

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

ANTHONY & ASSOCIATES, INC.

and

Case No. 05-CA-153220

PHYLLIS A. HEMPHILL
An Individual

Jose A. Masini and Stacey McClurkin, Esqs.
for the General Counsel.
Michael L. Hockaday, Esq., (Norfolk, Virginia),
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on March 3 and 4, 2016. Phyllis Hemphill filed the charge giving rise to this case on May 28, 2015. The General Counsel issued the complaint on September 1, 2015.

The General Counsel alleges that Respondent, Anthony and Associates, Inc., discharged Phyllis Hemphill on February 18, 2015 because she engaged in protected concerted activity in violation of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel and the 1-page closing argument filed by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Anthony and Associates, Inc., a corporation, is based in Marietta, Georgia. It provides staffing to government agencies, including the Walter Reed Medical Center in Bethesda, Maryland. During the period July 1, 2014 to June 30, 2015, Respondent provided services valued in excess of \$50,000 to the United States Government. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

5 The Charging Party, Phyllis Hemphill was hired in July 2012 by a Trans Tech, a company that had a contract to provide personnel to the Walter Reed Medical Center. Her title was personnel assistant 3, and she worked in a department that processed the credentials of the medical staff working at the hospital. Her wage rate was \$22.65 per hour. In September 2012, Staffing Dynamic replaced Trans Tech as the contractor at Walter Reed. Hemphill continued to work in the same job at the same wage rate and with the same title.

10 Staffing Dynamic's contract ended on September 30, 2013. Respondent Anthony and Associates was awarded the contract for the same work. It offered Hemphill a position with the same job description, but a new title and wage rate. The offer was for \$18.15 per hour as a personnel assistant 1.

15 On October 18, 2013, Respondent's president, Michelle Anthony met with a group of the former Staffing Dynamic employees at Walter Reed. A number of employees expressed their unhappiness with their new titles and pay rates. Anthony had a separate meeting with 6-7 employees of the credentialing department, who were particularly unhappy with the changes. Hemphill spoke up at these meetings. She told Anthony that she believed that the Federal
20 Service Contract Act prohibited Respondent from lowering the salaries employees had received from prior contractors. Hemphill also told Anthony that she would be contacting the Department of Labor about the matter.

25 Anthony replied that she would try to get the employees more money. Michelle Anthony suggested that Hemphill serve as spokesperson for the employees in the credentialing department. After the meeting, Hemphill and other employees discussed their complaints with Jeffrey Fennewald, a government supervisor. Hemphill acted as spokesperson for the group. Hemphill accepted Respondent's offer of employment on October 28, 2013.

30 Hemphill contacted the U.S. Department Labor (DOL) in October 2013 and asked it to investigate possible violations of the Service Contract Act. A DOL investigator interviewed some or all employees of Respondent at their worksite at Walter Reed in April 2014.

35 On January 29, 2015, Hemphill contacted DOL to inquire about the status of its investigation. Arti Sharma, the DOL investigator, emailed Michelle Anthony the same day requesting that Respondent conduct a review and evaluation of the actual duties performed by each employee who was covered by the Service Contract Act at Walter Reed, by February 9, 2015.

40 On January 30, 2015, Nicole Young, then Respondent's Human Resources Manager, sent an email to many or all of its employees asking them for a list of their major job functions and a description of what they do for most of their workday. This email was sent to most employees' computers at Walter Reed; not their home computers.

45 Joel Chung, another of Respondent's employees, responded to Young from his government computer, on January 30, as follows:

Please refer to the PWS¹ in the contract to get the information that you are requesting. Thanks and have a wonderful day.

Charging Party Hemphill responded: I concur.

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On Sunday, February 1, Human Resources Manager Young sent the following message to Chung and Hemphill at their government computers:

Joel and Phyllis,

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I am requesting this information because what is in the PWS doesn't specifically address my request. Please turn this in to me no later than Wednesday as originally requested.

