

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

ADVOSERV OF NEW JERSEY, INC.

and

Case 22–CA–131230

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NEW JERSEY REGION

COUNSEL FOR THE GENERAL COUNSEL’S OPPOSITION TO
RESPONDENT’S MOTION TO REOPEN THE RECORD AND FOR
RECONSIDERATION

On March 11, 2016, the Board issued its Decision and Order affirming Administrative Law Judge Steven Fish’s conclusions that Advoserv of New Jersey, Inc. (Respondent) violated Sections 8(a)(1) and (3) of the Act when it unlawfully discharged Todd Kowinsky. On March 18, 2016, Respondent filed a Motion to Reopen the Record and for Reconsideration alleging that certain answers provided by Kowinsky during a February 2016 deposition somehow constituted newly discovered, extraordinary evidence warranting the Board’s reconsideration of its Decision and Order. Respondent’s contention is meritless, absurd, and its Motion must be denied.

Respondent first argues that because Kowinsky asserted in his deposition that one of the reasons he was fired related to his worker’s compensation claims (the subject of the civil lawsuit for which the deposition was taken), Kowinsky somehow perjured

himself during his testimony before Judge Fish when, at one point during cross-examination, he asserted that he no longer believed his worker's compensation award to be a cause of his dismissal. To be clear, Kowinsky did not commit perjury. Respondent exhausted this line of inquiry during its cross examination of Kowinsky before Judge Fish, Judge Fish properly credited Kowinsky's testimony then, and the newly submitted worker's compensation deposition transcript certainly does not constitute the type of extraordinary evidence requiring that the record be reopened.

An examination of the hearing transcript, deposition transcript, and correspondence between the parties reveals that Kowinsky testified consistently and truthfully in each forum.

Upon his termination in late December 2013, Kowinsky retained counsel (Edward Azar), who corresponded with Respondent to exercise Kowinsky's appeal rights under Respondent's employee handbook. In Azar's January 20, 2014 letter to Respondent, he noted that "it appears that one of the motivating factors for terminating Mr. Kowinsky was his recent recovery of a significant worker's compensation claim against Advoserv..." (GC Exh. 15). Azar's letter made clear that there were several grounds to challenge Kowinsky's unlawful termination and Kowinsky's trial testimony confirmed this fact. Kowinsky testified that by the Charging Party (1199 SEIU United Healthcare Workers East) filing an unfair labor practice charge with Region 22, this was his statement to Respondent that one of the other motivating factors for his termination was his union organizing and protected, concerted activities. (Tr. 98). Kowinsky also specifically testified on cross-examination that he believed he was discriminated against "because I was involved in union talks and other ways as well," referencing New Jersey's

Law Against Discrimination. (Tr. 93). In fact, although Kowinsky first testified at the trial that at the time, he did not believe his worker's compensation claim related to his termination, he later clarified that the reason he believed his worker's compensation settlement had played a role in his termination was because his supervisor Terri Outer told him that the Respondent was looking for any reason to write him up or fire him. (Tr. 94-95).¹

Kowinsky's deposition testimony was consistent with his trial testimony.² On pages 65, 74, and 78 of the deposition, Kowinsky stated that he believed that he was terminated for several reasons. On pages 65 and 75, he confirmed that one of the reasons for his termination was his union activity. (Dep Tr. 65, lines 16-20; 75, lines 17-19). And on pages 65 and 78, Kowinsky confirmed that he now believed that his worker's compensation judgment did play a role in his termination. (Dep Tr. 65, lines 16-22; 77, lines 24-25; 78, line 1). Clearly, Kowinsky has not perjured himself - he has consistently attributed his termination to several factors throughout his post-discharge communications and testimony.

Not only is Respondent's assertion of perjury misplaced, its subsequent analysis in paragraph 14 of its Motion is similarly in error. Respondent asserts that only Kowinsky's testimony established his protected activity. The record evidence is clear, however, that Judge Fish relied on the testimony of Kowinsky, supervisor Terri Outer, and Respondent (clinician) witness Alana Bellizzi to correctly find that Kowinsky was engaged in protected, concerted activities in his complaints regarding staffing levels.

