

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

RICHMOND DISTRICT NEIGHBORHOOD  
CENTER

and

Case No. 20-CA-091748

IAN CALLAGHAN, An Individual

GENERAL COUNSEL'S REPLY BRIEF  
TO RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by  
Yasmin Macariola  
Counsel for the General Counsel  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, California 94103-1735

## I. Introduction

In its Answering Brief<sup>1</sup>, Respondent argues facts, that even if considered by the Board, do not establish that Respondent could have reasonably believed the Facebook conversation endangered its funding or student safety. As stated in General Counsel's exceptions, when placed in its proper context, the Facebook conversation was not so egregious as to lose the protection of the Act.<sup>2</sup> Respondent also erroneously argues that General Counsel is requesting that the Board disturb the Administrative Law Judge's credibility resolutions.

## II. Respondent's Additional Facts Do Not Change The ALJ's Failure To Apply The Objective Standard

Respondent asserts several additional facts and argues that these facts support the ALJ's findings that the Facebook conversation lost the protection of the Act. However, even if the Board were to accept these facts, these facts do not change the context in which the Facebook conversation took place. Therefore, under the applicable legal standard, which uses an objective test, the Facebook conversation did not lose the protection of the Act.

### A. Respondent Could Not Objectively Conclude That Moore's Facebook Conversation Lost The Protection Of The Act Because Of Her Past Work Performance

Respondent first argues that Kenya Moore was marked as a poor work performer in the summer before her termination and that General Counsel's argument about placing the Facebook conversation in the context of Ms. Moore being an excellent employee is misplaced. (R. Brf. 1 & 30). While Ms. Moore did receive a far less favorable review from the summer supervisor than her regular academic year's supervisor, there is nothing in the summer review to suggest she

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<sup>1</sup> General Counsel has filed an extensive Motion to Strike on Respondent's Answering Brief because it included untimely cross-exceptions to the ALJ decision and untimely facts and arguments to affirm the ALJ Decision. Therefore, this Reply Brief will only address the portions of Respondent's Answering Brief that is properly and timely before the Board.

<sup>2</sup> See *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 55 (D.C. Cir. 2011) and *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), enfd., 561 F.2d 1196 (5th Cir. 1977).

had the potential to endanger the youth or Respondent's funding. (R. Exh. 3). Very little weight should be given to the summer review because it was issued by an individual who was not Ms. Moore's direct supervisor; his review was based on a much shorter observation period than the previous school year; and that summer period was immediately following the school year where employees had concertedly complained about working conditions but received a cold shoulder from Respondent. Respondent also admits that it re-hired Ms. Moore after she received the negative notice from the summer supervisor, which shows that Respondent also had given little weight to the summer supervisor's recommendation. (R. Brf 30). In comparison, just three months earlier, Ms. Moore had received a positive evaluation from her supervisor, Rena Payan, based on an observation period of 15 months. (J. Exh. 4). Additionally, Ms. Moore had no record of discipline in her personnel file. (Tr. 142). Given these facts, Respondent could not have reasonably believed that the rhetorical language used by Ms. Moore posed a threat or danger to students or its funding, since she had a stellar reputation amongst her colleagues and the students she cared for (Tr. 38) and Respondent obviously wished for her to return despite the summer supervisor's view of Ms. Moore.

B. Jan Nicholas' Notes Show That She Did Not Actually Read The Facebook Conversation And Therefore Could Not Have Viewed It In Its Proper Context

Respondent argues that Human Resources Jan Nicholas personal notes state that the tone of the Facebook conversation made Respondent concerned and that was why Respondent rescinded Mr. Callaghan's and Ms. Moore's re-hire letters. (R. Brf 7). However, Respondent omits the first part of Ms. Nicholas' notes which state "It was difficult to read the screen shots, but what I could read was disturbing." (J. Exh. 9). These notes show that Ms. Nicholas did not read the Facebook conversation in its entirety and that Respondent cherry-picked which Facebook posts to consider out of context in order to justify the termination of the two

employees. The ALJ should have considered this when evaluating the Facebook conversation under the objective legal standard. Had the ALJ placed the Facebook conversation in its proper context, he would have concluded that Respondent could not have reasonably interpreted that the language used in the Facebook conversation posed an actual threat to its programs.

C. Respondent Refused To Address The Protected Concerted May Complaints And Knew About The Complaints When Terminating Callaghan And Moore

Respondent argues that there is no evidence that Respondent refused to address the employees concerns after the employees engaged in protected concerted complaints in May 2012. (R. Brf. 16).<sup>3</sup> Instead, Respondent puts the burden on the employees to follow up on said complaints by arguing that employee Sarah Godfrey did not try and follow up on the issues the following summer or fall. *Id.* However, the record evidence supports the ALJ's finding that Respondent did indeed refuse to address the employees' complaints. The ALJ found that Respondent turned a cold shoulder to the employees after this meeting and that Ian Callaghan tried to set up a follow up meeting with management but was rebuffed. (ALJD 2: 40-42). Yet the ALJ failed to consider Respondent's refusal to address employee concerns even while finding that the Facebook conversation was a continuation of the protected concerted May complaints. Had the ALJ taken these facts into consideration, when looking at whether Respondent could reasonably conclude that the Facebook conversation posed a threat to its funding and youth, he would have found that Respondent took the Facebook comments out of

