

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MEGAN SWEITZER, WILLIAM MAHER AND  
DENISE MAHER, INDIVIDUALS AND  
OWNERS OF RETRO FITNESS AND PA FIT  
LLC<sup>1</sup>

and

Case No. 04-CA-139626

MICHELLE KRAUS,  
An Individual

*Elana R. Hollo, Esq.,*  
for the General Counsel.

*Larry J. Rappoport, Esq. (Stevens and Lee, King of Prussia, Pennsylvania)*  
for the Respondent.

*Michael J. Davey, Esq. (Eckell Sparks, Media, Pennsylvania)*  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on May 6, 2015. Michelle Kraus filed the charge in this matter on October 27, 2014. The General Counsel issued the complaint on January 29, 2015.

The General Counsel alleges that Respondent violated Section 8(a)(1) by discharging Michelle Kraus on May 9, 2014 because she brought sexual harassment issues to Respondent's attention; and to discourage other employees from engaging in concerted activities to improve the terms and conditions of their employment.

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<sup>1</sup> There was some discussion at trial as to whether this case is correctly captioned. I believe that there is no need to change it. However, the record makes clear that Megan Sweitzer and William and Denise Maher are franchisees of Retro Fitness Corporation and as such they own two fitness gyms which they operate as PA Fit and PA Fit II.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## Findings of Fact

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### I. JURISDICTION

Megan Sweitzer, and her parents, William and Denise Maher, are franchisees of Retro Fitness Corporation. They own two fitness gyms, one in East Norriton, Pennsylvania (PA Fit)<sup>3</sup> and the other in Holmes Pennsylvania (PA Fit II). Ms. Sweitzer and her parents are referred to herein as a singular Respondent. Megan Sweitzer operates both gyms. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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### II. ALLEGED UNFAIR LABOR PRACTICES

Respondent opened the gym in East Norriton in 2011. On December 30, 2013, it opened its second gym, PA Fit II, in Holmes, Pennsylvania. Megan Sweitzer manages the facilities with the assistance of Nick Rueger, who is head of Respondent's personal training department. Each facility also has a manager. At Holmes, Darold Williams was the manager from the opening until sometime in March 2014. In March, Nick Persia became manager and Williams became a rank and file employee as a personal trainer.

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One of the first personal trainers Respondent hired was the Charging Party, Michelle Kraus. Another trainer was Nichole Gussin. Some of the trainers were male; others were female.

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Kraus and Gussin exchanged text messages regarding what they considered to be favoritism towards male trainers by managers. In February 2014, they agreed to send an email to Megan Sweitzer about this, but did not do so. Kraus and Gussin also exchanged text messages about text messages that Gussin received from male trainers that they perceived as sexually suggestive.<sup>4</sup>

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Sometime in late February or early March, while in Respondent's lunchroom, Nichole Gussin showed Michelle Kraus a text message on Gussin's I-phone. The text said something to the effect that Gussin was lucky that Kraus was in the lunchroom with Gussin. Kraus testified that Gussin told her that the text was from Darold Williams. However, this is classic hearsay. There is no probative evidence that Darold Williams sent such an email.

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<sup>2</sup> The General Counsel's motion to correct transcript is granted. The reporting service provided a corrected copy of the transcript that made most of the changes requested by the General Counsel. However, the following changes were not made: Tr. 16, line 11 should read personal trainers rather than facilitators. Tr. 20, line 12 should read Hollo, rather than Judge Amchan. Tr. 171, line 14 should read Rappoport, rather than Hollo.

<sup>3</sup> Norriton, PA is located near Norristown, PA.

<sup>4</sup> The text exchanges between Gussin and Kraus also mentioned what I assume is "inappropriate" behavior by someone named Bill, who is not identified in this record. It is not even clear that Bill is an employee of Respondent.

A few weeks later, Kraus and Gussin were together when Gussin showed Kraus another text message. It said, "Does Makayla need a new daddy?" Makayla is Gussin's daughter. Michelle Kraus testified that Gussin told her that this email was also from Williams. Like the other email there is no non-hearsay probative evidence that Williams sent such an email. Neither  
5 Gussin nor Kraus mentioned these text messages to anyone in Respondent's management until April 30, 2014, over a month and a half after the second one.

