

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

GEORGIA AUTO PAWN,

Respondent,

and

CYNTHIA JOHNSON, an Individual,

Charging Party.

CASE NOS. 10-CA-132943

10-CA-142161

**EMPLOYER'S ANSWERING BRIEF TO EXCEPTIONS**

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## **EMPLOYER'S ANSWERING BRIEF TO EXCEPTIONS**

Georgia Auto Pawn (hereafter "Employer" or "the Company") files its Answering Brief to Exceptions filed by Charging Party on or about December 12, 2015, and respectfully submits the following:

### **I. STATEMENT OF THE CASE**

On March 4, 2015, Counsel for the General Counsel issued a Consolidated Complaint and Notice of Hearing alleging the Company violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by (1) disciplining and discharging Cynthia Johnson ("Charging Party" or "Ms. Johnson") because she engaged in protected, concerted activity, (2) prohibiting Ms. Johnson from discussing her wages, and (3) maintaining certain rules in its employee handbook.

On March 16, 2015, the Company timely filed its Answer raising certain affirmative defenses and denying it committed any unfair labor practice.

A hearing was held in Atlanta, Georgia on July 9, 2015, before Administrative Law Judge William N. Cates. On October 21, 2015, Judge Cates issued a decision finding the Employer maintained certain unlawful rules in its employee handbook and recommending the dismissal of all other allegations.

On December 14, 2015, Charging Party filed "Charging Party's Exceptions Brief to the Decision of the Administrative Law Judge." Counsel for General Counsel did not file exceptions, nor did the Employer.

As shown herein, Charging Party's Exceptions are without merit and should be overruled.

## **II. CHARGING PARTY'S EXCEPTIONS ARE WITHOUT MERIT AND SHOULD BE OVERRULED**

Charging Party excepts to the ALJ's decision arguing his credibility determinations were erroneous, that certain violations not alleged in the complaint should have been found, and that the ALJ's legal conclusions were erroneous in light of Charging Party's discredited version of facts. Charging Party also improperly argues facts not in the record. Charging Party's Exceptions ignore the well-reasoned analysis of the ALJ and the weight of credible record evidence. Contrary to Charging Party's claims, the evidence and rationale set forth in the ALJ's decision establish that the decision to discipline Charging Party was motivated by Charging Party's insubordinate and inappropriate behavior, not her participation in protected activity. The ALJ likewise properly concluded the decision to discharge Charging Party was the result of her refusal to discuss with the Employer's Regional Manager, Larry Smith, the confidential file improperly left on her desk, not her participation in protected activity. Moreover, the ALJ properly concluded, the Employer established the affirmative defense that these actions would have been taken in the absence of protected activity.

### **A. The ALJ Correctly Discredited Charging Party and Credited The Employer's Witnesses**

The Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence establishes they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Here, Charging Party argues Judge Cates' conclusions were incorrect, but she does not offer a shred of objective evidence in support of that position.<sup>1</sup> ALJ Cates, on the other hand, offers compelling support

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<sup>1</sup> Charging Party cited to non-record evidence in an effort to discredit affiant Alexandra Reiss. This "evidence" included arguments regarding shared ownership of Reiss' employer and Respondent and speculation that Reiss was therefore biased. Charging Party's argument is of dubious value and, in any event, cannot be considered as the

for his credibility findings. These findings were based on more than the demeanor of witnesses, which Judge Cates is uniquely qualified to assess. Judge Cates also pointed to the credibility of the Employer's witnesses, the consistent and corroborated nature of the testimony offered by the Employer, the fact that Charging Party's testimony was shifting, self-serving and often did not make sense, and, finally, that Charging Party's two affidavits were incomplete, did not address significant aspects of her live testimony and, in spots, was contrary to that testimony. These findings were well-founded.

Charging Party was caught in at least one blatant lie when she testified that she kept notes throughout her employment "because several people" had told Charging Party that the Employer's Area Manager, Samantha Murillo, was not trustworthy. Tr. 79. However, Charging Party could not produce those notes in response to the Employer's subpoena because, she claimed, Mr. Smith, "did not allow me to have access to my desk" when she was terminated. Tr. 79. However, Mr. Smith testified that he asked Charging Party if she needed anything from her desk. Tr. 132. Likewise, Alexandra Reiss, who provided a statement months before the trial and had no reason to know access to the desk would be an issue, wrote in her affidavit that "Smith asked if she needed help getting her stuff out of the building, and she said that she would get her fucking shit." GC13 ¶5. In fact, Ms. Reiss twice mentioned Mr. Smith asked Charging Party if she needed to retrieve her belongings. See also GC13 ¶8 ("... Smith asked if she needed help getting her [stuff], and Johnson responded with curses."). On this point, Ms. Reiss' affidavit is particularly reliable – it was impossible for Ms. Reiss to have known Charging Party would claim she was not permitted to get her notes from her desk.