Chung replied to Nicole Young from his government computer:

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Nicole,

My job functions is that which is in the PWS of the contract; since a modification was either never requested or completed to change anyone's job functions back in October 2013 when almost everyone at that time stated that the information was incorrect. Now this is not me being difficult, but to request certain information that you should already have and not say as to you are requesting it is a problem for me. So my question to you is simple with me providing you with this information will that change my pay rate or pay me for the job that I have been doing? Because when AAI took over the contract I was reduced to a Customer Service Rep II and nothing that I do is customer service rep. I have made that complaint since the beginning of the contract and no one has done anything to change that or to even address it. Now that the contract is up again for renewal you are requesting this information for what? My supervisor wrote down and sent emails as to what I do, I myself even stated what I do for Receipt Control back in October 2013 and yet this information is being requested again. This is not me being difficult, but I am a little frustrated with everything that has gone on with this contract since we are the folks doing the work and basically being told to just deal with it. I have included my supervisor Ms. Sharon Herndon on this email and she can tell you all that I do. Thanks and have a wonderful day.

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Young wrote back on February 2, sending the following email to Chung and Hemphill on their government computers. She copied Chung also on his private computer:

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Thanks as I'll inform the President you have refused to supply this information based on the below.

¹ The Performance Work Statement (PWS) is a document that sets out the duties a particular employee is to perform pursuant to his or her employer's contract with the Government.

There is no evidence in this record as to how many, or whether any other employees responded to Respondent's inquiry.

5 Ariel Lingat, the Government's contracting officer's representative emailed Young:

Nicole,

10 What exactly being asked from your contractors? If they are working other what is on their PWS, then they are in violation of contract. Please ensure that all of your contractors are not performing outside of scope of works.

Lingat's email at least suggests that the responses of Chung and Hemphill to Respondent's inquires, i.e., that their duties are exactly what is specified in the Performance Work Statement, was not an unreasonable response.

15 Young responded to Lingat on February 2:

20 Specifically, I have been asked as communicated in the original request for employees to simply provide me with a list of only major job functions and the systems that they use to perform that function (i.e., if they use a database system what is the name of that system).

At anytime did I not request them to work outside their duties or provide me with anything other than the systems they use.

25 Making sure they are not working outside of the job scope is not an issue as this matter was resolved when the contract was given.

If Joel and Phyllis are unwilling to provide this information I will simply inform Michelle that they chose not to do so as directed to me.

30 Lingat reiterated his opinion that the Performance Work Statement described the duties of Anthony and Associates employees:²

35 Below string email, you asked them to list their major job function and what they spend most of their duties, which is already specified in their PWS. May be this is the confusion. Instead of just asking them the kind of program or software they using for data base entry.

Lingat suggested that Young ask the employees the following:

40 I am in need of a list of your major job functions and or what you. spend most of your duties on.

For example, if one of your major functions is data entry, I need you to list that and provide the specific software system used.

45 On February 2, Young sent an email to Lingat and to Hemphill and Chung on their government computers:

² Lingat reiterated this opinion at trial, Tr. 111.

Thanks for pointing that out. I don't want to turn this into a broad issue, so letting it go.

5 Young apparently did not follow up on Lingat's suggestion.

Hemphill was off of work from February 2 to February 9. On February 9, she sent Young, Chung and Lingat the following email with an attachment:

10 To All on this email string, please see my attached PDF response to this previously sent emailed-communication. I do not see Michelle Anthony's email . on this string so AAI please forward to her. Thank you in advance.
We are a people robbed and damaged; we feel like we are trapped in holes and hid in prison houses as if we are for a prey with no one to watch over us and protect our rights: we made it known that the reduced pay rate would result in
15 deficiency and hardship and no one spoke up and said, Restore.

G.C. Exh. 4A, pg. 2.

20 The PDF attachment, G.C. Exh. 4B, is a three-page comprehensive summary of Hemphill's dispute with Respondent over the wages and classification of all Respondent's employees at Walter Reed.

25 Lauren Orrok, the Contracting Officer for Respondent's contract responded to Hemphill's email on February 10, stating that government employees are not permitted to weigh in on a dispute between contract employees and their employer. Orrok copied Michelle Anthony on this response.

