

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

KARL KNAUZ MOTORS, INC., d/b/a
KNAUZ BMW

Respondent

and

Case: 13-CA-46452

ROBERT BECKER, An Individual,

Charging Party.

**RESPONDENT'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

INTRODUCTION

When Charging Party complained about Respondent's deployment of the hot dog cart at its BMW Ultimate Drive Event ("Event") and posted Event-related pictures and comments on his Facebook page, he was not engaged in protected activity under the "mutual aid and protection" clause of Section 7 of the Act. From Respondent's perspective – and from the perspective of any reasonable employer – Charging Party was raising concerns about a sales and marketing strategy. From Respondent's point of view, Charging Party might as well have been complaining about the color of paint on the wall or the landscaping in front of the dealership. Thus the Judge's conclusion that Charging Party's conduct was protected under Section 7 of the Act is erroneous. So, too, is his conclusion that Respondent's since-rescinded "Courtesy" policy violated Section 8(a)(1). The Board should grant Respondent's cross-exceptions on these issues.¹

¹ Counsel for the Acting General Counsel is referred to, simply, as "General Counsel." The Administrative Law Judge's Decision is referred to as "Decision." General Counsel hearing exhibits are referred to as "GCX ___." Citations to the transcript shall appear (Tr. __.)

ARGUMENT

A. Charging Party's Complaints And Facebook Posts About Respondent's Food Offerings At The Ultimate Drive Event Were Not Protected Under Section 7 Of The Act Because They Were Unrelated To Employee Interests (Cross-Exceptions 1-3)

The Judge erroneously concluded that Charging Party's Facebook posts related to the Ultimate Drive Event were protected conduct under Section 7 of the Act. Charging Party's complaints and Facebook posts about hotdog carts and bottled water at the Ultimate Drive Event related to Respondent's sales and marketing strategy – not compensation or any other terms of employment. As the record demonstrates, from Respondent's perspective, Charging Party may as well have been complaining about the art hanging on the wall or the price of the new 5-Series sedan. Simply because an employee complains about such things does not automatically mean those complaints are for employee "mutual aid or protection." Thus, contrary to the Judge's holding, Charging Party's conduct was not protected under Section 7 of the Act.

Only two employees of Respondent testified at the hearing – Charging Party Becker and coworker Greg Larsen, a General Counsel witness. Their testimony demonstrates that the sales employees were concerned that Respondent had selected an inadequate sales and marketing strategy for such a prominent event. There is no indication of any concerns about compensation or any other terms and conditions of employment. Consider the following excerpts from the record:

Becker: "... we all kind of, you know, kind of looked around the room and rolled our eyes and ..." (Tr. 35.)

Becker: "... I said to Phill, I'm like you know, I can't believe that we're not doing more for this event." (Tr. 36.)

Becker: "... We're, this is a major launch of a new product and, it just, we just don't understand what the thought is behind it." (Tr. 36.)

Becker: "... We all kind of filed out and kind of walked out onto the showroom floor and all of us talked about it. I mean, we were, we were very concerned about what was going to transpire and, just the fact that, you know, that they weren't doing more." (Tr. 37.)

Becker: "... what Greg said was that, you know, we can't believe that he's, the Mercedes, you know, gets these really nice events and then, we got we're kind of like the red headed stepchild. And, we're the bread and butter store in the auto park and we're going to get the hotdog cart." (Tr. 38.)

Becker: "[Greg said] I can't believe that all we're doing is, you know, having the hotdog cart based on the importance or the magnitude of this, magnitude or the importance of this event." (Tr. 92.)

Becker: "... I said, you know, it's you know, it's not adequate for what we're doing. You know, Greg said you know, absolutely right. He said I don't get it." (Tr. 92.)

Larsen: "I asked what [food] was going to be served and hoped that they weren't going to use the hotdog cart." (Tr. 112.)

Larsen: "I thought we should have had a better display for food and stuff." "Because it's the new 5 Series. It's our bread and butter car for BMW. I thought it should be more professionally done." (Tr. 114.)

Larsen: "I don't think [the hotdog cart] represents BMW or us presenting BMW well, especially in the 5 Series because, the 5 Series is our main car. It's one of the most popular cars we sell for BMW." (Tr. 114.)