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information to which she cites is not part of the record. See Rule 102.45 of the NLRB's Rules and Regulations; Int'l Bridge & Iron Co., 357 NLRB No. 35 (2011).

As the ALJ also found, Charging Party's testimony about recording her conversation with Ms. Murillo likewise was telling. Charging Party admitted she told Ms. Murillo she was recording the June 9 conversation. Tr. 75. However, she did not produce a recording in response to the Employer's subpoena. Tr. 75. In an effort to explain this, Charging Party testified she attempted to record the conversation on her smart phone, but was unsuccessful. Tr. 75-76. However, in an email Charging Party drafted to Mr. Smith's supervisor, Don Hulse, but which she never sent, Charging Party stated Ms. Murillo "prohibited me from recording the conversation," NOT that she tried to record the conversation and failed. Tr. 71. She also nonsensically stated "I advised [Ms. Murillo] that Georgia Code 16-11-16 states that the law does not prohibit a person who is party to a conversation from recording a conversation; therefore I was acting in accordance with Georgia law." Tr. 71-72. On cross examination, Charging Party admitted she was not sure if she cited a specific code section to Ms. Murillo. Tr. 73. As Judge Cates found, this shifting story further evidences Charging Party's incredibility and willingness to twist the facts. ALJD at 12.

As the Judge also found, Charging Party's incomplete initial affidavit further evidences her incredibility. ALJD at 12. In it, she never claimed she told Ms. Murillo she was recording the conversation, nor did she state she told Ms. Murillo "do your job and answer your phone." Tr. 70, 76. These were critical components of that conversation – particularly for an employee who was disciplined for insubordination. Yet, in order to paint herself in the best light, Charging Party omitted these facts from her sworn affidavit, once again evidencing her willingness to distort or fabricate the facts for her benefit.

Likewise, as the ALJ found, Charging Party's incredibility is further evidenced by her nonsensical denial that Ms. Murillo, despite her alleged statement that Charging Party could not

discuss her wages “even with me,” actually did discuss Charging Party’s wages with Charging Party on three occasions and, in fact, initiated the first conversation with Charging Party about her review. Tr. 77-78; 88; ALJD at 13.

Finally, and most critically, when cross examined about why she would omit mention of telling Ms. Murillo to do her job and answer her phone, Charging Party denied this comment was a cause for her getting written up the following week. Instead, she testified she understood Ms. Murillo wrote her up because of Charging Party “discussing my wages with people because she said I wasn’t supposed to be doing that.” Tr. 77. This, however, is directly contradicted by the “rebuttal” Charging Party claims to have written shortly after the June 9 meeting with Ms. Murillo. In it Charging Party stated that Ms. Murillo presented her with “a reprimand for insubordination.” GC4. There is NO mention of being written up because she discussed her wages with other employees. The reason for this is simple – as the ALJ found, Charging Party was written up for insubordination, she understood this, and she reluctantly admitted it under oath. ALJD at 15-17; Tr. 86. Indeed, Charging Party testified, Ms. Murillo started the June 17 meeting by telling Charging Party “I’m going to tell you right now, you’re not going to be disrespectful towards me ....” Tr. 43-44.

In contrast to Charging Party’s shifting, inconsistent and fantastic testimony, there was not a single inconsistent or incredible statement made by either of the Employer’s witnesses. As such, their testimony properly was credited over that of Charging Party.

**B. The ALJ Correctly Concluded Charging Party Was Lawfully Disciplined and Subsequently Discharged For Misconduct, Not Participation in Protected, Concerted Activity**

1. The ALJ Properly Held Counsel For The General Counsel Failed To Establish A Prima Facie Case Of Discrimination.

The ALJ properly cited to Wright Line, finding the Employer’s decision to discharge Charging Party was not unlawfully motivated. Pursuant to the framework set forth in that case, the “General Counsel [must] make a *prima facie* showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” 251 NLRB 1083, 1089 (1980). The ALJ correctly concluded Charging Party’s purported protected activity was not a substantial or motivating factor in the decision to discharge her. ALJD at 20. He further (and correctly) concluded the Employer would have taken the same action in the absence of protected activity. ALJD at 20. More recently, in Tracker Marine, 337 NLRB 644, 650 (2002), the Board affirmed an ALJ’s decision finding the employer discharged an employee for lying, not because he engaged in protected activity. As a result, the ALJ found the “evidence fail[ed] to establish a link between [the employee’s] protected activities and the adverse employment action.” Id.