Sometime in April, prior to April 30, Nick Rueger, Respondent's head of the personal training department, met with Michelle Kraus and gave her a performance review. The review  
10 was very positive. However, Rueger told Kraus that he had noticed that she had a negative attitude recently. Kraus told Rueger that her negativity stemmed from personal problems outside the gym. She did not raise any workplace issues with him. Megan Sweitzer participated in this performance review by telephone.

Sweitzer and Rueger met again with Kraus on April 30, 2014. Sweitzer asked Kraus what was bothering her. Kraus again replied that she was upset by personal problems not related to work. During or after this meeting, Sweitzer suggested that Kraus come to her with any work-related problems. That evening Kraus sent Sweitzer the following email.

20 Subject: My Issues. Important.

Megan,

25 You have asked me to come to you if there are issues that need to be addressed. There are situations that have occurred over the past few weeks that have made me uncomfortable. I believe that writing this down is the best way I can be clear and articulate about these important issues.

30 From our conversation earlier today, it is apparent that my management feels I am negative and distant. I have distanced myself from management as well as some of my co-workers, because, quite frankly I am uncomfortable and disturbed by many of their actions.

35 The reason I have not brought this up until now is because the two people that make me uncomfortable at work are my two managers. I haven't brought this to you because I have attempted to follow the chain of command. I hope you understand that this is a tough situation for me. If I were to bring up the inappropriate behavior of my managers, to my managers, I fear I would face repercussions and unfair treatment.

40 I'd like to document for you a list of the incidents that bother me, in writing,

45 The first two incidences were extremely uncomfortable and absolutely not handled properly or professionally by management. The first one happened when I was having a conversation with a coworker, and I said, "My client was acting very weird." Another coworker of mine overheard the conversation, and said, "That's because they want you to take it in the butt." He said this in front of several co-workers and my manager Nick at the trainers' desk with potential clients and members by the desk.

Alarmed as I was, I responded, 'Excuse me? That's my client so that would be very inappropriate.' He responded, "Well, not really, all you would do is get in trouble for it." This is when I looked over to my manager and hoped that he would step in and handle the situation properly. He did not. He stood there and said nothing, and laughed. I was embarrassed and very disappointed in the complete lack of professionalism from my coworker and manager. That comment was completely out of line, disrespectful, and qualifies as workplace sexual harassment. I removed myself from the situation and then told Nick Persia that I was upset, and that the other Nick did nothing about the situation. I advised him that if I didn't receive an apology from those involved and if they were not dealt with in a professional manner I would come to you, Nick assured me he would handle it. A few days later I did receive an apology from my coworker, but not from my management.

The second incident occurred when a coworker of mine greeted me with the words, "What's up slut," when I approached the trainers desk. Again, a manager was present- This time it was Nick Persia. I do NOT feel I deserve to be talked to this way, and I was quite upset, Nick Persia then said to my coworker, "You can't say stuff like that, you could get written up." They both laughed about it, and NOTHING was done. . . yet again. This is the second time that I did not feel that my management handled the situation properly or did anything meaningful at all.

This is where difficulty following chain of command occurs. When management act inappropriately and fail to handle themselves professionally, I don't feel comfortable coming to them for a resolution.

The next incident has happened many times while I have been present at the trainer's desk. I have heard my managers and well as male co-workers talk about 'sleeping, or banging" several female clients/members.. . including Audra and my client Alexis. They constantly 'make rude and inappropriate comments and [sic] females faces and bodies. I have known Audra for a while now and I am quite close with her father. It is completely inappropriate that managers or male coworkers publicly talk about sleeping with ANY members of the gym, This is another example of workplace sexual harassment and a lack of professionalism.

Could you image if other members heard them saying this? If I was a potential member. I would be outraged. As a female employee I am disgusted, I do not agree with any of this behavior so I have removed myself from associating or being part of anything they say/do, which leads, me to seem distant, or negative since I am not friendly with them anymore. Management is part of the problem, so I don't see how going to them will be part of a proper or professional solution.

