UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GEORGIA AUTO PAWN,

Respondent,

and Case Nos. 10-CA-132943

10-CA-142161

CYNTHIA JOHNSON, an Individual

Charging Party.

CHARGING PARTY'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF TO EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTION IS WITHOUT MERIT AND SHOULD BE DISREGARDED

The Respondent's Answering Brief is a collection of red herrings, strawmen, irrelevancies and misstatements of the record and should be given little consideration. While it is filled with an ad hominem attacks upon Charging Party, it fails to deal with the salient relevant facts herein and omits discussion of key facts that are adverse to its position. The Respondents argument that Johnson was allegedly a problem employee who was discharged from her employment solely for violating an insubordination policy that the company allegedly had in place has no merit. Contrary to the Respondent's claim, the evidence and rationale set forth in the ALJ's decision does not establish that the decision to discipline Charging Party was solely motivated by Johnson's alleged insubordinate and inappropriate behavior, not her participation in protected activity. The

ALJ likewise improperly concluded the decision to discharge Johnson was the result of her refusal to discuss with the Employer's Regional Manager, Larry Smith, the confidential file left on her desk, not her participation in protected activity. Moreover, the ALJ improperly concluded, the Employer established the affirmative defense that these actions would have taken in the absence of protected activity.

A. The ALJ Improperly Discredited Charging Party and Credited The Employer's Witnesses

The Respondent essentially contends that the ALJ's decision was based upon his credibility findings and is, therefore, immune from meaningful review by the Board. But, as established in Charging Party's Brief in Support of Exceptions and as summarized below, the ultimate outcome of this case is not affected by the ALJ's limited credibility findings. While the Administrative Law Judge's credibility determinations are ordinary given great weight by the Board, they are not binding on it. The Board is free to substitute its own view of the law for that of the ALJ and frequently reverses its own precedents.

In Plaza Auto Center, the US Courts of Appeals for the Ninth Circuit remanded the case to the panel (Board) heading the NLRB's judicial functions, requesting the Board give full effect to the factual and credibility findings of an NLRB ALJ, who determined that an employee's obscenity laced outburst at the owner of a company was menacing, physically aggressive or belligerent. The court also asked the Board to reapply its Atlantic Steel Co. (245 N.L.R.B., 814 (1979) test, in light of these credibility and factual findings which the Board previously discounted, to determine whether the employer violated the NLRA by terminating the employee. (Plaza Auto Ctr. v NLRB, 664 F. 3d 286 (9th Cir. 2011). On May 28, 2014, on remand, the

Board overturned the ALJ's factual findings and reapplying Atlantic Steel, again held that the employer's outburst did not cause him to lose the protection of the NLRA. Accordingly, the Board affirmed a prior Board panel's conclusion that the employer violated Section 8(a)(1) of the NLRA by terminating the employee.(360 N.L.R.B slip. op. 117, 2014 WL2213747 (May 28, 2014).

Plaza Auto is much similar to this case. When applying the objective standard to access the nature of Johnson's conduct, the Charging Party respectfully urges the Board to consider the fact that the Respondent, in particular, Area Manager Samantha Murillo, did not characterize Johnson's behavior as loud, belligerent or defiant in her written description of their conversation. (GC 5) In fact, Regional Manager, Larry Smith testified that "Johnson was a good employee." (Tr.Tr.128) Moreover, Respondent argues that the Judge pointed to the credibility of the Employers witness's testimony being consistent and corroborated; however, the substantial evidence established through Respondents own admission along with unrebutted and testimonial evidence does not support his findings.