Similarly, here, the ALJ correctly concluded Charging Party’s insubordination served as an intervening event belying any causality between her putative protected concerted activity and the discipline she suffered (including her ultimate termination). ALJD at 17, 20. As to her discipline, as the ALJ found, Charging Party was rude and insubordinate to Ms. Murillo, telling her to “do her job” and “answer her phone.” ALJD at 17. This outburst was the result of Charging Party being upset that Ms. Murillo told her to do her “sales job,” not because of any discussion regarding wages. As a result, Charging Party understood, and the ALJ found,

Charging Party was disciplined for *insubordination*, not participation in protected activity. ALJD at 17. Indeed, Charging Party’s rebuttal recognized “[t]he write up was a reprimand for insubordination. However, I strongly disagree ....” GC4. Further evidencing this is Charging Party’s description of how the June 17 meeting began: with Ms. Murillo telling her “I’m going to tell you right now, you’re not going to be disrespectful towards me ....” Tr. 43-44.

Likewise, and as the ALJ properly found, it was Charging Party’s insubordinate refusal to speak with Mr. Smith which resulted in her discharge, not alleged participation in protected concerted activity. ALJD at 20-21. In fact, according to Mr. Smith’s account of the meeting, which the ALJ properly credited, he and Charging Party never discussed her wage increase, nor did they discuss her disciplinary action or her email to Mr. Hulse. ALJD at 20; Tr. 133. Instead, Mr. Smith asked about the file on Charging Party’s desk, she refused to discuss it, became belligerent, and finally refused to speak altogether. ALJD at 20. As a result, Mr. Smith discharged Charging Party. This had nothing to do with alleged participation in protected activity. As such, the ALJ properly found Counsel for General Counsel failed to show the causality necessary to satisfy the Wright Line test.

2. The ALJ Correctly Found That Even If Counsel For General Counsel Established A Prima Facie Case, The Employer Showed It Would Have Disciplined And Discharged Charging Party In The Absence Of Participation In Protected Activity.

The ALJ correctly found the Employer established the affirmative defense under Wright Line.

In Banner Estrella, 362 NLRB No. 137 (June 26, 2015), the Board found the employer did not violate the Act when it issued a coaching to an employee for the insubordinate conduct of failing to follow his supervisor’s instructions, which the employee considered to be unsafe. The Board found an affirmative defense under Wright Line, concluding the employer would have

disciplined the employee for insubordination (failing to follow the supervisor's instructions) even assuming he had been engaged in protected concerted activity. Here, as in Banner Estrella, the ALJ correctly found that even if protected concerted activity was a motivating factor in Charging Party's discipline and discharge, her insubordination was an overriding event establishing the Wright Line affirmative defense. See also Safety-Kleen Corp., 269 NLRB 602, 604-605 (1984) (termination of employee lawful where he was discharged after protesting discipline in an insubordinate manner). Here, neither Mr. Smith nor Ms. Murillo had any intention of disciplining Charging Party. However, Charging Party became irate and insubordinate, ultimately causing her discipline and later her discharge.

a. The ALJ Correctly Found Respondent Established The June 17, 2014 Counseling For Insubordination Would Have Been Issued In the Absence of Protected Activity.

As the ALJ found, Ms. Murillo acted lawfully in disciplining Charging Party. As detailed above, during their telephone conversation on June 9, 2014, Charging Party was insubordinate, yelling at Ms. Murillo and telling Ms. Murillo she should do her job and answer her telephone. Tr. 111-112. The ALJ found this outburst was the result of Charging Party finding Ms. Murillo's comment "go back to doing your sales job?" to be demeaning, *not* because of their discussion of wages. ALJD at 17.<sup>2</sup> Charging Party's insubordinate behavior continued during the June 17, 2014 meeting with Ms. Murillo and fellow branch manager, Ben Raimondi, during which Charging Party rolled her eyes, interrupted Ms. Murillo and raised her voice. Notably, at the hearing, Charging Party did not deny telling Ms. Murillo to "do [her] job and answer [her] phone." ALJD at 17; Tr. 77. Thus, even assuming Counsel for General Counsel established Charging Party was engaged in protected concerted activity during her telephone conversation with Ms. Murillo, the ALJ properly found the Company lawfully issued discipline

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<sup>2</sup> For this reason, Charging Party's reliance on Atlantic Steel, 245 NLRB 814 (1979) is misplaced.

in light of Charging Party's subsequent insubordinate conduct. See Banner Health and Safety-Kleen, supra. Indeed, Charging Party understood she was being disciplined for insubordination, *not* protected concerted activity. This evidences: (1) that Charging Party *was* insubordinate, and (2) that the Employer's motivation was lawful.

b. The ALJ Correctly Found Respondent Established Charging Party Would Have Been Discharged In The Absence of Protected Activity.