¹ Kowinsky confirmed in his deposition his trial testimony that Outer informed him that Respondent was looking for reasons to write him up and get rid of him. (Dep Tr. 23, lines 10-12; 24, lines 19-23).

² Respondent only attached certain pages of the deposition transcript to its Motion. I have attached the full deposition transcript for the Board's consideration.

Bellizzi testified that nearly half of the staff agreed with the proposed staffing changes and the other half, including Kowinsky, disagreed with changes. Furthermore, Outer confirmed that Kowinsky and others complained about the staffing changes, she informed her boss about the employees' discontent, and was told that Jessica Bayer was coming to the facility to meet with the employees to address their concerns. Clearly, there is ample record evidence to support Judge Fish's conclusions that Kowinsky was engaged in protected, concerted activities when he made his intemperate remarks about his supervisors. In its Motion, Respondent has supplied no contrary evidence to necessitate reopening the record, let alone require a different result.³

Even assuming *arguendo* that Kowinsky should not be credited on the subject of his worker's compensation claim, the record remains replete with evidence establishing both a prima facie case of a violation and evidence that Respondent's proffered defenses were pretextual. Central to these findings (from both Judge Fish and the Board) was evidence generated by Jessica Bayer herself. Her handwritten notes established that on December 16, Kowinsky's co-workers told her that he was "all in on Union," "starting Union nonsense again," and had been distributing Union cards for two weeks. Based on this evidence, and Bayer's mendacious denials upon being shown her notes at trial, Judge Fish correctly concluded on page 30 of his decision that "[t]he above evidence completely destroys Bayer's credibility as to her knowledge of union activities in general, and of Kowinsky's union activities in particular, in 2013. It further undermines the

³ Kowinsky's deposition testimony regarding his protected, concerted activity was again completely consistent with his trial testimony. In his deposition, Kowinsky repeatedly asserted that the problems with proposed staffing changes were shared by a number of his co-workers, this was the reason for Bayer to speak with him and others on December 16, and was the subject matter being discussed when he made his intemperate remarks to Bayer. (Dep Tr. 42, lines 6-23; 47, lines 11-14 and 23-25; 48, lines 1-2; 52, lines 22-25, 53, lines 1-7; 55, lines 4-8.

credibility of Blough's denials that he was unaware of any union activity or Kowinsky's role in such activities in 2013." The record evidence demonstrates that Kowinsky testified in a detailed, straightforward and truthful way, and for many reasons Judge Fish properly credited his testimony over Bayer's blatantly untrue accounting of events. Even if a certain portion of Kowinsky's testimony should not be credited, there remains more than enough evidence in the record to reach the same proper conclusion that Judge Fish and the Board already did- that Respondent unlawfully discharged Todd Kowinsky in retaliation for his union and protected, concerted activities. Based on the above, Respondent's Motion to Reopen the Record and for Reconsideration must be denied.

In addition to Respondent's unsupported perjury allegation, Respondent also raises in its Motion the allegation that the Board made a material error when it rejected the defense that Respondent would have terminated Kowinsky even absent his protected conduct. This contention was raised and rightly rejected by both Judge Fish and the Board. And since Respondent makes no representation in its Motion that this argument is based on either newly discovered evidence or extraordinary circumstances, this allegation must also be rejected.

CONCLUSION

Based on the above evidence, Counsel for the General Counsel respectfully requests that Respondent's Motion to Reopen the Record and for Reconsideration be denied.

Dated at Newark, New Jersey this 1st day of April, 2016

Respectfully submitted,

/s/ Michael Silverstein

Michael Silverstein
Evamaria Kartzian
Counsel for the General Counsel

CERTIFICATION

This is to certify that copies of Counsel for the General Counsel's Opposition to Respondent's Motion to Reopen the Record and for Reconsideration have been duly served via electronic filing on this date as follows:

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Dated at Newark, New Jersey this 1st day of April, 2016.

/s/ Michael P. Silverstein

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