Anthony emailed Orrok on February 10:

30 Good afternoon Lauren,

I apologize for the inconvenience and disturbance that this may have caused the government: I was made aware of this situation this morning. Just to give you a quick update as to why I tasked our HR department to contact all of the employees and request that they provide their major job duties is in response to the current DOL investigation
35 that has been ongoing since last Spring. I will forward a copy of the request that I received personally about a week ago from DOL in their efforts to work with myself and the Contracting Specialist, Carol Hall to expedite their investigation if at all possible so as to try to resolve classification clarifications on the existing contract as soon as possible.

40 That was sole the purpose of the request, to assist the DOL in validating claims and allegations concerning the accuracy of the job duties and classifications, which if she had inquired of AAI, she would have been informed that this was a company-wide request that was a part of the efforts to address all PWS-related complaints. Actually, this
45 was not a request, but a requirement from DOL that we provide this information as you will see in the next email.

I did not inform the entire staff that this request was being made to conform with an unexpected requirement from the DOL, as I do not feel that was necessary as their employer. We simply requested this information from each and every employee on site, and unfortunately this is her response to a simple request by her employer, which obviously is a part of all employees' job duties and responsibilities, compliance with management's directives and instructions. This should have never been escalated in this manner.

Again, I sincerely apologize for this inconvenience, and I am addressing this matter this week with our HR, management staff and the employee personally. We are preparing documentation to address this situation professionally and properly. Based on this current action and several other actions that have continued to occur by this employee, we will be preparing termination documentation, without any prior notice to the employee, that will be complete and in place for removal of Ms. Hemphill from WRNMMC on February 13, 2015.

This type of unprofessional behavior is in direct violation of several of our company policies and directives governing the standards of conduct we expect from all of our employees. It is unfortunate that Ms. Hemphill has taken the actions that she has chosen to take in this matter.

G.C. Exh. 13.

On Wednesday afternoon, February 11, at 2:58 p.m., Young sent all Respondent's employees an email to their government computers. It attached a memo from Respondent's CEO threatening disciplinary action, up to and including termination, if employees did not provide an adequate response to Respondent's inquiry regarding their job duties.

At 5:02 p.m., February 11, Michelle Anthony sent the following email to contracting officer Orrok:

Based on additional information that is being investigated and developed in this matter and after further consultation with counsel, we are going to need additional time to ensure everything that needs to be completed, documented and performed as preparation for this termination is fully complete without premature implementation of the termination process:

Having said that, the termination effective date will need to be extended a little longer to ensure all areas are thoroughly addressed in an attempt to cause minimal disruption or interruption of services to the government and ensure legal sufficiency.

As an interim measure to clarify questions for the entire staff as to the importance of compliance with the DOL investigative request, we sent a Memorandum for Record to all employees today so as to put questions to rest and also as an attempt to ensure employees are at ease with the mandatory DOL request and investigative process.

There have been no additional incidences or concerns that have been raised to my level as of COB today. Just wanted to keep you informed of the status in this matter. I am making contact daily with the COR, Mr. Lingat.

5 We have discussed this situation and are working together to bring a mutually satisfactory conclusion to this matter as soon as possible.

10 Hemphill responded the next day to Young's email of February 11, by sending Young the job description that she received when she was hired. Young wrote back indicating that response was not adequate.

Hemphill replied on February 12:

15 Nicole, what I have previously stated is that the Job Title classification and salary for Personnel Assistant I that Anthony and Associates changed me to does not reflect what is on the Job Description for Credentialing as on the contract Performance Work Statement and has lowered my salary by \$4.50 an hour. The previously titled Personnel III Job classification and Job description paying \$22.65 an hour and the Word Processor III Job Description and classification paying \$19.95 an hour did not match the Credentialing Job Description Performance Work Statement paying \$56,694.95 as on the contract and therefore, I requested it conformance on the SF 1444 for Authorization of Additional Classifications and Wage Rates for the Credentialing Staff Positions. It needs to be established at the Equivalent Rates for Federal Hires (2) 52.222-42 on the Wage Determination.

