

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KANKAKEE COUNTY TRAINING CENTER
FOR THE DISABLED, Inc.

and

Cases 25-CA-166729
25-CA-166765
25-CA-166785
25-CA-168799
25-CA-168802

AMERICAN FEDERATION OF STATE , COUNTY
AND MUNICIPAL EMPLOYEES (AFSCME),
Council 31, AFL-CIO

**ANSWERING BRIEF OF KANKAKEE COUNTY TRAINING CENTER FOR THE
DISABLED, INC. TO GENERAL COUNSEL'S EXCEPTIONS AND BRIEF TO THE
DECISION OF ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the NLRB Rules and Regulations, the Respondent, Kankakee County Training Center, Inc., (KCTC) files this Answering Brief to General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge of September 14, 2016.

I. The Administrative Law Judge correctly found that the Section 8(a)(1) allegations and the Section 8(a)(1) and (3) allegations and the Section 8(a)(1) and (5) allegations should be dismissed.

II. ARGUMENT

Response to General Counsel's Argument Section IV.A.

As opposed to General Counsel's proposition, it is the conclusion of the Administrative Law Judge that Mr. Mazzuchi was counseled regarding interrupting work, and that talking about the union during working hours was not discussed by anyone with Mr. Mazzuchi or Ms. Williams. Such a finding is consistent with the testimony of Bev Flowers, Tr Page 391 through 394. Simply because it is inconsistent with Mr. Mazzuchi's testimony and that of Ms. Williams, it does not render the court's decision incorrect. In fact, the court specifically finds that he credits Beverly Flowers testimony over that of Mr. Mazzuchi. Though not expressed, it is equally clear that he does find Ms. Williams testimony credible in this regard. Additionally, the record is clear that KCTC does not permit employees to talk about non-work related subjects in the vocational setting. DSP's are charged with providing active treatment to clients, which means that when production work is slow or a production line is stopped, it becomes their duty to provide active

treatment, however Mr. Mazzuchi acknowledged and understood that he was not a DSP, and consequently was not responsible for providing active treatment. Tr page 17, Lines 6-9; Tr. Page 149.

In light of the foregoing it is clear that the Administrative Law Judge's decision regarding 8(a)(1) was correct.

Response to General Counsel's Argument Section IV.B.

The Administrative Law Judge found specifically that anti-union animus was not a motivating factor on the part of KCTC in the suspension or discharge of Priscilla Williams. In support of his finding, the Judge cites Ms. Williams's testimony regarding Ms. Graham's statement that Ms. Graham did not care whether or not a union was voted in, and the fact that KCTC had only one meeting of the employees where Steve Mitchell asked why they wanted a union and stated that he (Mitchell) did not feel that the employees needed one. In lines 15-44 on Page 11 of his decision, the Judge indicated that he considered the evidence, observed the witnesses, and determined that Ms. Williams would have been suspended and discharged, despite whatever protected activity she may have been involved in.

What the Judge did do was found that as a matter of law, the Respondent satisfied its *Wright Line* burden. *NLRB v Wright Line, a Division of Wright Line, Inc.*, 662 F. 2d 889 (First Circuit 1981).

The balance of General Counsel's argument urges the Board to reconsider the factual findings of the Administrative Law Judge with respect to Ms. Williams. Even though the burden in *Wright Line* may have limitedly shifted to the employer, contrary to General Counsel's implied assertion that such a shift places the employer in a position of proving

that no unfair labor practice had occurred, it does not. Under *Wright Line*, an employer in a Section (8)(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the General Counsel. Accordingly, General Counsel's argument essentially takes the position that since the statements Ms. Williams chose to produce on her behalf did not speak directly to a number of the issues raised in the charges against Ms. Williams, that it should somehow be incumbent on the employer that although they did not essentially refute the allegations since they did not speak to them, the employer could not have concluded that the allegations made were true. That is an example of a complete reversal of the burden. Ms. Williams was noticed and participated in the pre-disciplinary meeting in order to come forth with whatever evidence she had to refute the charges against her. The fact that she produced statements that don't speak to the issues of misconduct charged, cannot be taken in that context, as though they were not made. She knew what the charges were but she could not produce any evidence that refuted the critical charges.