For instance, Respondent allege that Johnson was caught in at least one blatant lie when she testified that she kept notes throughout her employment because several people had told her that the Employer's Area Manager, Samantha Murillo, was not trustworthy. Tr.79. Respondent alleged that Johnson lied that she could not produce those notes because she testified, Mr. Smith, "did not allow me to have access to my desk" when she was terminated. Tr.79. However, Johnson testified that, "after Smith told her to leave he went and sat her desk." Tr.53 In fact, Johnson stated that "she had to ask Smith for her purse." Tr.53. Nonetheless, Johnson did provide the Respondent

with her notes that she kept in a calendar at home. Tr.53. According to, Smith, "he asked Johnson if she needed anything and she replied No, I got my shit." In fact, Alexandria Reiss wrote in her affidavit that "she heard Smith ask Johnson if she needed help with her stuff from the building, and she said that she would get her fucking shit." GC at 5. Then she shifts her story to Smith asked Johnson "if she needed to retrieve her belongings." See also Tr.145. However, Smith testified twice that "Johnson had her phone as she walked out the door." Tr. 132. See also Tr.145. Yet, he does not mention anything about Johnson's purse. Whereas, on cross-examination, Smith was asked "if Johnson had her phone while the two were in the manager's office." He replied, "I don't recall. Smith was asked, did Johnson have her purse with her? He replied, "I don't recall. Smith was asked so, if she didn't get anything from her desk, did she have her purse and phone with her when she left? Smith testified "she must have "Yes". Tr.145 It is evident that Smith's testimony was inconsistent; moreover, it's even clearer that Smith and Reiss was not being truthful.

Furthermore, Respondent contends that Johnson's failure to include information in her initial affidavits should be a reason to discredit her testimony and dismiss the case. However, Johnson testified that she did not write her affidavits herself Tr.101 and that she answered truthful to the questions that were asked by the Counsel for the General Counsel." Tr.102 Moreover, the record and evidence establishes that the information not included was collaborated by the Employer's own witness's inconsistent testimony and written statements.

For instance, The Respondent argue that ALJ also found, Johnson was not credible because she did not include in her affidavit that she told Murillo that she was

not recording the conversation, nor did she state she told Murillo "do your job and answer the phone." Tr. 70, 76. The Respondent contends these were critical points of the conversation-particular for an employee who was disciplined for insubordination.

Yet, Murillo admits that Johnson informed her she was recording.Tr.110 Murillo admits that she told Johnson that her she was disrupting the workplace by recording her and that Johnson could have just called her Tr.111 21-23; however, her testimony does not make sense because Johnson was speaking with her. Furthermore, Murillo wrote under the Reason and Purpose for counseling section of the Employee form, "During the conversation "She informed the Area Manager that she was recording this conversation. Under the Job Expectation and Desired Result section, Murillo promulgated a new recording policy that prohibited any further recordings amongst coworkers in effort to restrain employees from documenting their protected concerted activity. (GC Ex. 5)

Finally, and most critically, The ALJ incorrectly concluded that Charging Party's protected activity was not a substantial or motivating factor in the decision to discharge her. (ALJD at 20)The Respondent alleges that Johnson was not written up for discussing wages and that she knew that the write up was solely for insubordination due to her being disrespectful to Murillo.

According to Murillo, she did not tell Johnson that she was not supposed to discuss pay with anyone. Tr.112. However, Murillo admits that Johnson told her that she had asked other employees about their wages. Tr.0.111, 119. Murillo admits that she then told Johnson that she was disrupting the workplace and that Johnson should have just called her instead of calling other employees.Tr.111. Murillo admits that she had no

idea whether Johnson's discussion with other employees occurred during working time. Tr. p. 120. Moreover, under the section titled Purpose and Reason for Counseling, Murillo noted that Johnson "had spoken with a few other employees" about the decrease in the amount of her raise. Under the section titled Job Expectations and Desired Results, Murillo wrote "All employees are required to adhere to company policy for resolving issues by following the chain of command." She went on to state that Johnson's going out the "chain of command" by contacting other employees "negatively impacted the morale of other employees." (GC Ex.5) In fact, Murillo referred the company's policy which states "the company will inform you of your classification for your position. Then if you have any questions concerning your classification, hours, or compensation, you should contact your supervisors." (GC Ex. 3) Clearly the written disciplines references this protected activity and directed Johnson to refrain from similar activity in the future. Like Murillo's verbal admonition, the written discipline issued to Johnson was also unlawful.