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30 Please understand Nicole, I nor any of the contract employees on this contract have the authority to change the Performance Work Statements submitted by the federal government workers (Department Heads, Contracting Officer CO; Contracting Officer Representative COR, or Assistant Contracting Officer Representatives ACOR) on this contract.

Young replied to Hemphill at her government computer:

35 I'm considering your responses as non-responsive and if this is your final response. Again, I only requested, based on your input the functions that you spend most of your time performing, is what I needed.

40 I will annotate it and move forward.

On February 13, Kafiliat Odu, Respondent Project Manager, called Hemphill. Odu told Hemphill that Michelle Anthony wanted to email her something and asked for Hemphill's home email address. Hemphill told Odu to tell Anthony to send the email to her work computer. She refused to give Odu her home email address.³

³ Respondent apparently had Hemphill's home email address at one time. That address may have changed by February 2015.

On Saturday, February 14, Hemphill's granddaughter refused to sign for a package sent to Hemphill at her home by Anthony. Hemphill did not return to work until Wednesday, February 18, due to the Presidents' Day Holiday and a "snow day."

5 On February 18, Respondent, by Michelle Anthony, terminated Hemphill in a letter, G.C. Exh. 12. HR manager Nicole Young handed this letter to Hemphill as she was escorted off the Walter Reed premises. The letter alleges certain misconduct by Hemphill in 2014 as to which there is no evidence in this record. Respondent has not established that such misconduct occurred. Then the letter addressed alleged misconduct beginning on January 30, 2015 the day after the DOL investigation resumed. I infer that Michelle Anthony knew that somebody had contacted Ms. Sharma and that she at least suspected that it was Hemphill that did so.

15 With regard to the events after January 29, the termination letter stated:

15 On January 30, 2015, an email communication was sent out to all employees, requesting a brief description of job functions that occupy the majority of your work day. Instead of complying with the request for information, you replied in response to another employee's email reply that you concurred that this information was in the job description given to you upon hire and refused to follow the directive. That response had no relation to your job duties or job description that was requested. It also did not pertain to anything relating to performing your job duties and/or functions. It was insubordinate to the request to clarify your job duties as the company was performing a job analysis for each employee under this contract as had been requested by the Department of Labor. (Insubordination)

30 On February 9, 2015, you again sent an email in response to the original email on January 30th to AAI management, a co-worker, the co-worker's supervisor; the Director for your department, the contracting office staff that you are not satisfied with your position or pay.

35 The above -mentioned email was sent it 1:15 pm on February 9, 2015 from email address Phyllis.hemphill4.ctr@mail.mil during duty hours. You included a three -page PDF attachment entitled, "Response to Nicole Young Email January 30, 2015. The body of the email stated the following: "To All on this email string, please see my attached PDF response to this previously sent emailed communication. I do not see Michelle Anthony's email on this string so AAI please forward to her. Thank you in advance.

40 The attached document goes on to cite numerous allegations and complaints against Michelle Anthony, personally as well as AAI, her company. Although numerous complaints were cited in the document there was no proof of any of the allegations in the document. This document was forwarded to all of the individuals identified three paragraphs above. (Slander and defamation of character)

Ms. Anthony, in an attempt to address your concerns tried to contact you to inform you that your concerns were going to be addressed on Friday, February 13, 2015. She attempted to acknowledge that your email was forwarded to her as requested and she also attempted to give you an official directive to Cease and Desist using your government equipment for personal use.

Due to the fact that your document and complaints were not directly related to your day-to-day tasks that you are performing, she attempted to send her acknowledgement to your personal email address that was on file at the time as phee7@comcast.net. The email acknowledgement bounced back and Ms. Anthony requested Ms. Odu to contact you while you were on duty to request an alternate email address for personal notification: You responded to Ms. Odu that you had an alternate email address, but it was not one that you would not be willing to give to her.(Insubordination again).

