

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**BRANCH 4779, NATIONAL ASSOCIATION OF
LETTER CARRIERS (NALC), AFL-CIO
(UNITED STATES POSTAL SERVICE)**

Respondent

and

**VALERIE JUNE WINIESDORFFER,
an Individual**

CASE 07-CB-155726

Charging Party Winiesdorffer

and

ELIZABETH BOSSICK, an Individual

CASE 07-CB-156115

Charging Party Bossick

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN REPLY TO
RESPONDENT'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL
COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

Counsel for the General Counsel Donna M. Nixon, pursuant to §102.46(h) of the Board's Rules and Regulations, respectfully submits this Brief in Reply to Respondent's Answering Brief to Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge.

**Donna M. Nixon
Counsel for the General Counsel
National Labor Relations Board**

In its Answering brief, Respondent makes three key assertions:

1. Respondent's President Robert Willbanks sent the text in question to employee Alan Wilson and other employee/members, and then it was unintentionally distributed to Charging Parties Elizabeth Bossick and Valerie Winiesdorffer. Since Willbanks did not give permission for the text to be sent to the Charging Parties, he cannot be held responsible for it.
2. Since the text in question was disseminated by Wilson, who is not an agent of Respondent, Willbanks cannot be held responsible for the receipt of the text by the Charging Parties.
3. The texts were harmless and concertedly make fun of the Manager of the Employer, not Bossick.

The first two contentions are irrelevant to the question at hand, which is the reasonable interpretation of the text as received by Bossick and Winiesdorffer. The third contention is false, and ignores the impact of the text on Bossick and Winiesdorffer.

1. Whether Respondent intended the text to be sent to the Charging Parties is irrelevant

The Board has held in a number of cases, and in a variety of ways, that the unintentional distribution of a threat is irrelevant to the analysis of whether a statement is a threat. Thus, in *Bahama Joe's, Inc.*, 270 NLRB 1377 (1984), where a manager made a statement to his assistant manager threatening to discharge an employee for union activity, and the statement was uttered within earshot of another employee, the Board

found a violation of the Act. The Board held that, where it was merely possible for the statement to be heard by other employees, an 8(a)(1) violation had occurred. *Id.*, at 1377.

Similarly, in *Painters Local 558 (Forman-Ford)*, 279 NLRB 150 (1986), the Board held that statements made by union officials which were unintentionally overheard by members and which suggest unpleasant or violent repercussions if they participate in Board processes, constitute unlawful restraint and coercion. The Board found a violation even though the conversation began before the member arrived, and the participants were not anticipating the member's arrival. In overruling the Administrative Law Judge, the Board held that "It is immaterial that these statements were not directed to Raney (the member). Even if the threat was unintentionally communicated to him, it was coercive." *Id.* See also, *Ford Radio & Mica Corp.*, 115 NLRB 1046 (1956)(Board *indicating* that, even if the threat is unintentionally communicated, a violation still exists.); *Viele & Sons*, 227 NLRB 1940, 1944 (1977)(*holding* that threat to discharge employees because of their union activities uttered in the presence of another employee, even if unintentionally communicated to such employee, violates Section 8(a)(1).); *Owego St. Supermarket, Inc.*, 159 NLRB 1735, 1736-7 (1966)(Section 8(a)(1) violation occurred, despite the fact that the threat was unintentionally communicated, where assistant store manager threatened an employee by telling his mother that her son/the employee would suffer economic reprisals if he persisted in his union activities.).

In the instant case, Willbanks sent the text to employees Wilson, Al Shaw and Mark Tocco using ordinary texting procedures. A text, once sent, is not owned by the

sender in the sense that he has to approve where it goes or who it is sent to. Once sent, a text can be forwarded to as many people as desired. The original sender has no control over its forward movement. Willbanks had no reasonable expectation of privacy, and could exert no control over where it was sent. Whether he meant for Bossick or Winiesdorffer to read the text is irrelevant. He sent it and it was subsequently distributed. Just like the supervisor who is overheard making an improper statement, or one Union representative talking to another, if the speaker makes a statement that could reasonably be communicated to others or overheard by others, or seen by others, he bears the burden of the consequences of that statement.

2. There is no dispute as to the creator of the text

Respondent argues in its Answering brief that Wilson is not an agent of Respondent, so his distribution of the text to Bossick cannot be imputed to Respondent. However, there is no dispute as to who wrote the text. The text was created by Respondent's President Willbanks. There is also no dispute as to what was said in the text. There is no allegation that Wilson altered the text. Willbanks consciously relinquished control and any expectation of privacy once he sent the text to Wilson and two other employees. It is irrelevant as to how Bossick received the text. Her receipt of the text is analogous to a supervisor leaving a threat of discharge on the Xerox machine. It is irrelevant that the supervisor meant to destroy the copied document. It doesn't matter if the supervisor meant it as a joke to other employees. What matters is how a reasonable person in the place of the recipient of the document interprets it.

3. Willbanks did not disavow or explain the text

In *Local 235, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (General Motors Corp.)*, 313 NLRB 36, 41 (1993), a member was publicly ridiculed at a Union membership meeting and blamed the members for additional costs to the Union because he appeared as a witness in an NLRB case. In finding a violation, the Board cited the *Painters* case, *supra*, which stated, “here, the undisavowed statements conveyed a forceful and direct message: members who file charges or testify in Board proceedings against the union will be subject to public humiliation and blame.”

This is similar to the case at hand in that Respondent never disavowed the statement made by Willbanks in which he publicly taunted Bossick. Respondent called it school yard play, but never presented the facts to Bossick or Winiesdorffer like they did at trial. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). At no time prior to trial did Willbanks or anyone else from Respondent ever present the other texts to her, or try to explain the context. At no point did Willbanks or anyone else from Respondent state that it was inappropriate for Willbanks to send the text or that Respondent disavowed Willbanks actions. At no point was Willbanks sanctioned or reprimanded by Respondent for his actions.

Instead, Respondent by its inaction, allowed Bossick and possible others to interpret the text as they received it, as a threat. Even if the text was using the

Postmaster's voice, the text was ridiculing Bossick, who unlike Shaw, Wilson or Tocco, was not privy to the prior texts and was not participating in the "joke."

This scenario is similar to two people of different races telling each other racial jokes at work. Both parties think it is funny. However the jokes escalate into racial epithets and include the use of props such as nooses and swastikas. A bystander, who is not in on the "joke" observes a part of the interaction and is offended. He reports the incident as racial harassment. The employees are notified and never explain to anyone that it was all a joke. If a supervisor is made aware of these jokes and does nothing, the employer can be held responsible. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001)(Employer is held liable for racially offensive jokes told between co-workers); *Jean-Baptiste v. K-Z, Inc.*, 442 F.Supp.2d 652 (N.D. Indiana, South Bend Division 2006)(racial jokes and epithets from co-workers can contribute to a hostile work environment). If one of the offending people is a supervisor, the employer would be directly responsible for their actions. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(Under Title VII, employer was subject to vicarious liability to victimized employees for the actions of supervisors who participated in uninvited and offensive touching, lewd remarks, and offensive references to women).

Although these are Title VII cases and involve employer action or inaction, the gist of the theory is the same. An entity in the workplace such as a union, which has a duty to bargaining unit members/employees, abdicates that duty and bears responsibility when it belittles, harasses or threatens its members/employees. An employer or a union can only

escape liability by disavowing the offensive behavior and taking action to discredit it.

Here, Respondent did nothing.

Dated at Detroit, Michigan this 16th day of May 2016.

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