

No. 17-1544

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LEE CRAFT

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Statement regarding oral argument.....	1
Statement of jurisdiction	1
Statement of the issue presented	2
Statement of the case.....	3
I. The Board’s findings of fact	3
A. Between February and June 2011, the Company gives Craft six warnings for poor work performance; in early July, the Company receives employee complaints about his behavior	3
B. In Late July, the Company warns Craft and demotes him; in November, Craft harasses Coleman; in December, the Company investigates additional complaints about Craft from Coleman and other employees.....	6
C. In January 2012, the Company decides to discharge Craft, but instead gives him a final written warning and directs him to stay away from Coleman; the Company discharges Craft for flouting the stay-away order, intimidating and harassing coworkers, and sharing his warning notice ...	9
II. The Board’s Conclusion and Order	13
Summary of argument.....	14
Standard of review	15
Argument.....	17
The Board’s dismissal of the complaint allegation that the Company violated Section 8(a)(1) of the Act by discharging Lee Craft was rational and supported by substantial evidence	17

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
A. Applicable principles.....	17
B. Substantial evidence supports the Board’s finding that the Company would have discharged Craft for legitimate reasons even in the absence of protected activity.....	18
C. Craft’s contentions are without merit.....	22
Conclusion	24

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Conley v. NLRB</i> , 520 F.3d 629 (6th Cir. 2008)	16
<i>Fluor Daniel, Inc. v. NLRB</i> , 332 F.3d 961 (6th Cir. 2003).....	16
<i>Int’l Union v. NLRB</i> , 981 F.2d 861 (6th Cir. 1992)	16
<i>NLRB v. A&T Mfg. Co.</i> , 783 F.2d 148 (6th Cir. 1984)	18
<i>NLRB v. Alternative Entertainment, Inc.</i> , 858 F.3d 393 (6th Cir. 2017)	18
<i>NLRB v. City Disposal Sys.</i> , 465 U.S. 822 (1984).....	17
<i>NLRB v. Gen. Fabrications Corp.</i> , 222 F.3d 218 (6th Cir. 2000)	16
<i>NLRB v. Main Street Terrace Care Ctr.</i> , 218 F.3d 531 (6th Cir. 2000)	17
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	17-18
<i>Tel Data Corp. v. NLRB</i> , 90 F.3d 1195 (6th Cir. 1996)	16-17
<i>Williamson v. NLRB</i> , 643 F.3d 481 (6th Cir. 2011)	15-16

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	14, 15, 18, 22
Statutes:	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	17
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 14, 17
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	16
Section 10(f) (29 U.S.C. § 160(f))	2

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Lee Craft (“Craft”) to review a Decision and Order of the National Labor Relations Board (“the Board”)

dismissing portions of an unfair-labor practice complaint against Phillips Electronics North America Corporation (“the Company”). The Board’s Decision and Order issued on August 14, 2014, and is reported at 361 NLRB No. 16. (D&O 1-13)¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160 (f)), and venue is proper, because the alleged unfair labor practices occurred in Memphis, Tennessee, where the Company operates a distribution center. Craft timely filed his petition for review because the Act places no time limitation on such a filing.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board’s dismissal of the complaint allegation that the Company violated Section 8(a)(1) of the Act by discharging Lee Craft was rational and supported by substantial evidence.

¹ Record references in this brief are to the original record. “D&O” references are to the Board’s decision, which incorporates the decision issued by the administrative law judge. “Tr” refers to the transcript of the unfair labor practice hearing. “GCX” and “RX” refer to the exhibits of the General Counsel and the Company, respectively. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by Craft, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Craft for engaging in protected activity, namely, showing his final warning to other employees and discussing it with them. (D&O 5; GCX 1(a), (c), (e).) The complaint also alleged that the Company violated Section 8(a)(1) of the Act by maintaining a rule that made discipline confidential and prohibited employees from discussing discipline. (D&O 5; GCX 1(e).) After a hearing, an administrative law judge issued a decision recommending dismissal of the complaint in its entirety. (D&O 5-13.)