Ms. Anthony also had the email printed and sent to you via overnight delivery by USPS with signature confirmation. The package was attempted to be delivered on February 14, 2015 by the USPS. The tracking receipt read: Your item was refused by the addressee at 11:33 am on February 14, 2015 in Suitland, Maryland 20746: (Insubordination)

On February 12; 2015, Mrs. Young replied to your email concerning clarification of the original email request on January 30, 2015 requesting a list of your major job functions that you perform which you spend the majority of your time performing. Your responses and replies to her request continued to be non-responsive and eventually Mrs. Young concluded the email conversation stating that your responses were non-responsive to her request and gave one final clarification of her request, which you never responded again. Therefore, your information has not been received as requested. (Insubordination)

Based upon the government's request for immediate removal from the worksite and the above- stated information detailing your failure to correct and improve several violations of company policies concerning rude, discourteous and unprofessional communication, your failure to follow instructions from management, and. your unwillingness to follow company complaint procedures which directly violates AAI's Standards of Conduct /Behavior policy and procedures outlined in the employee handbook on Page 10 under paragraph number (12) which states: Insubordination or refusing to follow instructions of the immediate supervisor or management; refusal or unwillingness to accept a job assignment or to perform job requirements. Paragraph number (22) states: Unlawful unprofessional-like conduct, on or off Company premises, which adversely affects AAI services, property, reputation or goodwill in the community, or interferes with work, AAI hereby immediately terminates your employment based on all of the above- listed factors.

Your last official day of employment with AAI is today Wednesday, February 18, 2015.

5 As a factual matter, the termination letter makes clear that Respondent's termination of Phyllis Hemphill was related to her persistence in protesting the change in her classification and reduction in wage rate.

10 The letter also makes factual assertions that have not been established on this record. Most important of these is Respondent's assertion that the government requested that Respondent remove Phyllis Hemphill from the Walter Reed contract. There is no reliable evidence that this is so.

15 First of all, the record establishes that Respondent decided to terminate Ms. Hemphill on February 10, before any of Respondent's agents discussed removal with any government official.

20 Michelle Anthony had a telephone conversation with Ariel Lingat on or about January 29. Anthony said that in this conversation, Lingat raised a compliance concern regarding the use of government computers. Lingat testified that he noticed that Hemphill had been using her government computer to send messages regarding personal matters between her and Respondent after reading Hemphill's February 9 email. He testified that he emailed Nicole Young suggesting that Young might want to investigate whether this violated the IT agreement for government IT users. This email, if it existed, is not in the record. Lingat denied that he did anything other than suggest further investigation to see if there were grounds for termination.

25 I find that there is no credible evidence that Lingat or any other government employee requested that Hemphill either be terminated or removed from the Walter Reed contract.

30 Respondent routinely communicated with its employees, including Hemphill, on personnel matters via their government computers. If Hemphill violated the IT agreement, Respondent did so to a far greater extent. It is hard to believe that Lingat was not aware of this. Indeed, Hemphill's use of the government computer was to respond to inquiries from Respondent. Respondent's reliance on Hemphill's misuse of her government computer is a pretextual reason advanced by Respondent for her discharge.

35 I need also address Respondent's exhibit, which purports to be an email from Lingat, which states, "We will terminate Ms. Hemphill today." First of all, it is unclear who Lingat means when he says "We." Even on its face the email does not establish that Respondent removed Hemphill and terminated her on orders, or even at the request of any government employee. Moreover, Exhibit R-8 is off dubious authenticity given that the email chain is not in chronological order. Lingat's email appears to have been sent 2 and ½ hours after Hemphill was escorted off the Walter Reed premises.

45 Further, the manner in which Exhibit R-8 was introduced suggests that it is inauthentic. Ariel Lingat was called at a witness by the General Counsel on March 3. Respondent waited until March 4, after Lingat was excused, to introduce R-8, thus depriving the General Counsel of the opportunity to conduct voir dire and/or cross-examine Lingat about his email. Exhibit R-8 is entitled to no weight.

Analysis

5 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 he or she engaged activity protected by Section 7 is a violation of Section 8(a)(1).

