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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

Plaza Auto Center, Inc.

Case: 28-CA-22256

and

Nick Aguirre, an Individual

POST-HEARING BRIEF OF PLAZA AUTO CENTER, INC.

I. STATEMENT OF FACTS

A. Background

This case centers primarily on the termination of Complainant Nick Aguirre (“Aguirre”) from Respondent Plaza Auto Center, Inc. (“Plaza Auto”). Plaza Auto, a pre-owned automobile retail business in Yuma, Arizona, employs approximately 10 to 15 employees and is owned by Tony Plaza (“Plaza”). Transcript of Proceedings held May 5, 2009 (hereinafter “Tr.”) pp. 12. Aguirre was hired at Plaza Auto on about August 30, 2008, and began working as a car salesman on about September 1. Tr. pp. 27, 59-60. On October 28, 2008, Aguirre was terminated due to his repeated and unacceptable use of obscene language towards Plaza during a meeting with Plaza and

Plaza Auto sales managers Juan Felix (“Felix”) and Gustavo MacGrew (“MacGrew”). Tr. pp. 35-37, 134, 172-73.

B. Aguirre’s Employment with Plaza Auto

Aguirre was interviewed and hired by Felix and MacGrew on about August 30, 2008. Tr. pp. 27. When he was hired, Felix informed Aguirre that as a salesperson he would be compensated solely on a commission basis. Aguirre would receive 25 percent of the gross profit the company made on a sale. Tr. pp. 157-59.

Another requirement of his position was to participate in the dealership’s tent sales about every two weeks. During these sales, cars are moved to a Sears store parking lot and sales personnel stay on the lot with the cars. Tr. Pp. 59-60, 66. About once a week, Felix and MacGrew held a meeting with sales personnel to talk about the weekly sales, to motivate employees, and address any problems. Tr. pp. 65-66, 160. During a tent sale in October, Aguirre approached Felix and asked if he would get a paycheck if he did not sell cars for the pay period. Felix informed Aguirre that because he was paid solely on commission, he would not get paid if he did not sell a car. Tr. pp. 161-62. Additionally, Aguirre asked for information on what the company paid for cars and informed Felix that he did not trust the company and thought the company was stealing money from him. Tr. pp. 161-64.

C. Aguirre’s Termination from Plaza Auto

On the morning of October 28, 2008, upon his arrival at the Plaza Auto dealership, Plaza was informed by the company’s bookkeeper Barbara Montenegro (“Montenegro”) that Aguirre wanted to speak to Plaza about his commission. Tr. pp. 47, 130, 212-13. Earlier in the day Aguirre had stopped into Montenegro’s office and

inquired about whether he was paid on a minimum wage or commission basis and asked to meet with Plaza. Tr. pp. 212-13. Plaza asked Felix to find Aguirre so he could meet with him to discuss Aguirre's concerns. Felix also informed Plaza that Aguirre had been questioning him a few days earlier about his method of payment and had stated to Felix that he did not trust the company and thought the company was stealing his money. Tr. pp. 47, 53, 162-68. Aguirre, Felix, MacGrew and Plaza met in Felix's small, private office. At the beginning of the meeting, Plaza informed Aguirre that he had been told about some concerns that Aguirre had so he wanted to meet with him. Aguirre asked whether he was going to be fired, and Plaza replied "no." During the conversation Aguirre repeatedly asked whether he was being fired, and Plaza repeatedly said he was not firing Aguirre. Tr. pp. 168-69, 198. After Plaza informed Aguirre he would not disclose certain information about the price of cars because the company did not provide that information to sales personnel, Aguirre blew up and repeatedly called Plaza a "fucking asshole," "fucking stupid," "you're a fucking asshole" and stated "you don't know what you're doing," "everybody's talking about you," Tr. pp. 34-35, 168-70, 197-99. Aguirre got up out of his chair in a manner that caused both Felix and MacGrew to rise from their chairs, fearing Aguirre was going to strike Plaza. Tr. pp. 34-36, 171-72. Plaza repeatedly asked Aguirre to calm down, and when Aguirre would not calm down, Plaza told Aguirre "that's it, you're done." Plaza informed Aguirre that he was being fired because of his verbal abuse. Tr. pp. 35-39, 134, 170-78, 193. Aguirre told Plaza he would regret firing him. Tr. pp. 34-36, 171-72.

Prior to this meeting, Plaza was not informed that Aguirre had complained of or talked to other employees about certain issues such as availability of restrooms at

tent sales, breaks or minimum wage issues. Tr. pp. 14-18, 27. 131-32. After Aguirre was fired, Plaza and his supervisors were informed that Aguirre had filed a complaint with the Arizona Department of Labor regarding minimum wage violations. Tr. pp. 29, 132, 174-75. Aguirre left the office and proceeded to tell other sales people at the dealership that he had been fired because he contacted the “Labor Board.” Tr. pp., 174-75. Plaza did not intend to fire Aguirre when he entered the meeting on October 28, 2008. Tr. pp. 131.