In the *Wright Line* test, the motivation of the Respondent is determined by the trier of fact. Accordingly, review of the findings is subject to the substantial evidence test. The substantial evidence test does not turn on the quantity of evidence, but rather whether or not there is any evidence in the record that could have been used to satisfy the fact finder. When that test is applied, the fact that employer opposition to unionization was minimal and that Priscilla Williams herself admits that Diana Graham said she had no preference as to whether or not the employees unionized are sufficient. The paucity of evidence presented to demonstrate bad motivation by the employer could also have been a factor in the court's decision. Regardless there is sufficient evidence in the record to support his finding. The

Court found against the Charging Party in that anti-union animus was not a substantial or motivating factor in Ms. William's suspension or discharge. Under the *Wright Line* test, as set forth in *Big Ridge, Inc. V. NLRB*, 808 F.3d 705 (7th Circuit 2015), there are 3 propositions that must be proven by a preponderance of the evidence: 1. That the employee engaged in protected activity. 2. The decision maker knew it. 3. The employer acted because of anti-union animus. Even if all three of those elements had been shown to exist, which they were not, the burden would then shift to KCTC to either rebut the evidence, or mount an affirmative defense that the company would have taken the same action despite the employee's protected activities. General Counsel goes on to argue that because Julie Galeaz did not ask Priscilla Williams to prepare a written statement before charging her with a critical offense, demonstrates that the Respondent was looking for reasons to discharge Ms. Williams. Again, at the time that Ms. Williams was suspended the evidence shows that employer had five witnesses, some union, some not union, including supervisory personnel, who essentially corroborated the conduct that Ms. Williams participated in. Ms. Galeaz indicated that typically the employer interviews everyone involved, but here, she did not feel it was necessary before she decided to initiate discipline based upon the accounts given by the employees there. Moreover, the unrebutted evidence demonstrates that a pre-disciplinary meeting was held to afford Ms. Williams the opportunity to present whatever explanation she chose. Again this is simply General Counsel trying to impose more than the limited burden mandated by *Wright Line*. General Counsel argues essentially that the court may have reached a contrary conclusion regarding the suspension and discharge of Williams, but that is of no avail. The Administrative Law Judge is the trier of fact.

With respect to General Counsel's disparate treatment argument, it ignores the fact that with the exception of Schwana Murphy, essentially every witness testified that fighting, arguing, cursing and threatening, particularly if done in the presence of client (individuals with developmental disabilities) would result in discharge. Those include not only the employer's witnesses, but also the witnesses called by General Counsel.

The General Counsel sets forth in his argument relative to an incident that occurred more than three years prior to Priscilla Williams' incident, that "the written warning indicated that Murphy had also slapped Jones' hand away when Jones attempted to use the clock before her." The written warning does not say that. Moreover, a synopsis of the incident was written and Schwana Murphy's account does not say that she slapped the hands of a co-worker at the time clock. A co-worker who was not present and did not testify at trial, reported that Schwana Murphy had done that and Schwana Murphy may have testified at trial that she did, but that does not change the fact that she did not assert that at the time of the incident, nor apparently did any of the witnesses assert that this took place in front of clients at the time of the incident. There were no statements alleging threats. While cursing was noted, it was a short lived event, as supervisory personnel approached, all quieted down and they left. As opposed to Ms. Williams conduct wherein supervisory personnel were present and there were corroborated allegations of threats by several witnesses, and where by many witness accounts clients were present. Further, Ms. Williams conduct continued despite the presence and requests of supervisory personnel to stop. Respondent asserts these are major distinctions and simply because Ms. Murphy elects to confirm allegations that she did not make at the time in 2012, it does not support General Counsel's position for disparate treatment. The second example of General

Counsel for alleged disparate treatment, involved an incident where two employees got into an argument. Taylor Hines was given a written warning. Diamond Jordan, the person who made the alleged threat, was immediately suspended on February 6, 2014, the date of the incident, and she submitted her written resignation dated that same day, and she was never allowed to return to work, which was the unrebutted evidence presented at trial. Moreover, while there were allegations that she had used profanity, one employee made allegations against the other and it appears that there were no corroborating witnesses.

In light of the foregoing, the Respondent asserts that the Administrative Law Judge's decision did not err in his factual or legal findings.

Response to General Counsel's Argument Section IV.C.

The unrebutted evidence is that Respondent had multiple servers go down which are necessary for its billing, client care and other exigent business circumstances. The Judge properly limited his finding to the occurrence alleged in the complaint. Nevertheless, given the finding of the court, one would be hard pressed to see how other instances of a similar nature would result in a different conclusion. In addition, there has been no ULP filed relative to the company named by General Counsel in the General Counsel's Brief in Support of Exceptions of the Administrative Law Judge.

In light of the foregoing, the Respondent asserts that the Administrative Law Judge's decision did not err in his factual or legal findings.

Response to General Counsel's Argument Section IV.D.

Employer respectfully asserts that since the Administrative Law Judge found no violations of the Act regarding the suspension and discharge of Priscilla Williams, that the

Judge correctly did not provide for a remedy.

III. Conclusion

The decision of the Administrative Law Judge finding that the employer did not violate Section 8(a)(1), Sections 8(a)(1) and (3), and Sections (8)(a)(1) and (5) of the NLRA should stand.

Respectfully submitted,



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Certificate of Service

Steven C. Mills certifies on the 28th day of November, 2016, he served a copy of the foregoing by electronic service and U.S. Mail, first class postage fully prepaid, to the following persons, at the following addresses:

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