There is not a shred of evidence in the record that either Charging Party, Larsen, or any other employee communicated concerns about compensation to Respondent. From Respondent's point of view, the employees were expressing concerns about the dealership's Event-related sales and marketing strategy. This does not constitute protected conduct.

In addition to the record testimony, the Facebook posts highlighted in the Decision demonstrate that Charging Party was primarily concerned with whether Respondent was executing a successful sales and marketing strategy regarding the Ultimate Drive Event. There is no inkling of employee interests. One of Charging Party's Event-related Facebook posts made fun of the fact that "our clients could attain a over cooked wiener and a stale bun." (Decision at

3, lines 34-35; GCX 4.) Another post made fun of the “rare vintages of water that were available for our guests.” (Decision at 4, lines 3-4; GCX 4.) Charging Party’s complaints offer not even a hint of his alleged concern about the effect on compensation. There is, however, salesperson Larsen’s credible testimony that the use of the hot dog cart had no effect on salesperson commissions. (Tr. 119.)

In Eastex, Inc. v. N.L.R.B., 437 U.S. 556 (1978), the Supreme Court, discussing whether employee conduct fell under Section 7 of the Act, stated:

“It is true, of course, that some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activities. We may assume that at some point the relationship becomes *so attenuated* that an activity cannot be deemed to come within the ‘mutual aid or protection’ clause.”

437 U.S. at 567-68 (emphasis added). The Court’s use of the words “so attenuated” suggests that conduct could have some arguable relationship to employee interests, yet the conduct would still fall outside the protection of Section 7 of the Act. The Court noted that it was the Board’s task to determine when activity fell outside Section 7’s “mutual aid and protection” clause. 437 U.S. at 568.

Numerous Board decisions since Eastex have tackled this issue and found that employee conduct – despite some arguable relationship to employee interests – was nonetheless not protected conduct under Section 7 of the Act. The Board has held that the test of whether an employee’s activity is protected within the Act’s “mutual aid or protection” provision is not whether the activity relates to employees’ interests generally but whether it relates to “the interests of employees qua employees.” Harrah’s Lake Tahoe Resort Casino, 325 N.L.R.B. 1244, 1244 (1992). In Harrah’s, an employee actively pushed a proposal to management that the employee stock option plan (ESOP) purchase a controlling interest the employer’s parent company. The employee prepared a petition and circulated leaflets in support of his proposal.

The Board held that such activities were not protected under Section 7. The Board, citing Eastex, held that the employee's actions were so attenuated from employee interests that they did not come within the "mutual aid or protection" clause. 325 N.L.R.B. at 1244. The Board pointed out that "the thrust of the proposal was to cast employees in the role of owners with ultimate corporate control, and thus fundamentally to change how and by whom the corporation would be managed." Id.; see also First National Maint. Corp. v. N.L.R.B., 452 U.S. 666, 676-77 (1981) ("Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship.") Applied here, Charging Party's complaints about the food selection for the Event were akin to him trying to determine Respondent's sales and marketing strategy. His complaints, on their face, had nothing to do with compensation.

In Five Star Transportation, Inc., 349 N.L.R.B. 42 (2007), the employer refused to hire two drivers who had written letters to the local school board complaining of the quality of some of the employer's buses. The Board dismissed the Section 8(a)(1) allegations by the two drivers, finding that the letters "focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others." 349 N.L.R.B. at 44². Here, Charging Party's Event-related complaints (as well as those of coworker Larsen) were focused on the impression or effect the food would have on customers.³ The complaints did not indicate any concerns about employee terms and conditions of employment.

² The Board's conclusion regarding the two drivers was not at issue in the enforcement litigation before the Court of Appeals for the First Circuit. 522 F.3d 46 (1st Cir. 2008).

³ General Counsel argues that because Respondent's compensation program for sales employees included a customer satisfaction component, the complaints about the food served to customers were complaints about commissions. To quote Eastex, this is too attenuated to come under Section 7. Under this reasoning, any employee complaint about anything that could affect the customer experience would be protected. This is far too speculative, and Board cases (discussed herein) have not extended Section 7's protections that far.