The ALJ found Mr. Smith arrived at the facility on July 7, without any advance notice, and without any intent to discipline or discharge Charging Party (as evidenced by the undisputed fact that he did not bring a separation notice with him per his typical practice in termination situations). ALJD at 19. Instead, as the ALJ found, Mr. Smith's un rebutted testimony establishes he met with Charging Party solely to encourage her to interact positively with supervisors and co-workers. ALJD at 18-19.

When he arrived, Mr. Smith discovered an open file on Charging Party's desk contrary to the Company's confidentiality rules about which Charging Party had been coached just a few days prior. ALJD at 19-20; Tr. 116. When Charging Party returned, Mr. Smith attempted to discuss the file with Charging Party. ALJD at 20. However, she adamantly refused and became loud and belligerent. Charging Party's behavior was corroborated by Ms. Reiss, who noted in her Board affidavit that Charging Party was "loud and heated" and "displayed an attitude of refusal and insubordination. She neglected to answer any questions asked or comply enough to have effective communication." It was this insubordinate conduct, not participation in protected activity, which led to Charging Party's discharge. ALJD at 20-21.

As the ALJ found, Charging Party was lawfully discharged because of her refusal to comply with Mr. Smith's reasonable directive to discuss the open file on her desk. Given this intervening misconduct, even if Counsel for General Counsel had established a prima facie case

pursuant to Wright Line, the ALJ correctly found the Company met its burden of demonstrating it would have terminated Charging Party irrespective of any purported participation in protected concerted activity.

**B. The ALJ Properly Found Ms. Murillo Did Not Direct Charging Party Not To Discuss Wages.**

Charging Party claims Ms. Murillo told her she should not discuss her wages with others, not even with Ms. Murillo. Tr. 40, 88; Charging Party’s Exceptions Brief at 12. As the ALJ found, this claim was not credible; Ms. Murillo credibly testified she never told Charging Party she should not discuss her wages with others. Tr. 111-12. Indeed, the ALJ found, Charging Party’s claim that Ms. Murillo told her not discuss her pay with others “not even [Ms. Murillo],” made no sense; it was Ms. Murillo’s job to discuss Charging Party’s increase. ALJD at 14. In fact, Ms. Murillo initiated the conversation in May to discuss Charging Party’s increase, and also returned Charging Party’s telephone call to answer her questions. ALJD at 13.

In sum, and as the ALJ found, Charging Party was not a credible witness. Her testimony on this point and others was self-serving, contradictory and not credible. It was correctly discounted and should not be disturbed. Standard Dry Wall, *supra*.

**C. Charging Party’s Arguments Of Violations Outside The Scope Of The Complaint Are Without Merit And Should Not Be Considered**

Charging Party argues the ALJ erred in failing to find the Employer violated the Act by allegedly prohibiting her from recording her conversations with Ms. Murillo. This allegation is not included in the Complaint. Therefore, no violation may be found related to this issue. See GTE Automatic Electric, 196 NLRB 902, 903 (1972) (judge may not find a violation based on an allegation or theory that has been asserted only by the charging party). Charging Party further appears to argue the statements and directives set forth in her disciplinary counseling were unlawful. The Complaint, however, alleges only that the disciplinary memo was unlawfully

issued in response to protected activity. There is no allegation the *contents* of the disciplinary memo were unlawful. As a result, Charging Party cannot now pursue a different theory of a violation in light of the General Counsel's earlier failure to do so. Any other outcome would deny Respondent due process. See, e.g., Zurn/N.E.P.C.O., 329 NLRB 484 (1999) (judge properly refused to consider charging party's theory that respondent's hiring policy was unlawful on its face, as the General Counsel argued only that it was unlawfully applied).

## II. CONCLUSION

For the foregoing reasons, the Decision of the ALJ should be adopted in all respects.

Respectfully submitted,

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