Moreover, Murillo admits that she went to the location to talk about Johnson's raise and discuss how she spoke to her.Tr.113.

Murillo wrote, "As the conversation was being ended due to the Sales Reps tone becoming agitated and aggressive, she informed the Area Manager that maybe she should do her job and that she should answer her phone.(GC Ex.5) However, Murillo does not state why Johnson became "agitated" towards the end of the conversation. Whereas, Johnson testified that Murillo told her that she was not supposed to be talking to anyone about wages and that she would be getting written up for insubordination.Tr.40. In fact, Johnson testified that, "she went home and researched

the word insubordination and wrote a response letter." (GC Exhibit 4) However, Murillo denied telling Johnson she would be written up.Tr.112. Yet, Murillo admits that when she went to Johnson's location she intended to write her up for insubordination and that she brought the Employee Counseling Form with her. Tr.113 2-14. In fact, under the Job Expectations and Desired Result section of the form, Murillo noted "any further incidents of insubordination, not following company policy, or company procedures will result in termination. (GC Ex.5) Yet, the company failed to establish that it has an insubordination policy or that it had ever disciplined any employee for insubordination.

Moreover, Johnson's criticism of Murillo not doing her job was a continuation of her discussion about Murillo's failure to follow company policy by not issuing yearly performance evaluations to employees. The response was spontaneous, free of profanity, no longer than other protected outbursts, was not a threat or challenge to fight, was not true insubordination, did not result in refusal to comply, and was triggered by Murillo's insulting and demeaning comments. Moreover, it was not so egregious to lose the protection of the Act.

Applying the test set forth in Lutheran Heritage Village-Livonia supra, the Board found that the rules was unlawful because its "prohibition of negative conversations about managers would reasonably be construed by employees that discussing with their coworkers complaints about their managers affect working conditions thereby causing employees to refrain from engaging in protected activity. Claremont Resort & Spa, 344 NLRB at 832.

B. The ALJ Incorrectly Concluded Charging Party Was Lawfully and Subsequently Discharged For Misconduct, Not Participating in Protected Concerted Activity.

1. The ALJ Improperly Held Counsel For The General Counsel Failed To Establish A Prima Facie Case

The ALJ improperly found that the General Counsel's evidence fail[ed] to establish a link between [the employee's] protected activities and the adverse employment action. The Respondent proffered reasons are pretexual and advanced in an attempt to hide the unlawful motivation for Johnson's discharge. Moreover, the asserted reason for the discharge does not withstand scrutiny.

The Employer initially took the position that Johnson was disciplined because Smith was allegedly notified by Ben Raimondi (a non-party) that Johnson was loud and belligerent with Murillo on June 17th. Tr.126. According to Smith, "he went to the location to speak with Johnson about working well with her fellow employees and her supervisor.Tr.128. Yet, Murillo testified that she did not recall discussing these issues with anyone, including her supervisor, Larry Smith.Tr.113. In fact, Murillo testified "The meeting was moved off the sales floor so that we weren't in the way of the manager." Tr.114. However, Smith does not allege that the branch manager accused Johnson of being "loud and belligerent". In fact, he does not allege that Williams had any issues with Johnson. Moreover, Smith alleged that "his boss Don Hulse, did not notify him about Johnson's email." Smith testified that "he first heard about the email during court." (Tr.126-127) Yet, Smith admits that he did not attempt to see or interact with Johnson since her transfer on December 28, 2013 until he came to her location on July 7, 2014, which coincidentally is the same day Johnson sent her email protesting the Employee Counseling. (GC Ex.8) Besides, it is not disputed that Smith did not investigate Johnson's complaint. In fact, Johnson testified that, Smith stated "I already read the write up, and I agree with it. If you don't like it get out."Tr.52. Smith admits that he did

not intend to discuss the write up rather he wanted to discuss Johnson getting along with others. Tr.128.Yet, the company failed to establish that Johnson had been warned or counseled for any issue with her coworkers or supervisors prior to her discussion with Murillo regarding her pay or afterwards.