In Good Samaritan Hospital & Health Center, 265 N.L.R.B. 618, 626 (1982), the employees drafted a letter to management expressing concerns about a number of management decisions, including a supervisor's lack of contact with patients. The judge, affirmed by the Board, dismissed the complaint for lack of protected conduct and noted that the employees were concerned with patient care, and that their "energies were not directed to improve their lot as employees." Id. See also Damon House, Inc., 270 N.L.R.B. 143 (1984) (finding no protected conduct where "the overwhelming majority of concerns expressed in the [employees'] letter were not directly related to job interests"); Orchard Park Health Care Center, 341 N.L.R.B. 642, 643 (2004) (nursing assistant was not engaged in protected conduct when she called state hotline solely because of patient care concerns). Here, Charging Party's complaints and Facebook posts about the food selection for the Event focused on what customers would think – not on employee concerns – and thus were unprotected.

The Judge's conclusion that Charging Party was engaged in protected conduct ignored both the evidence and the law. The Board should grant Respondent's cross-exception on this issue and find that Charging Party's Event-related complaints and Facebook posts were not protected. This finding would be an additional reason to dismiss the First Amended Complaint regarding Charging Party's discharge.

B. Under *Wright Line*, Respondent Could Not Have Been Motivated By Charging Party's "Protected" Conduct Because It Had No Knowledge Of The Allegedly Protected Nature Of Charging Party's Conduct (Cross-Exceptions 1-3)

Part A, supra, demonstrates that Charging Party was not engaged in protected conduct as a matter of law. The Judge's erroneous conclusion to the contrary was compounded by the following holding:

Counsel for Respondent, in his brief, argues that it was not protected concerted activities because neither Becker nor any other employee made Respondent aware

that their complaints about the food being served was really about their commissions. However, this is not a requirement of protected concerted activities.

(Decision at 8, lines 28-31) (Emphasis added.) This holding, unsupported by any citations to case law, ignores the General Counsel's Wright Line burden of proof to prove that Respondent knew of Charging Party's protected concerted activities when it terminated his employment. Wright Line, 251 N.L.R.B. 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, 102 S. Ct. 1612, 71 L.Ed.2d 848 (1982). Contrary to the Judge's unsupported legal analysis, the Board has held in fact that an employer's knowledge of the protected and/or concerted nature of employee conduct is critical to whether the employer's adverse employment action was motivated by the employee's allegedly protected concerted conduct. Reynolds Electric, Inc., 342 N.L.R.B. 156 (2004), Amelio's, 307 N.L.R.B. 182 (1991).

In Reynolds Electric, the employer laid off and refused to recall an employee who had earlier complained to a manager about whether a construction job was a prevailing wage job. The employee had spoken with other employees about his concerns, but his conversation with the manager was one-on-one, and the manager was not aware of the employee's earlier conversations. The Board dismissed the employee's Section 8(a)(1) allegation because the General Counsel could not establish "that the Respondent knew of [employee's] conversations with Respondent's employees." 342 N.L.R.B. at 156. The Board's holding is on point here:

In an 8(a)(1) discharge or layoff case, the issue is whether the decisionmaker knew of the concerted protected activity, not whether the decisionmaker should or reasonably could have known [T]he evidence is *far too speculative* to support a finding that the knowledge element of a prima facie case has been established here.

342 N.L.R.B. at 157 (emphasis added). Note the Board's requirement of actual knowledge, and its rejection of speculation.

Similarly, in Amelio's, the Board dismissed a Section 8(a)(1) allegation where the employer terminated a waiter for misconduct. The waiter had earlier discussed the employer's tip distribution policy with his coworkers at an off-site meeting, but the Board found that the manager who was responsible for discharging the waiter did not have knowledge of the waiter's concerted activities. The General Counsel argued that other employees may have informed the manager of the meeting and the fact that the terminated waiter was present. The Board, however, held that this did not satisfy Wright Line's requirement that "the employer knew of the concerted nature of the activity." 307 N.L.R.B. at 182. Like in Reynolds Electric, *supra*, the Board found that the General Counsel's argument "represent[ed] no more than *bald speculation*, patently insufficient to fulfill the General Counsel's affirmative obligation to establish knowledge of concerted activity by the Respondent." 307 N.L.R.B. at 183 (emphasis added).