The Board's General Counsel filed exceptions to the judge's findings. (D&O 1; Exceptions.) The Board issued a Decision and Order affirming the judge's dismissal of the complaint allegation involving Craft's discharge, but finding, in disagreement with the judge, that the Company maintained an unlawful confidentiality rule. (D&O 1-5.)

I. THE BOARD'S FINDINGS OF FACT

A. **Between February and June 2011, the Company Gives Craft Six Warnings for Poor Work Performance; in Early July, the Company Receives Employee Complaints About His Behavior**

The Company operates a regional distribution center in Memphis, Tennessee, where it employs approximately 52 permanent and 48 temporary

employees. (D&O 6; Tr. 169, 234-36, GCX 1(a) par. 2(a), 1(j).) The employees work in one of four departments: Ballast, Professional, Consumer, and Receiving. (D&O 6; Tr. 174-75.)

Lee Craft began working at the Memphis facility in February 2003 as a material handler in the Ballast Department. In April 2010, the Company promoted him to a lead position there, under the supervision of Gene Blinstrup. (D&O 6; Tr. 45-49, 174, 176-77.) After one month in that position, he asked Regional Distribution Center Manager Sherry McMurrian if he could return to his position as a material handler, but she asked him to give it some more time. (Tr. 168, 243-44, GCX 1(e) par. 3, 1(j), RX 6, 8.)

In October 2010, when Blinstrup retired, Craft and Rolita Turner, a lead employee in another department, applied for his supervisory position. The Company selected Turner, and she became Craft's supervisor. (D&O 6; Tr. 50, 178, 181-82, 240, 431-32, 435, GCX 1(e) par. 3, 1(j).) After Turner was promoted, she concluded that Blinstrup had performed a lot of the work that leads such as Craft should have been doing. (D&O 6; Tr. 177-78, 181, 437.)

In early 2011, Turner, with the assistance of Manager McMurrian, prepared Craft's annual performance appraisal, which gave Craft an overall rating of "Improvement Needed." (D&O 6; Tr. 179-80, 241-42, 438, 471-72, RX 1.) Thereafter, between February and June 2011, the Company issued Craft six

counseling forms for “unsatisfactory performance,” including two verbal and four written warnings. The warnings were for failing on multiple occasions to ensure that orders were properly processed, and for working overtime without permission. (D&O 6; Tr. 182-89, RX 2-5.) During this time period, Manager McMurrin personally worked with Craft in an effort to improve his job performance. (D&O 6; Tr. 186-87, RX 8.)

In his capacity as a lead, Craft told employee Kim Coleman, who worked in the returns section of their department, that she would be fired. He made other intimidating remarks, including telling her: “I run this floor and you’re going to do what I ask you to do,” “I’m the boss,” and “[y]our expiration date is over.” (D&O 6; Tr. 236, 334-40.) In addition, Craft made numerous comments to Coleman about her clothes, including remarks about her underwear. (D&O 6; Tr. 340-41.) Before becoming a lead, Craft, who was married, had asked Coleman for a date, which she declined. (D&O 6; Tr. 336-37.)

On July 8, Coleman informed Manager McMurrin that Craft was harassing and threatening her. Specifically, Coleman reported that Craft was pulling her from her regular job of processing returns and reassigning her to pick orders, “hollering at her that she needs to do what he [tells] her to do,” and stating that he would “make sure she lost her job.” (D&O 6; Tr. 192-93, RX 7.) McMurrin then spoke with Craft and advised him to coordinate with Supervisor Turner before

reassigning Coleman to perform other work. McMurrin also told Craft that other employees had “the same complaints” about him, and that he needed to “communicate more effectively” and work more closely with Supervisor Turner. (D&O 6; Tr. 193-95, RX 7.)

On July 10, James Powell, who also worked as a lead in the Ballast Department, informed Manager McMurrin and Supervisor Turner that during a shift meeting with department employees, Craft “was screaming and threatening . . . to make sure they were fired.” (D&O 6; Tr. 189-91, RX 7.)