10 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)"

15 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 activity.

20 Hemphill engaged in protected concerted activity in protesting Respondent's reclassification of her job and others and lowering the wage rate she and others had received from prior contractors. Her protest was clearly concerted, as it was done in conjunction with Joel Chung and others. Hemphill's February 9 email was part of the protest she initiated in October 2013.⁴

25 If Hemphill's protests, particularly the February 9, 2015 email were protected, her discharge violates Section 8(a)(1), *Phoenix Transit System*, 337 NLRB 510 (2002). An analysis under the *Wright Line* (251 NLRB 1083 (1980)) doctrine is inappropriate in this case.

30 It is undisputed that one of the major reasons for which Respondent terminated Hemphill was her persistence in protesting her reclassification and reduction in pay, and the tone of her February 9 email. I also infer that Respondent suspected that Hemphill was responsible for the resurrection of the DOL investigation on January 29, 2015 after 8 months of no activity, and bore animus towards Hemphill as a result.

35 The connection between Hemphill's February 9 email and her termination is established by the timing of Respondent's decision to discharge her on February 10 and the wording of Michelle Anthony's email to Contracting Officer Lauren Orrok.

40 Respondent's reliance of Hemphill's alleged misuse of her government computer is pretextual, and as such is further evidence of discriminatory motive, *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988). First of all, it is unclear when Hemphill's use of her government computer became an issue. Michelle Anthony testified that Ariel Lingat brought this issue to her

⁴ Section 7 protects appeals or protests to individuals not associated with the employer, such as their government supervisors, the contracting officer and contracting officer's representatives at *Walter Reed, Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *Five Star Transportation, Inc.*, 349 NLRB 42 (2007) [Employer could not refuse to hire employees who urged a school board not to contract with Five Star due to fear of lower wages and/or other adverse changes in their terms and conditions of employment].

attention on January 29, Tr. 221-22. Lingat did not corroborate this testimony. He testified that when he read the attachment to Hemphill's February 9 email, G.C. Exh. 4B, he emailed Nicole Young asking her to investigate whether there was a breach of Respondent's IT agreement with the government. Neither Anthony's February 10 or February 11 emails to Contracting Officer Orrok mention Hemphill's alleged misuse of her government computer as a reason Respondent was planning to terminate Hemphill. I find that the alleged misuse of her government computer was an ex post facto reason conjured up by Respondent between February 11 and 18.

Moreover, this record does not establish that Hemphill misused her government computer or used it for non-work matters. Respondent routinely communicated with its employees via their government computers about their wages and classification. Hemphill's February 9 email was in response to such a communication.

Similarly, the record does not establish that Hemphill was insubordinate in the way she responded to Respondent's inquiries about her duties. If anything, the record indicates that her reference to the Performance Work Statement was not only reasonable, but accurate.

The only real issue in this case is whether the statements made in this email are of such a nature that they forfeit the protection of the Act. The criteria for evaluating whether an employee's conduct while engaging in protected activity forfeits the protection of the Act depends in part on when and where the allegedly protected conduct occurred. In the case of direct communications between an employee and manager or supervisor the criteria is set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). In making this determination the Board balances four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004).

Different criteria are used in cases addressing off-duty, off-site communications with other employees or third parties using social media, *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014); *Pier Sixty, LLC*, 362 NLRB No. 59 (March 31, 2015).

Consideration of factors 1 and 2 in the *Atlantic Steel* test favor a finding that Hemphill did not lose the protection of the Act. Her protected activity was not a face-to-face outburst to management. As a result, I find that the *Atlantic Steel* test not to be strictly applicable to this case. Rather the test I apply is the more amorphous totality of the circumstances test, as was applied in *Triple Play Sports Bar* and *Pier Sixty*. In any event, I would reach the same result applying either test.⁵

A case directly on point is *Union Carbide Corp.*, 331 NLRB 356, 359-60 (2000) in which the Board held that an employee, who like Hemphill was unhappy with his wage rate, engaged in protected activity and did not lose the protection of the Act by calling his supervisor a "f-g liar." Another similar case in *Ben Pekin Corp.*, 181 NLRB 1025 (1970) in which the Board held that an employee engaged in protected activity did not lose statutory protection by accusing the employer's president of bribing a union agent to accept a lower wage increase.⁶

⁶ Other similar cases are *Harris, Inc.*, 269 NLRB 733, 738 (1984); *United States Postal Service*, 241 NLRB 389 (1979).