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<sup>3</sup> Respondent also overstated the state of the record when it asserted that there was no General Counsel witness who contradicted Ms. Cusano's testimony about being receptive to the employees' May meeting where they listed their workplace complaints. *Id.* General Counsel made an offer of proof that if the ALJ would have allowed Supervisor, Ms. Alexandria Tom to testify, she would have testified that Ms. Cusano was not receptive to the employee complaints from the May meeting and indeed was upset by them. (Tr. 202: 15-20).

context in order to terminate two employees who clearly continued their protected concerted complaints in their Facebook conversation and stated their intent to continue the protected concerted complaints the following school year.

D. The ALJ Failed To Consider The Evidence That Respondent's Termination Of Callaghan And Moore Was A Pre-Emptive Strike

Respondent asserts that there is no evidence that Respondent's decision to terminate the two employees was a pre-emptive strike to ward off future protected concerted activity. However, the record evidence established that Respondent was upset by the protected concerted May meeting (Tr. 31-34, 106, 202) and refused to address any of the workplace concerns raised in this meeting by turning a cold shoulder and rebuffing Mr. Callaghan's attempts to set up a follow-up meeting. (ALJD 2: 40-42). Furthermore, the employees talked about continuing their protected concerted complaints the following school year in their Facebook conversation when Mr. Callaghan stated that "he would be back to raise hell" with his co-worker. (J. Exh. 7, p. 4, Tr. 44). Had the ALJ put the Facebook conversation in its proper context, he could not have taken Respondent's claims at face value and instead would have concluded that neither of the employees meant any harm to Respondent or its programs, but rather wanted to continue to address their workplace concerns with Respondent the following school year.

III. **General Counsel's Exceptions Go To The ALJ's Failure To Apply The Objective Legal Standard And Not His Credibility Resolutions**

Several parts of Respondent's Answering Brief claim that General Counsel is attempting to disturb the ALJ's credibility findings. (R. Brf 2, 21, 31). To the contrary, General Counsel is not requesting that the Board overturn the ALJ's credibility findings, since the ALJ did not make any specific credibility findings on the facts to which the General Counsel took exception. In his decision, the ALJ noted that credibility resolutions were derived from a review of the entire

testimony record and that to the extent those witnesses testified in *contradiction* to the findings his decision, their testimony had been discredited. (ALJD 1: fn1, emphasis added). The additional findings of fact that the General Counsel took exception to are facts that the ALJ specifically failed to make findings on, not facts that were in contradiction to any of the findings the ALJ had already made. General Counsel made these exceptions because the ALJ failed to use the objective legal standard when evaluating whether Respondent would lawfully conclude that the Facebook conversation lost the protection of the Act. These facts are significant because when applying the objective standard, they show that Respondent could not have reasonably concluded that the Facebook conversation posed an actual threat to its funding or student safety.

#### **IV. Respondent's Reliance On Advice Memoranda Has No Precedential Value**

Respondent improperly attempts to reverse the ALJ's finding that the Facebook conversation was concerted protected activity (ALJD 5: 32-38) by asserting that Facebook posts were individual gripes not protected by the Act. (R. Brf 9-15, 20, 32). Respondent cannot raise this exception in its Answering Brief, however even if the Board were to consider this exception, it should note that Respondent heavily relies on Advice memoranda to support its position. The Board has long held that Advice memoranda are not controlling as to the Board's view of law, but are statements of positions taken by the General Counsel. *Dresser-Rand Company*, 358 NLRB No. 97, fn. 2 (2012); see also *Carrier Corp.*, 319 NLRB 184, 195 (1995). Since the Advice memoranda have no precedential value, the Board should give no weight to Respondent's arguments which rely on Advice memoranda.

#### **V. The Facebook Conversation Does Not Lose The Protection Of The Act Under Either *Atlantic Steel* Or *Jefferson Standard***

Respondent also argues that the Facebook conversation lost the protection of the Act under both *Atlantic Steel* and *Jefferson Standard*. (R. Brf 22, 27). Respondent cannot raise this

exception in its Answering Brief and General Counsel has asked the Board to strike these portions of Respondent's brief. Should the Board deny General Counsel's motion to strike and consider this argument, the evidence shows that the Facebook conversation did not lose the protection of the Act under either test.

