith would fail to mention the primary reason for terminating Rice in an affidavit prepared by Respondent is not believable.

In addition to Smith's affidavit, Respondent had two additional opportunities to cite the falsity of Rice's post as the reason for his discharge in GC Exhibits 8 and 9. Neither document makes any mention of the truth or falsity of Rice's post. The most reasonable explanation of these facts is that Smith cited the actual reasons for Rice's discharge, profanity and inappropriate language, in her affidavit and supporting documents and Respondent merely raised the alleged falsity of Rice's post as a defense at hearing.

IV. MICHAEL RICE DESERVES A REMEDY

Respondent argues that Rice is not entitled to a remedy even if Respondent unlawfully discharged him based on Rice's invocation of the Fifth Amendment at hearing. Respondent attempts to draw parallels between Rice's invocation of a Constitutional right and instances where individuals lie under oath in Board proceedings. Such instances are distinguishable from the case at hand.

The invocation of the Fifth Amendment is explicitly contemplated by the Board in Section 102.31(c) of the Board's Rules and Regulations. Rice invoked his Fifth Amendment rights and thereby set in motion the procedures set forth in Section 102.31(c). The ALJ denied Respondent's request for an order from the Board under Section 102.31(c), which would require Rice to provide testimony. Respondent thereafter voluntarily chose not to utilize the procedures under Section 102.31(c) to appeal the ALJ's ruling to the Board. As discussed in the Acting General Counsel's Brief in Support of Cross-Exceptions, the ALJ appropriately dealt with Rice's Fifth Amendment invocation by finding that Respondent's witness testimony stood uncontradicted. If the Board intended any further penalty to a witness who invoked the Fifth Amendment, the Board would have set forth the appropriate penalties in Section 102.31.

The cases cited by Respondent concern situations where witnesses lie during Board proceedings about facts that go to a central issue in a case. Rice did not lie during the Board proceeding when he invoked a Constitutional right. His refusal to testify may have been remedied with an appeal to the Board, which Respondent voluntarily passed on. Rice's Fifth Amendment invocation resulted in the testimony of Respondent's witnesses standing uncontradicted and Rice lost the opportunity to provide testimony in support of his own case. Such is, and should be, the extent of penalty to Rice for asserting his Fifth Amendment rights. Even with such penalties, the record evidence supports a finding that Respondent discharged Rice unlawfully and Rice is entitled to reinstatement in backpay, as more fully discussed in the Brief in Support of Cross-Exceptions.

V. THE FACEBOOK ACTIVITY OF BOTH MICHAEL RICE AND WILLIAM NORVELL AT LEAST TOUCHED THE CONCERNS OF SECTION 7

In the Brief in Support of Cross-Exceptions, General Counsel argues that the discharges of both Michael Rice and William Norvell were unlawful pursuant to *The Continental Group, Inc.*,

357 NLRB No. 39 (2011). In *The Continental Group*, the Board held that a discharge pursuant to an unlawful rule is itself unlawful if the discharged employee engaged in Section 7 activity or in activity that touched the concerns of Section 7. In its Answering Brief, Respondent argues that neither Rice's nor Norvell's activities touched the concerns of Section 7 of the Act. In support, Respondent refers to cases discussed by the Acting General Counsel in Operations-Memorandum 12-31 (January 24, 2012).⁴ While the arguments in support of General Counsel's position regarding *The Continental Group* are more fully set forth in the Brief in Support of Cross-Exceptions, Respondent's discussion of OM 12-31 will be addressed below.

Respondent first discusses a case where a restaurant discharged an employee pursuant to an unlawful rule when the employee posted on Facebook about a co-worker. (OM 12-31, 9). The Division of Advice concluded that the employee's Facebook posts were motivated by a concern that the service her employer was providing was deficient. *Id.* at 11. As stated by the Division of Advice, the Board has held that protests over the quality of service provided by an employer are not protected where the concerns only have a tangential relationship to employee terms and conditions of employment. *Five Star Transportation, Inc.*, 349 NLRB 42, 44 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008).

The case at hand is distinguishable because neither Norvell nor Rice posted concerns on Facebook about the quality of service provided by Respondent. As more fully argued in the Brief in Support of Cross-Exceptions and the Acting General Counsel's Answering Brief to Respondent's Exceptions, Norvell's Facebook posts were protected, concerted discussions regarding the recent discharge of a co-worker. Rice's Facebook post either concerned, or gave the appearance of concerning, the working condition of Respondent's ambulances. The Board has found that similar complaints directly relate to working conditions because they concern the

⁴ Cited herein as OM 12-31, page number.

ability of employees to perform their work. See *Parr Lance Ambulance Service*, 262 NLRB 1284 (1982), *enfd.* 723 F.2d 575 (7th Cir. 1983). Thus, the first case discussed by Respondent is distinguishable from the case at hand as the Facebook activity of Norvell and Rice either concerned, or at least gave the appearance of concerning, terms and conditions of employment.

Second, Respondent discussed a case where an employee posted on Facebook that she hated people at work and wanted to be left alone. (OM 12-31, 11). In recommending dismissal of the charge, the Division of Advice noted that the employee's posts expressed personal anger with coworkers and the employer, were made solely on her behalf, and contained no language that the employee sought to initiate or induce coworkers into group action. *Id.* at 12. Rice's Facebook post is distinguishable because Respondent believed his post to concern the working condition of Respondent's ambulances, which concerns terms and conditions of employment for the reasons discussed above. Additionally, Rice's post begins, "Hey everybody," which should be considered an attempt to initiate group action. Norvell's Facebook posts are distinguishable because his posts were not personal rants or anger towards co-workers, but rather they were efforts to aid a co-worker concerning terms and conditions of employment. As such, both Rice's and Norvell's Facebook activity is distinguishable from the second case Respondent highlighted.

In a case that was not discussed by Respondent, an employer discharged an employee for posting concerns on Facebook about the employer's treatment of herself and her co-workers. (OM 12-31, 18). The Division of Advice found the discharge unlawful and specifically noted that the employer was concerned about the employee's involvement in her co-workers' work-related problems. *Id.* at 20. This case parallels the facts regarding Norvell's discharge, as Norvell engaged in Facebook activity to express concern and support for the work-related problems of his co-worker, Chelsea Zalewski, namely her discharge. As such, Norvell's

Facebook activity should at the least be considered the type of activity that touches on the concerns of Section 7 of the Act.

VI. CONCLUSION

Counsel for the General Counsel respectfully urges that the Board find in favor of the previously stated exceptions, find that Respondent violated the Act as alleged in the Complaint, order Respondent to cease its unlawful conduct, and direct that Respondent remedy the harm that it has caused to its employees.

Respectfully submitted,

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Dated this 27th day of November, 2013