Next, a female co-worker has been getting several disgusting sexual harassment text messages from a male co-worker of mine. I have seen these messages and am completely outraged. There is clearly no respect, considering she is a female and she is married.

Another incident occurred when a coworker of mine had texted me and said 'I out-trained you by I session this pay period, but you beat me with your classes.' I asked how they knew this and they told me they were looking at my commission/payroll sheet. There is absolutely NO reason why any co-workers of mine should be looking at my pay sheet or seeing how much I get paid per session. This is again very inappropriate and unprofessional.

Nick Persia has told me on several occasions to not go to Nick Rueger because he "Doesn't like confrontations." I have been told that I can come talk to any manager at any time, but statements like this lead me to believe the exact opposite.

All these incidents have made me very upset, and even angry. The best way I could see to handle these uncomfortable situations is to just perform my job duties and then leave. There is no need for me to associate myself with the people involved, who make me uncomfortable and say disgusting things, unless I have to, whether it be for training or for meetings.

This is what has leaded me to be distant, because, clearly, there is no line between friendship and management. I don't think that my managers can or will handle situations correctly because they are too busy being friends with their co-workers. Since I have lost faith in how my managers can perform their duties, I felt no need to associate with them unless it involved work.

The last issue I have is that there is no consistency when it comes to potential client disbursement, and there is nothing in writing stating how a professional intro/assessment will be handled when the managers are present. I was specifically told by Persia that when both managers are at the gym, they will be doing the introductions together, and the introductions will not be done by a trainer.

There have been several occasions, including one that happened yesterday, when both managers have been present and other trainers were asked to do the assessments. Most often, I am not asked, whether It be due to a scheduling conflict or perhaps they just didn't want to use me. When they asked me yesterday I was quite confused, considering both of them were present. This is an example of how trainers are told one thing, yet this is not how the situation proceeded, I performed my work duties and trained the potential client, for free, while Nick Persia sat at the desk on his cell phone and the other Nick ran on the treadmill. I find that ironic that I have to work for free while they can work out and text but get paid for it. I think that there needs to be clear guidelines followed when it comes to introductions. Introductions should not happen on a "When they feel like it" basis. Consistency is key at a place of business. When managers stay consistent and communicate openly and honestly, employees will respond to that, leading to more membership sales. Overall, the lack of consistency and communication has left me feeling quite negative the approach of management,

I absolutely love my job. There is nothing more important to me than training my clients the best way that I possibly can. I clearly have a loyal following. I feel very uncomfortable about my professional surroundings. I think there is a lack of

communication, a lack of consistency, and most certainly a lack of professionalism at Retro Fitness.

5 I am uncomfortable every day I go into work, and I do not feel that I should be treated or talked to the way that I have. To reduce this, I have distanced myself.. which is what I believe I am being reprimanded for by you and by management.

10 This has not affected my training performance in any way, I have tried to act professionally, despite the harassment and inappropriate behavior of my managers and coworkers. Nick said, during my evaluation, that he has called my clients and received nothing but great reviews, The only thing that has changed is my relationship and association with my co-workers and managers.

15 I honestly do not feel that any of these situations I have detailed for you were handled properly and, I fear that when I tell you these things my job may be at jeopardy. I fear that I will be treated even more unfairly from my managers and co-workers, I am making a leap of faith here by bringing these issues to you.

20 I love being a trainer, and I am excited to continue providing excellent services to my current clients and future members of Retro Fitness, I just wish that these rather significant issues and behavior can be addressed. I do not wish to continue feeling fearful and uncomfortable when I come to work every day.

25 Sincerely,

Michelle Kraus

Sweitzer responded 22 minutes later:

30 Michelle –

35 Thank you for the email. I knew there had to be something going on that I was not aware of. These are things that I need to know. This will be discussed with my partners (parents) and handled properly. I will talk to you about how I will be handling this before I do anything further. This email will stay between you and I for now.. Thank you.

Also, if the “female co-worker” is getting harassing text messages from one of my employees and would be willing to bring them to me, that would be great.

40 Megan

45 Sweitzer met again with Michelle Kraus on May 7. She asked Kraus who was the female co-worker who was getting harassing text messages and who was the male co-worker sending them. Kraus identified Nicole Gussin as the female and Darold Williams as the male.