A. No Loss Of Protection Under *Atlantic Steel*

In deciding whether an employee loses the protection of the Act by opprobrious conduct, the Board balances four factors. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

The first factor, place of discussion, militates in favor of finding their communications protected under the Act. The Facebook comments were made online, not during working hours, not during the school year, and not at the workplace itself, therefore there was no possibility that the discussion would have disrupted Respondent's work environment. J. Exh. 7, Tr. 58, 200. See *Datwyler Rubber & Plastics, Inc.*, 350 NLRB, 669, 670 (2007) (an outburst during a meeting in the employee break room was not disruptive to the employer's work processes). Furthermore, the ALJ found that the conversation was set to "just my friends" and was not public. (ALJD 3: 1-2). There was no evidence to show that these comments were viewed by current students, its school board members or parents, and Respondent did not receive any complaints from either school board members or parents. (Tr. 146, 149, 183, 201). There is simply no evidence that the Facebook discussion somehow disrupted Respondent's work or that Callaghan's or Moore's comments resulted in any sort of harm to Respondent's business or funding.

The second factor, the subject matter, also militates in favor of making their Facebook conversation protected. The ALJ found that the subject matter of the Facebook discussion was protected. (ALJD 5: 33-35). The third factor, the nature of these employees' outburst, does not support finding that their Facebook conversation lost the protection of the Act. A proper reading

of their comments, in context, shows that it does not involve any literal threats, insubordination, or physically intimidating conduct. See *Tampa Tribune*, 351 NLRB 1324, 1326 (2007), enf. denied in *Media General Operations Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009) (the employee's outburst remained protected where not directed at the manager and unaccompanied by physical conduct, threats, or confrontational behavior). Instead the employees made some rhetorical statements that they did not want to ask for permission and wanted to take the kids on field trips wherever they wanted as an expression of their frustration with Respondent's neglect of providing resources to be able to meet work goals. Tr. 37, 43, J. Exh. 7, p. 1 & 4. Although both employees peppered their comments with profanity, they were not directed toward their supervisors or the kids of the program, and were far less egregious in comparison to other instances of profanity the Board has held as protected. See *Tampa Tribune*, *supra* at 1324-1327 (employee called vice president a "stupid fucking moron"); see also *Burle Industries*, 300 NLRB 498, 500, 504 (1990), enf. 932 F.2d 958 (3d Cir. 1991) (where the employee called a supervisor a "fing asshole"). The employees' Facebook comments are critical of Respondent, but they do not reach the level of being so violent or of such serious character as to render the employee unfit for further service. See *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007) (quoting *NLRB v. Illinois Tool Works*, 153 F.2d, 811, 816 (7th Cir. 1946), enf. 519 F.3d 373 (7th Cir. 2008) (communications in the course of protected activity protected unless "so violent or of such serious character as to render the employee unfit for further service").

As for the fourth factor in *Atlantic Steel*, it does not weigh in favor or against protection of the Act because the conversation was between two employees and not directed at a supervisor. In sum, their Facebook discussion did not lose the protection of the Act under *Atlantic Steel*.

B. No Loss Of Protection Under *Jefferson Standard*

The nature of the employees' Facebook comments also were not disparaging or disloyal statements within the meaning of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 US 464 (1953), and progeny, so as to lose the protection of the Act.<sup>4</sup> To lose the protection of the Act, the public criticism must be made with a "malicious motive" and must be "maliciously untrue." *Id.*; *Mastec Advanced Technologies*, 357 NLRB No. 17, slip op. at 6 (2011). Statements that are "false, misleading, or inaccurate," or made when emotions are high as to make it hyperbolic or biased, is insufficient to establish it was "maliciously untrue." *Valley Hospital Medical Center, supra* at 1253.

Here, unlike in *Jefferson Standard*, the Facebook statements were not part of a public campaign to disparage Respondent or its programs, nor were they made at a critical time in the initiation of the Respondent's business or to hurt the Respondent's business or its funding. To the contrary, these statements were non-public Facebook conversations between those who were "friends" on Facebook, made in reaction to Respondent's recent demotion of Moore, and its unwillingness to address employees' complaints regarding the terms and conditions of their employment; they were not false; and the statements were not intended to hurt, nor did it hurt Respondent's business or funding. Most significantly, the record establishes the Facebook conversation was directly related to ongoing protected concerted activity. Therefore, the Facebook conversation for which Moore and Callaghan were discharged was not so disloyal or detrimental as to lose protection of the Act under *Jefferson Standard*.

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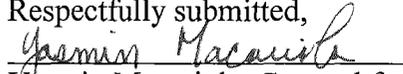
<sup>4</sup> In *Jefferson Standard*, employee statements were found unprotected where they were made "at a critical time in the initiation of the company's business," were unrelated to any ongoing labor dispute, and constituted "a sharp, public, disparaging attack upon the quality of a company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." The Board has carefully distinguished between "disparagement of an employer's product" and "the airing" of what may be highly sensitive issues. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enfd.* 358 F. Appx. 783 (9th Cir. 2009).

**VI. Conclusion**

General Counsel respectfully submits that the record establishes that Respondent violated Section 8(a)(1) of the Act, as alleged in the Complaint, and therefore should order an appropriate make-whole remedy.

Dated at San Francisco, California, this 11th day of February, 2014.

Respectfully submitted,



Yasmin Macariola, Counsel for the General Counsel

NLRB, Region 20

901 Market Street, Suite 400

San Francisco, California 94103-1735