II. ANALYSIS

Section 7 of the National Labor Relations Act (“Act”) provides, in relevant part, that employees “shall have the right to .engage in other concerted activities for the purpose of .mutual aid or protection.” 29 U.S.C. §157. To establish a violation of Section 8(a)(1) of the Act, General Counsel must demonstrate (1) that Aguirre’s activity was concerted, (2) that Plaza Auto knew of the concerted nature of Aguirre’s activity, (3) the concerted activity was protected by the Act, and (4) the adverse employment action at issue (e.g. discharge) was motivated by Aguirre’s protected concerted activity. *Meyers Indus. Inc.*, 268 NLRB 493, 497 (1984) (“*Meyers I*”). General Counsel will not be able to establish its prima facie case.

A. Aguirre’s alleged activities were not concerted

The General Counsel has not provided sufficient evidence to demonstrate that Aguirre’s actions were concerted. *See Meyers Indus. Inc.*, 281 NLRB 882, 885 (1986) (“*Meyers II*”) (the question of whether an employee has engaged in concerted activities is a factual one based on the totality of the record evidence). For an employee’s activity to be concerted the Board requires that such action be *engaged in with or on the*

authority of other employees and not solely by and on behalf of the employee himself. *Id.* at 885 (emphasis added).

The sum of the evidence demonstrates that, although Aguirre may have conversed with his co-workers on topics such as restrooms, breaks, and compensation, and asked supervisors questions about the conditions of his job, these actions were taken on behalf of Aguirre alone and not while he was engaged with or on the authority of other employees. *Id.* Additionally, if he did undertake actions on behalf of other employees, he did not inform management and management was not aware of his attempted concerted action.

Aguirre testified that upon starting his new job, he began asking co-workers and supervisors questions such as where a bathroom was located during his first tent sale and when he could take a break. Tr. pp. 61-63. At a tent sale in mid-September, Aguirre claims he spoke with co-workers Oscar Martinez and Jimmy Pagan about how to alternate schedules so each could use the restroom and then asked Felix if “I could go take a break, if I could get something to eat and use the restroom.” Tr. pp. 69. These questions were clearly asked for Aguirre’s own benefit.

Furthermore, during a tent sale Aguirre “got close” to Felix and asked if he would get paid if he didn’t sell any cars for a pay period and explained he was having economic problems. Tr. pp. 161-62. Aguirre claims he asked Felix to direct him to specific cars that he could make a potential good earning so he would know what vehicles to sell. Tr. pp. 87. Aguirre never brought up issues of his compensation or minimum wage requirements at any sales meeting. Tr. pp. 160. These are actions that



specifically benefit or relate to Aguirre alone and cannot be construed to be concerted action on behalf of others.

Additionally, Aguirre claims that he was surprised by his first paycheck and showed his pay voucher to Martinez and Pagan and had several conversations over the course of “several days, several weeks” with these individuals regarding how much he got paid. Tr. pp. 73. Aguirre claims he informed Pagan and Martinez on October 28 that he contacted the “Labor Commission office” in Phoenix, that he believed they were entitled to a minimum wage. Aguirre claimed he agreed to go talk to Barbara Montenegro, Plaza Auto’s bookkeeper, to inform her of his beliefs about minimum wage rules on behalf of not only himself, but also Pagan and Martinez who told him “please go and find out and let us know.” Tr. pp. 82-83, 88. Although Aguirre’s testimony attempts to demonstrate action engaged with others, the General Counsel failed to corroborate Aguirre’s self-serving testimony with similar evidence from Martinez, Pagan or any other Plaza Auto employee. In fact, James Pagan’s understanding of these events was extremely different. Pagan believed that Aguirre was acting on his own behalf when complaining about minimum wage issues. Aguirre did not tell him he had information from the “Labor Board” and did not tell him he was going to speak to Montenegro about minimum wage issues, let alone on Pagan’s behalf. Tr. pp. 144-45, 152-53.

Furthermore, Pagan could not confirm a conversation where he replied to any of Aguirre’s statements regarding work conditions, and essentially summarized his interactions with Aguirre as a mere bystander to Aguirre’s “complaining.” Tr. pp. 144-150. “Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to .to protect or improve his own status or



working position, it is an individual not a concerted, activity, and, if it looks forward to no action at all, it more likely to be mere 'gripping.'" *Adelphi Institute, Inc.*, 287 NLRB 1073, 1074 (1988) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964). Although group activities do not need to be "specifically authorized," in a formal sense, there should at least be a *general* awareness on the part of the group as to the intended action of the individual employee. *Meyers II*, 281 NLRB at 886. Pagan was clearly not aware of Aguirre's concerted efforts on his behalf.