B. In Late July, the Company Warns Craft and Demotes Him; in November, Craft Harasses Coleman; in December, the Company Investigates Additional Complaints About Craft From Coleman and Other Employees

On July 25, Manager McMurrin and Operations Manager Gerak Guyot met with Craft and gave him a written warning for “unsatisfactory performance” and “insubordination” for his conduct during the July 10 shift meeting. (D&O 7; Tr. 191, GCX 1(e) par. 3, 1(j), RX 6, 8.) The warning stated that according to employee Powell, Craft “was out of control and was threatening and berating the team,” and that employees Coleman and Uma Jalloh “perceive[d] his behavior as harassment.” (D&O 7; RX 6.) The warning further stated that Craft’s behavior as a lead was “unacceptable,” that after six months as a lead he was “not performing” lead functions, and that he would return to his position as a material handler.

(D&O 7; RX 6.) The warning concluded by stating that Craft “must perform his duties as [a] material handler in a positive manner or he will be subject to further disciplinary actions.” (D&O 7; RX 6.)

In November, Craft and Coleman argued over whether Coleman had placed a skid in the wrong bin. After Coleman checked the bin and realized that she had made an error, she apologized to Craft. (D&O 7; Tr. 343-44.) Craft told Coleman, “[g]et on your knees and apologize,” a comment that she viewed as “sexual in nature.” (D&O 7; Tr. 344, 353.) Coleman refused and walked away. (D&O 7; Tr. 344.)

On December 22, Coleman informed Supervisor Turner that she was very uncomfortable because Craft had left some type of recording device next to her workstation, and believed that Craft was trying to record her conversations. Turner informed Managers McMurrin and Guyot. Guyot discovered that the device was not a recording device, but rather a portable hand-held videogame system. The Company informed Craft that he should not have the device on the floor. (D&O 7; Tr. 305-06, 314, 321, 326-29, 351-53, RX 16.) McMurrin’s notes about the incident state that she had previously spoken with Craft in June 2011 about using his cell phone or other devices to record people without their knowledge. (D&O 7; 306-07, 313-14, RX 16.)

On December 26, Supervisor Turner brought Coleman to Manager McMurrin's office. Coleman, who was crying and visibly upset, stated that she was frightened of Craft and had experienced enough of his harassment. Coleman told McMurrin about the incident where Craft directed her to get down on her knees and apologize, and added that he regularly stared at her. She also told McMurrin that Craft was trying to make people think that he was recording their conversations and phone calls, and that he appeared to be taking pictures of the product that another employee was sorting. (D&O 7; Tr. 198-201, 255-56, 307-08, 344-45, 443, RX 11, 16.)

Thereafter, Manager McMurrin spoke with other employees to investigate Coleman's complaints. Employee Antonio Edwards reported to McMurrin that Craft had stated that he was going to start making some changes and was going to fix it so that "no one had to kiss butt to move up the ladder." (D&O 7; Tr. 267.) Employee Len Lee told McMurrin that Craft had "bad blood" for Coleman, and that he had observed Craft trying to intimidate her. (D&O 7; RX 10.) Employee LaToya Hyde told McMurrin that Craft had problems with "single women" working on the work floor, and said that he treated them differently than other women. (D&O 7; Tr. 204, 261-62, RX 10.) Employee Thelma Halbert reported that she had witnessed Craft harass Coleman by telling her that she would be fired and staring at her. Halbert also stated that even though Craft was no longer

Coleman's lead, he continued to monitor her work and tell her what to do. (D&O 7; Tr. 202-03, 482-83, RX 10, 19.) McMurrin also learned from these employees, as well as employee Lester Peete and Coleman herself, that Craft had made comments during pre-shift meetings that were inappropriate and blamed other employees for work issues. (D&O 8; Tr. 210-13, 348-50, 407-09, 423-24, 441-42, RX 11, 18, 19.) In addition, Supervisor Turner informed McMurrin that after Craft returned to his material handler position, he had "persistently attempted to undermine and belittle" her decisions. (RX 11.)

On December 28, Manager McMurrin met with Craft to tell him that the Company was investigating him for another report of "intimidating and harassing behavior." Craft denied that he had engaged in any inappropriate conduct. (D&O 7; Tr. 74-77, 204, 206-07, 277, RX 11.)