On the other hand, in the *Atlantic Steel* case itself, the Board deferred to an arbitrator's ruling sustaining the discharge of an employee who called his supervisor a "lying s.o.b." The *Atlantic Steel* decision is at odds with later Board decisions in which similar conduct has been deemed insufficient to forfeit the protections of the Act. In *St. Margaret Mercy Health Care Centers*, 350 NLRB 203, 204-05 (2007), the Board citing *Dreis & Krump Mfg. v. NLRB*, 544 F. 2d 320 (7th Cir. 1976) stated the test as follows:

Otherwise protected activity remain[s] protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.

In *St. Margaret Mercy*, the Board found that an employee did not forfeit the protection of the Act by telling other employees that management was not being truthful with regard to an employee evaluation process.

With regard to otherwise protected statements made to third parties, the Board has found that an employee forfeits the protection of the Act only if the statements are made with knowledge of their falsity or with reckless disregard for their truth or falsity, *Jimmy Johns*, 361 NLRB No. 27 (2014); *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011). If one were to apply this test, Hemphill clearly did not forfeit the protection of the Act.

In sum, I find that the totality of Board precedent leads me to conclude that Hemphill did not forfeit the protection of the Act. She did not make any malicious and/or untrue statements of fact. She did not use any obscenities. She did not threaten Respondent's management. Respondent, therefore, violated Section 8(a)(1) in terminating Hemphill for her continued concerted protests regarding the decrease in her wages, and specifically in retaliation for the February 9, 2015 email.

REMEDY

The Respondent, having discriminatorily discharged an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010).

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on her Social Security earnings record.⁷

⁷ The General Counsel also seeks reimbursement for all Hemphill's expenses while seeking interim employment. At present, there is no Board precedent for such a remedy. It is up to the Board, not this judge to decide whether to change existing Board law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

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Respondent, Anthony and Associates, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Discharging or otherwise discriminating against any of its employees for engaging in protected concerted activities, including protesting their wage rate and the classification of their job.

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(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Within 14 days from the date of the Board's Order, offer Phyllis Hemphill full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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(b) Make Phyllis Hemphill whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

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(c) Compensate Phyllis Hemphill for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Phyllis Hemphill in writing that this has been done and that the discharge will not be used against her in any way.

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(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

⁸ 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.

5 (f) Within 14 days after service by the Region, post at its Walter Reed jobsite
copies of the attached notice marked "Appendix".⁹ Copies of the notice, on forms provided by
the Regional Director for Region 5, after being signed by the Respondent's authorized
representative, shall be posted by the Respondent and maintained for 60 consecutive days in
10 conspicuous places including all places where notices to employees are customarily posted. In
addition to physical posting of paper notices, the notices shall be distributed electronically, such
as by email, posting on an intranet or an internet site, and/or other electronic means, if the
Respondent customarily communicates with its employees by such means. Reasonable steps
shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by
15 any other material. In the event that, during the pendency of these proceedings, the Respondent
has gone out of business or closed the facility involved in these proceedings, the Respondent
shall duplicate and mail, at its own expense, a copy of the notice to all current employees and
former employees employed by the Respondent at any time since February 18, 2015.

15 (g) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region attesting to the
steps that the Respondent has taken to comply.

20 Dated, Washington, D.C., April 13, 2016



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Arthur J. Amchan
Administrative Law Judge

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity, including protesting or complaining about your wages, hours and/or other terms and conditions of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Phyllis Hemphill full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Phyllis Hemphill whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Phyllis Hemphill for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Phyllis Hemphill, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

ANTHONY & ASSOCIATES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/05-CA-153220 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.