Moreover, Smith shifted his reason for terminating Johnson from her behavior to her refusing to discuss a customer file. According to Smith, employees violate company policy by leaving folders on their desk because the company was strict due to privacy laws. Tr.130. However, Murillo testified "she did not consider the issue to be disciplinary in nature" Tr.117. In fact, Murillo testified that “her conversation with Johnson was not confrontational at all.” Tr.120. Besides, Johnson provided pictures showing that it was common for employees to leave folders on their desk.

Nonetheless, Johnson testified that “Smith told her that the branch manager, Ms. Williams had informed him that Johnson finished with a customer, and went to lunch and will finish when she returns.” Tr.50. Johnson testified that it was understanding folders were to be put up before the end of day.Tr.50.Williams had to also believe Murillo instructed them to put their files up before the end of the day because she allowed Johnson to leave the folder until she returned; however, the Employer failed to show that Williams was disciplined. According to Smith,“he was probably aware about the July 3 audit because it’s his job to review branches”Tr.130; however, on cross-examination Smith admits he can’t be sure if he reviewed the audit or not". Smith also admits he didn't mention GC Exhibit 9 during his conversation with Johnson. Tr.142. It’s evident that the branch manager would be the logical witness to testify regarding significant disputed matters in this case; however, the company failed to provide a

statement from Williams or call her to testify. In fact, Smith makes no mention of Williams being there at all. Yet, Smith testified that “he went next door to another office and asked Alexandria Reiss if she heard anything and if she would write him a statement. (Tr.113)

Moreover, the judge stated in his decision that "the company's witness Alex Reiss testified in her pre-trial affidavit that "she did to recall Johnson saying anything to the effect she did not want to discuss a file, but did state it, "It sounded familiar Johnson saying that she want to discuss something or wanting to discuss something else, but I can't recall any specifics. (ALJD, pg.11, 20-25)

Based on the obvious timing of Johnson’s discharge, the Company’s complete inability to articulate a straightforward and consistent explanation for the discharge, the company’s resort to inaccurate and pretextual explanations, and the Company fails to demonstrate that Johnson’s termination was a logical and consistent outgrowth of its policies and practices regarding its employees, the Charging Party respectfully urges the Board to find that the General Counsel has met its burden of proving that Johnson’s discharge was unlawfully motivated by her involvement in protected activities.

C. The ALJ and Respondent failed to show by preponderance of the evidence that Respondent would have discharged Cynthia Johnson absent her protected activity.

The Charging Party respectfully urges the Board to go beyond the employer's obvious wish to be rid of an activist and to inquire into the questions of actual case, giving serious consideration to the employer's legitimate business reason to discourage the employee. See, e.g. NLRB Lowell Sun, 320 F. 2d. at 841 (Aldrich,J., concurring)(employers knowledge that discharge will having pleasing result not to be

confused with actuating motive).

Since the evidence establishes that the reason given for Johnson's discharge were pretextual, Respondent failed by definition to show that it would have taken the same action for those reasons, absent conduct, and there is no need to perform the second part of the Wright Line analysis. Road Trucking Company, Inc.,342 NLRB 895, 898 (2004) Furthermore, the fact that Respondent failed to provide any evidence that it had ever terminated or even disciplined a single one of its employees for "insubordination" or "leaving out a file" precludes a finding that Respondent would have terminated Johnson absent of her protected activity. This is because under Wright Line, an employer cannot carry its burden of persuasion merely by showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. Hicks Olds & Hickgas, Inc. 293 NLRB 84, 85 (1989).

CONCLUSION

Based on the entire record of this matter and on forgoing arguments, Charging Party respectfully urges the Board to find that the Respondents violated Section 8(a)(1) as alleged in the complaint and issue a proper remedy.

Respectfully submitted by:

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