The only distinction between the instant case and the cases of Reynolds Electric and Amelio's is that in the former, the issue is whether Respondent had knowledge that Charging Party's activity was "protected," while in the latter the issues were whether the employers had knowledge that the employees' activities were "concerted." This is a distinction without a difference because what ultimately matters under Wright Line is whether the General Counsel can demonstrate that Respondent knew that Charging Party's conduct was protected and concerted. Here, the General Counsel has failed to satisfy his evidentiary burden, and the Judge's holding that such knowledge "is not a requirement" is totally erroneous.

The Judge's holding expressly concedes that he is engaging in the kind of speculation that Board and Supreme Court precedent prohibits as a substitute for knowledge of protected concerted activity. The Judge noted that the food selected for the Ultimate Drive Event "could have had an effect upon his compensation." (Decision at 8, line 21) (Emphasis added.) The

Judge strayed even further from the evidence when he speculated that “there may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lowering rating in the Customer Satisfaction Rating because of it; not likely, but possible.” (Decision at 8, lines 23-26) (Emphasis added.) Indeed, if the Board is looking for actual evidence from an impartial disinterested witness regarding whether it is reasonable to think that the food selection at the Event could affect compensation, consider the unchallenged testimony of General Counsel witness, Greg Larsen, a fellow salesperson. Like Charging Party, Larsen complained about the food selection for the Event. Larsen, however, testified unequivocally that he did not believe Respondent’s use of the hotdog cart interfered with his potential commissions. (Tr. 119.) The Decision should not have ignored this key piece of Larsen’s testimony on the issue of whether conduct was protected. See *Il Progresso*, 299 N.L.R.B. 270, 290 (1990) (resolving credibility in favor of “articulate, believable, and impartial witness (he was a witness for General Counsel)...”)

In sum, General Counsel never demonstrated that Respondent knew that the Event-related complaints and Facebook posts were related to employee compensation. The Judge’s holding that knowledge of the protected nature of Charging Party’s conduct “is not a requirement” (Decision at 8, lines 30-31) is erroneous and must be rejected. From Respondent’s perspective, Charging Party’s Event-related complaints and Facebook posts were about its sales and marketing strategy. As discussed in part A, supra, this does not constitute protected conduct under Section 7 of the Act. The Board should grant Respondent’s cross-exception on this issue. This finding would be an additional reason to dismiss the First Amended Complaint regarding Charging Party’s discharge.

C. The “Courtesy” Policy From Respondent’s Employee Handbook Did Not Violate Section 8(a)(1) Of The Act (Cross-Exceptions 4-6)

The ALJ found that Respondent’s “Courtesy” policy from its Employee Handbook violated Section 8(a)(1) because employees “could reasonably interpret [the policy] as curtailing their Section 7 rights.” (Decision at 11, line 15.) The Courtesy policy, rescinded on July 19, 2011, stated as follows:

Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

(Decision at 7, lines 1-5; GCX 2, p.28.)

The Judge’s conclusion boiled down to one offending word in the policy – “disrespectful.” (Decision at 11, lines 19-21.) The Judge relied entirely on University Medical Center, 335 N.L.R.B. 1318 (2001), a case in which the Board carefully parsed the employer’s policy regarding insubordination and “disrespectful conduct” during a period when the respondent had just purchased the hospital from a predecessor, and there was intense union activity surrounding the transaction. 335 N.L.R.B. at 1331 (union engaged in public hearings, marches, media communications, and petitions related to the transaction). Context is important. Indeed, the Judge specifically quoted the portion of the holding in University Medical Center that “[d]efining due respect, in the context of union activity, seems inherently subjective.” (Decision at 11, lines 20-21 (quoting 335 N.L.R.B. at 1321)).

The Judge’s reliance on University Medical Center was erroneous. First, the Court of Appeals for the District of Columbia Circuit refused to enforce the Board’s holding on the insubordination and disrespectful conduct policy. Community Hosps. of Central Calif. v. NLRB, 335 F.3d 1079 (D.C.Cir. 2003). The court held that the Board’s parsing analysis of the phrase

“other disrespectful conduct” was myopic. Relevant here, the court noted that “[w]hen read in context ... that prohibition clearly does not apply to union organizing activity – including ‘vigorous proselytizing’; it applies to incivility and outright insubordination, in whatever context it occurs.” 335 F.3d at 1088. The court found the Board’s reading of the policy “implausible.” Id. at 1088-89.