B. Aguirre was terminated for his egregious misconduct not protected activity

Protected activity on Aguirre's part, if any, was not a substantial or motivating factor in Plaza Auto's decision to terminate his employment. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd 662 F.2d 899 (1st Cir. 1981). At the beginning of the October 28 meeting, Plaza knew that Aguirre wanted to speak with him about his compensation. During the meeting Plaza made very clear to Aguirre that he did not intend to fire Aguirre. Aguirre repeatedly asked if he was being fired, and Plaza replied, "no." Aguirre commented that he was being fired for going to the "Labor Board," and Plaza repeated "no." Even after Aguirre began verbally berating Plaza with obscenities, Plaza still told Aguirre he was not fired. However, when Aguirre refused to calm down, continued to call Plaza a "fucking asshole" and "fucking stupid," and made an intimidating physical gesture toward Plaza did Plaza decide to terminate Aguirre. Both MacGrew and Felix consistently testified to the same with regard to the October 28 meeting. *See* Tr. pp. 34-39, 168-172, 197-199, 212-216.

Furthermore, Plaza Auto had a legitimate, nondiscriminatory reason to terminate Aguirre regardless of any alleged protected activity due to his extreme



misconduct during the October 28 meeting. *Wright Line*, 251 NLRB at 1089; *see also Carleton College v. NLRB*, 230 F.3d 1075, 1080-82 (employer had legitimate reason for nonrenewal of employee's contract when employee, during a meeting with dean used vulgarities and described department as "laughingstock" and "pig"); *Summit Logistics, Inc.*, 337 NLRB 927, 928 (2002) (Board upheld discharge of employee who discussed work week and overtime issues with "labor board", and although such activity was a substantial and motivating factor in the termination, employee could have also been terminated for performance issues). Despite any alleged animus towards Aguirre's activities, Plaza would have terminated him nevertheless. Plaza Auto has a legitimate and necessary interest in fostering a professional and respectful atmosphere among its employees. *See Carleton College*, 230 F.3d at 1081-82. For instance, Plaza Auto had recently terminated an employee, Eddie Yemens, for using similar, yet less severe, obscene language in addressing a supervisor. See TR. pp. 173-74. As a result of Aguirre's misconduct at the October 28 meeting, Plaza had a legitimate reason for terminating his employment, despite any alleged protected activity. An employee's continuous use of obscene language and intimidating physical actions are rarely tolerated in any employment context.

Furthermore, even if an employee is engaged in concerted protected activity, that employee can lose the protection of the Act through egregious misconduct. *See Carleton College*, 230 F.3d at 1081; *also Diamler Chrysler Corporation*, 344 NLRB 1324, 1329-30 (2005); *Pipe Realty Co. and Stone*, 313 NLRB 1289, 1290 (1994), *Atlantic Steel Company*, 245 NLRB 814, 816-17 (1979). "[M]isconduct that is flagrant or renders the employee unfit for employment is unprotected. The context of the

misconduct is the key to deciding whether the misconduct is protected by the Act.”
Carleton College, 230 F.3d at 1081.

Whether an employee’s conduct has “crossed [the] line” into unprotected activity depends on several factors which are to be balanced: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Atlantic Steel*, 245 NLRB at 817.; *see also Trus Joist Macmillan*, 341 NLRB 369, 371 (2004) and *Diamler Chrysler*, 344 NLRB at 1329 (both cases applying *Atlantic Steel* factors to find employees’ use of profanity and lewd gestures while engaged in concerted activity removed statutory protection). Aguirre’s misconduct at the October 28 meeting was not protected activity. Although the meeting took place in a small, private room, Aguirre’s outburst could be detected within the external work environment. Tr. pp. 214-16. Additionally, the meeting with Plaza was held at Aguirre’s request to address his questions and concerns. The nature of Aguirre’s outburst was not mere “salty language,” nor an impulsive outburst. *See Carleton College*, 230 F. 3d at 1081; *Trus Joist Macmillan*, 341 NLRB at 371. Finally, Aguirre’s rude and insubordinate reaction was in no way provoked or justified by any comment by Plaza who repeatedly attempted to get Aguirre to calm down. Despite any alleged activities on Aguirre’s part, physical intimidation, abusive language and insubordination are not be protected by the Act. *Carleton College*, 230 F.3d at 1081-82 (we cannot allow an employee to leverage his rights by wrongful conduct giving an employee license to defy his employer); *Trus Joist Macmillan*, 341 NLRB at 371; *Diamler Chrysler*, 344 NLRB at 1329 (employees

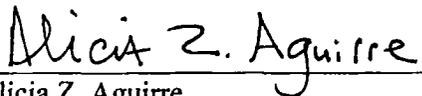
are permitted some leeway for impulsive behavior when engaged in concerted activity, but this must be balanced against the employer's right to maintain order and respect).

C. CONCLUSION

For the foregoing reasons, Plaza Auto respectfully requests that the Complaint be dismissed.

Respectfully submitted this 9th day of June, 2009.

The Law Office of Alicia Z. Aguirre, PLC


Alicia Z. Aguirre
Attorney for Plaza Auto Center, Inc.

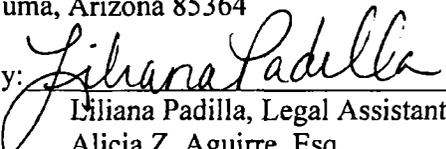
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing POST-HEARING BRIEF OF PLAZA AUTO CENTER, INC. has been E-Filed / mailed on this 9th day of June, 2009, to the following:

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