Sweitzer sent a text message to Gussin asking her to send the text messages Kraus referred to as “disgusting sexual harassment text messages.” Gussin responded that she had not

saved the messages. However, she promised to advise Sweitzer if she got any inappropriate text messages from anyone in the future.

5 Megan Sweitzer also specifically asked Gussin if she felt that she was being harassed. Gussin did not directly answer this question.

10 Nick Rueger asked Darold Williams to forward to him all the text messages that Williams had exchanged with Nicole Gussin. Williams told Respondent that he did so. Upon receiving these texts, Sweitzer and Rueger discovered that Gussin had sent a number of very sexually suggestive text messages to Williams.<sup>5</sup> None of the emails provided by Williams were the ones that Kraus characterized as the “disgusting sexual harassment text messages.”

15 On May 9, Nick Rueger issued a disciplinary warning to Gussin for unprofessionalism. The same day, Sweitzer fired Kraus in the presence of Rueger and Michael Urday, a representative of Retro Fitness. Sweitzer told Kraus that she was being terminated because she had falsely accused a co-worker of sexual harassment, Tr. 69-70.

20 Sweitzer and/or Rueger asked Kraus to sign a termination notice, which stated as the reason for Kraus’ discharge, “Falsely accused fellow trainer of harassment.” Kraus refused to sign the notice, R. Exh. 2. In response to Kraus’ application for unemployment insurance benefits, Respondent also stated that she was fired for making false accusations that a co-worker was sexually harassing another co-worker.

#### 25 *Analysis*

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged activity protected by Section 7 is a violation of Section 8(a)(1).

30 Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...* (Emphasis added)"

35 In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group  
40 activity.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

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<sup>5</sup> On May 13, 2014, Respondent, by Nick Rueger, issued Williams a warning for “Inappropriate behavior/texting co-worker.”

Michelle Kraus engaged in protected concerted activity but not with regard to the conduct for which she was terminated. Kraus and Gussin discussed sending an email to Respondent complaining about favoritism in favor of male trainers.

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Kraus also testified that she and Nicole Gussin discussed mentioning sexually harassing text messages to Megan Sweitzer in the email Kraus planned to send, Tr. 54. However, without first-hand testimony from Gussin to that effect, I decline to credit Kraus' self-serving testimony in this regard.<sup>6</sup> Given her unsupported statements accusing Darold Williams of sexual harassment, I decline to take her uncorroborated testimony at face value.

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Respondent fired Kraus soon after receiving the April 30, 2014 email for some of the contents of that email. However, this fact does not resolve the question of whether Respondent discharged Kraus for engaging in protected concerted activity. I find that it did not.

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Respondent has been very consistent with regard to the reason it fired Kraus. That reason is making a false accusation that one co-worker (Darold Williams) was sexually harassing another (Nicole Gussin). There is no basis in this record for concluding that Respondent fired Kraus for any other reason. Moreover, the General Counsel's complaint specifically states that it was Kraus' complaint about sexual harassment in concert with Nicole Gussin that constitutes Kraus' protected activity.

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The General Counsel does not rely on Kraus' complaints about anything else. There is no evidence on which to conclude that Respondent, as alleged in the complaint, fired Kraus to discourage employees from engaging in concerted activities to improve the terms and conditions of their employment. Specifically, there is no evidence on which I can conclude that Respondent was motivated by a desire to discourage employees from lodging bona fide complaints regarding sexual harassment.

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Further this record does not establish that Williams was sexually harassing Gussin and in fact may affirmatively establish that he was not doing so. The concept of "sexual harassment" is designed to protect working men and women from the kind of sexually based conduct that is severe and/or pervasive enough to create an environment that a reasonable person would find hostile or abusive, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Baskerville v. Culligan Intern. Co.*, 50 F. 3d 428, 430-31 (7<sup>th</sup> Cir. 1995).

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The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome," *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). There is no credible evidence that the sexually tinged texts allegedly sent by Darold Williams to Nicole Gussin were unwanted. There is no credible evidence that Gussin ever indicated to Kraus that these messages were unwanted. There is no credible evidence that Kraus had any reason to believe they were unwanted.<sup>7</sup>

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<sup>6</sup> I do not draw an adverse inference from the General Counsel's failure to present Gussin as a witness. However, I view her absence from the hearing to be fatal to the General Counsel's case.