Second, the Judge should have applied Lafayette Park Hotel, 326 N.L.R.B. 824 (1998), as he did in dismissing the allegations as to Respondent’s “Bad Attitude” policy. (Decision at 11, lines 3-6, 8-14.) In Lafayette Park Hotel, the Board refused to find a rule requiring employees to act according to the employer’s “goals and objectives” violated Section 8(a)(1). 326 N.L.R.B. at 825. Relevant here, the Board noted that to the extent the rule could be read to have an ambiguous meaning, “any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase ‘goals and objectives’ in isolation, and attributing to the Respondent an intent to interfere with employee rights.” Id. Similarly, in Adtranz ABB Daimler-Benz Transp. v. N.L.R.B., 253 F.3d 19 (D.C.Cir. 2001) vacating in part 331 N.L.R.B. 291 (2000), the appellate court reversed the Board’s holding that an abusive language policy violated the Act. The policy, like Respondent’s “Courtesy” policy, advocated “trust and respect for self and others,” and it prohibited the use of “abusive or threatening language to anyone on company premises.” The court sharply rebuked the Board, noting: “In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language.” 253 F.3d at 26

Here, the Courtesy policy, read in context, prohibits being disrespectful in the same sentence as prohibiting profanity, which Board cases hold is a lawful prohibition. House of Raeford Farms, 308 N.L.R.B. 568, 584 (1992) (upholding discipline of employee who violated

employer's no-profanity rule). The term "disrespectful" should not be read in isolation. Also, there is no basis here to attribute to Respondent "an intent to interfere with employee rights." There is no evidence of union activity at Respondent's dealership.

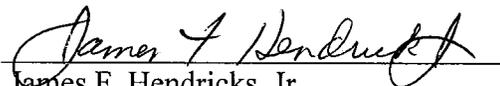
The Judge's conclusion that Respondent's "Courtesy" policy violated Section 8(a)(1) was contrary to controlling Board law. The Board should grant Respondent's exception on this issue and dismiss that portion of the Amended Complaint alleging the policy violated the Act.

D. The ALJ's Conclusion Of Law Regarding The Courtesy Policy In Respondent's Employee Handbook Is In Error (Cross-Exceptions 4-6)

The Decision's Conclusions of Law states in relevant part: "2. The provisions contained in Paragraphs (b), (c) and (d) of its Employees' Handbook from about August 23, 2003 to July 19, 2011 violate Section 8(a)(1) of the Act." (Decision at 11, lines 45-46.) As discussed in part C, supra, this conclusion as to Paragraph (b) (the Courtesy policy) is in error. The Board should grant Respondent's exception on this issue and dismiss that portion of the First Amended Complaint alleging the Courtesy policy violated the Act.

CONCLUSION

WHEREFORE, for the reasons discussed herein, Respondent respectfully requests that the Board grant Respondent's cross-exceptions and accordingly reverse any contrary findings, conclusions of law, or recommended orders in the ALJ's decision.



James F. Hendricks, Jr.
Brian J. Kurtz
FORD & HARRISON, LLP
55 East Monroe Street – Suite 2900
Chicago, Illinois 60603
Telephone: (312) 332-0777 / Fax: (312) 332-6130

ATTORNEYS FOR RESPONDENT KNAUZ BMW

Submitted: November 9, 2011

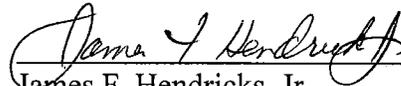
CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was filed electronically with the National Labor Relations Board, Office of the Executive Secretary, before 5:00 p.m. on November 9, 2011.

Service of this **RESPONDENT'S RESPONDENT'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was sent via Federal Express delivery on November 9, 2011, to the following:

Charles J. Muhl, Esq. (copy)
Counsel for the General Counsel
National Labor Relations Board
209 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(plus courtesy copy via e-mail)

Robert Becker
1094 Blackburn Drive
Grayslake, IL 60030


James F. Hendricks, Jr.