

**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 REPLY BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Counsel for the Acting General Counsel (hereinafter "General Counsel") did not carry his burden to demonstrate that Respondent Knauz BMW (hereinafter "Knauz") terminated the employment of Charging Party Robert Becker ("Becker") for engaging in protected concerted activity. Specifically, General Counsel failed to demonstrate that Becker's concerns about the food being served at the dealership's sales event constituted protected conduct. Thus the Judge's holding to the contrary was in error. Furthermore, the Judge erred in ruling that Knauz's "Courtesy" policy violated the Act.

A. Becker's Food-Related Concerns Were Not Protected Under Section 7 Of The Act

Respondent's brief in support of its cross-exceptions did not "misstate" the law regarding General Counsel's *Wright Line* burden, as General Counsel alleges. Indeed, it is General Counsel who misstates the law when he claims that his burden is to show that Respondent knew of the concerted, not protected, nature of the activity. (GC Resp. at 3.) The cases cited by Respondent affirm General Counsel's burden to demonstrate both the concerted and protected nature of the activity:

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.

Reynolds Electric, Inc., 342 N.L.R.B. 156, 157 (2004). Section 7 safeguards *protected concerted* activity. General Counsel cannot seriously argue that he only needs to prove one aspect of the conduct but not the other. In this case, he failed to demonstrate that Becker's food-related conduct was protected. Thus the Judge's ruling that Becker's conduct was protected is in error.

The General Counsel cites a number of cases in his responsive brief purportedly for the proposition that he did not have to demonstrate Respondent's knowledge that Becker was engaged in protected conduct. These cases are easily distinguishable from the instant case because they all involve employee complaints that are undoubtedly protected by Section 7 of the Act. In Kysor Industrial Corp., 309 N.L.R.B. 237 (1992), the employees brought an express complaint to their manager "concerning their work assignments." 309 N.L.R.B. at 238. This is protected conduct because it unmistakably relates directly to their employment terms and conditions and their interests as employees. The employees in Crowne Plaza LaGuardia were presenting a petition in protest of a perceived reduction in hours. 357 N.L.R.B. No. 9 (Sept. 30, 2011). The employees in Wagner-Smith Co. were complaining expressly about the working condition of certain equipment and machinery. 262 N.L.R.B. 999 fn.2 (1982). The employees in Chas Ind. Co. were complaining about who might be performing bargaining unit work – a possible violation of their labor agreement. 203 N.L.R.B. 476, 479. In each of the cases cited by General Counsel, the employees at issue were raising concerns that related expressly to their interests as employees.

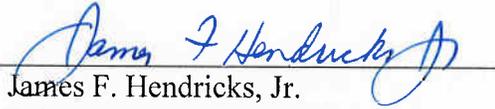
By contrast, Becker was complaining about refreshments available to nonemployees at a sales event. General Counsel is correct that there is a customer service component to

Respondent's salesperson compensation. However, he conveniently ignores the testimony of his own witness, salesman Greg Larson, who testified without contradiction that the food served at the sales event did not interfere with salesperson commissions. General Counsel's argument fails to heed Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), where the Supreme Court noted that at some point the relationship between employee activity and employee interests becomes "so attenuated" that the activity falls outside Section 7 of the Act. Id. at 567-68. As Respondent has earlier asserted, Becker's food-related complaints may as well have been about the dealership's landscaping or the price of a vehicle. Sure, those subjects can affect customer satisfaction, but such complaints bear little or no relationship to Becker's interest as an employee. The Judge erred in holding that Becker's food-related complaints were protected under Section 7.

B. Respondent's Courtesy Policy Did Not Violate Section 8(a)(1) Of The Act

The Judge erroneously held that Respondent's "Courtesy" policy violated Section 8(a)(1) of the Act. General Counsel suggests that the Judge's ruling "was not contingent on a parsing of the language in that rule." (GC Resp. at 12.) The Judge relied entirely on a case involving a similar policy where "the Board stated that a problem with this rule was the word disrespectful." (ALJD at 11 (citing University Medical Center, 335 N.L.R.B. 1318, 1321 (2001))). In fact, the Judge did parse the language of Respondent's Courtesy policy, and this was improper. See Community Hosps. of Central Calif. v. NLRB, 335 F.3d 1079, 1088-89 (D.C.Cir. 2003) (denying enforcement to Univ. Med. Ctr.'s parsing of the policy language).

WHEREFORE, for the reasons stated herein and more fully discussed in Respondent's brief in support of its cross-exceptions, Respondent respectfully requests that the Board grant Respondent's cross-exceptions and accordingly reverse any contrary findings, conclusions law, or recommended orders in the Judge's Decision.



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ATTORNEYS FOR RESPONDENT KNAUZ BMW

Submitted: December 6, 2011

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing **RESPONDENT'S REPLY 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 December 6, 2011.

Service of this **RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was sent via Federal Express delivery on December 6, 2011, to the following:

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