<sup>7</sup> Neither Gussin nor Williams testified in this proceeding.

Although Krauss may not have known of the text messages Gussin sent to Williams, I conclude that she, rather than Respondent, should bear the consequences of not knowing the full story behind the text messages she observed.

Furthermore, although somewhat suggestive, the sexual innuendos contained in those texts are relatively mild. Although a single incident may constitute sexual harassment if sufficiently severe, the two text messages observed by Kraus do not come close to meeting the standard for sexual harassment, which is that the harasser's actions be sufficiently severe or pervasive.

I conclude that the tests enunciated in *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011) and *Encino Hospital Medical Center*, 360 NLRB No 52 (2014) provide appropriate guidance for determining whether the statements made by Michelle Kraus in her April 30, 2014 email concerning sexual harassment of a co-worker are protected by Section 7. With regard to communications to third parties, the Board employs a standard of whether statements made in the course of a labor dispute were made with reckless disregard for their truth or falsity; however, a statement may be protected even if it is false, misleading or inaccurate. Statements made to Respondent that are "deliberately deceptive or maliciously false" may also lose the protection of the Act.

On the basis of this record, I conclude that Kraus' allegations regarding sexual harassment were made with reckless disregard for the truth and are unprotected. Since Nicole Gussin did not testify in this proceeding, there is no probative evidence as to why she showed the two text messages in question to Kraus. From the texts Gussin was sending to Williams, it is very unlikely that she did so because she felt Williams was making unwelcome sexual advances to her. There is absolutely no credible evidence that Gussin encouraged Kraus to complain about these messages to Respondent. There is no credible evidence on which to conclude that Kraus had any reason to believe that these texts were unwelcomed by Gussin.

Kraus had no basis to accuse Williams of sexual harassment when she wrote the April 30 email to Sweitzer and when she identified Williams as the person who sent the emails. Therefore, I find that the statements regarding sexual harassment in the April 30 email were "deliberately deceptive or maliciously false."

I therefore find that Respondent terminated the Charging Party, Michelle Kraus, for statements in her April 30, 2014 email that were made with reckless disregard for their truth or falsity. These statements were also "deliberately deceptive." I therefore find these statements suggesting that a female co-worker was being sexually harassed were not protected by Section 7 and that Respondent therefore did violate Section 8(a)(1) in discharging Kraus for making them.<sup>8</sup>

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<sup>8</sup> Respondent did not follow its past practice or its employee handbook regarding progressive discipline in terminating Michelle Kraus. The handbook does not provide for termination for a first offense of any nature. Respondent's past practice does not establish that it previously terminated any employee for a first offense. Sweitzer testified that she did terminate one other employee without resorting to progressive discipline, Tr. 159-60. However, G.C. Exh. 3 establishes that this employee received a prior final written warning before he was terminated.

Deviation from an employee handbook and a progressive discipline scheme are evidence of

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

## ORDER

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The complaint is dismissed.

Dated, Washington, D.C., June 19, 2015.

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Arthur J. Amchan  
Administrative Law Judge

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discriminatory motivation, *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004); *Guardian Automotive Trim, Inc.* 340 NLRB 475, 475 fn. 1 (2003). Regardless, in this case I find that Respondent discharged Ms. Kraus for activity that was not protected. Thus, Respondent's disparate treatment of Kraus is irrelevant to the disposition of the complaint.

The General Counsel also faults Respondent for doing an inadequate investigation of Kraus' claims that Nicole Gussin was being sexually harassed. To the contrary, Respondent did a sufficient investigation to establish that the texts from Williams to Gussin were not unwanted. I find the General Counsel's reliance on *NLRB v. Burnup & Sims*, 379 NLRB 21, 23 (1964) to be irrelevant to this case. First of all, I find that the conduct for which Ms. Kraus was terminated was not protected. Second of all, I find that Kraus engaged in misconduct by making serious assertions about a co-worker that were unwarranted on the basis of the facts available to her.

<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.