C. In January 2012, the Company Decides To Discharge Craft, but Instead Gives Him a Final Written Warning and Directs Him To Stay Away from Coleman; the Company Discharges Craft for Flouting the Stay-Away Order, Intimidating and Harassing Coworkers, and Sharing His Warning Notice

On January 3, 2012, Manager Guyot submitted an incident report to Manager McMurrin recommending Craft's discharge. (D&O 8; Tr. 323, RX 17.) In the report, Guyot described various problems with Craft's performance and conduct as an hourly and lead employee, which others had observed. (D&O 8; RX 17.) Guyot concluded the report by stating that he had "fully support[ed]" the

“decision to demote Craft from [l]ead back to material handler,” and that “in light of all the other incidents,” he also “support[ed] the decision to move forward and terminate” Craft’s employment, “to eliminate the hostile working environment [he] has caused.” (D&O 8; RX 17.)

On January 4, Coleman submitted a written statement summarizing Craft’s conduct towards her. In her statement, Coleman said that Craft had repeatedly criticized her and threatened that she would be fired. Coleman also observed that Craft stared at her throughout the day and tried to record her telephone conversations. In addition, Coleman referenced recent problems with Craft, such as him telling her to get on her knees and apologize, and an earlier incident when Craft exceeded his authority by attempting to have her removed from the facility by a security guard because she was using a cell phone. (D&O 8; Tr. 257-61, 331-33, RX 9.)

On January 4, Craft picked the wrong item when filling an order. As a result, an incorrect order was shipped to the customer. On January 16, while deleting a delivery and adding to another shipment, Craft mistakenly added all new deliveries to one shipment. It took administrative staff several hours to correct his error and reprint 318 delivery forms. (D&O 8; Tr. 80-81, 216-18, GCX 6.)

On January 16, Manager McMurrian met with Manager Guyot and three supervisors. They reviewed Craft’s personnel file and discussed the continuing

problems with his job performance and conduct despite having coached, disciplined, and demoted him. They decided unanimously to discharge Craft and prepared a termination notice. (D&O 1, 8; RX 11, 12.) The notice stated that the Company was discharging Craft for “inappropriate behavior,” “violation of [c]ompany policy/procedures,” and “insubordination.” (D&O 12; RX 12.)

Manager McMurrin prepared an accompanying memo recounting the reports of Craft’s intimidating and harassing behavior towards Supervisor Turner and various employees, including Coleman, and the steps that the Company had already taken. (D&O 11; Tr. 212-14, RX 11.) In her memo, McMurrin concluded that after Craft’s demotion he had “continued to display intimidating, offensive, and demoralizing behavior,” and therefore that it was “in the best interests of the [C]ompany and the employees . . . to terminate Lee Craft’s employment, effective immediately.” McMurrin’s memo added that Craft’s “intimidating behavior” was “a violation of company policy,” and that the Company “has the responsibility to create a safe environment where offensive and intimidating behavior is not tolerated.” (D&O 11; RX 11.)

In reviewing Craft’s personnel file, the Company discovered that it had not, as was its custom, previously given him a final written warning. Accordingly, the Company did not discharge Craft, but instead issued him a final written warning on January 20 for “inappropriate behavior,” “unsatisfactory performance,” “violation

of company policy/procedures,” and “insubordination.” (D&O 1, 8; Tr. 216-17, GCX 6.) In the warning notice, which McMurrian gave to Craft that day, the Company stated that he had engaged in “highly disruptive behavior in pre-shift meetings” and “harassing and intimidating behavior towards colleagues and management,” and that “[s]everal employees” had “reported feeling threatened” by him. (D&O 1, 8; GCX 6.) The notice, which also noted Craft’s recent shorting and shipping errors, concluded by telling Craft that “[a]ny further incidents of inappropriate behavior, performance, or attendance issues will result in immediate termination.” (D&O 1, 8; GCX 6.)

In addition to issuing the final written warning, Manager McMurrian decided to move Craft to a new department in a different building, where he would be assigned to a male supervisor. When she met with Craft to give him the warning, she informed him about the transfer, and directed him to stay away from Coleman’s work area. (D&O 1, 8; Tr. 46, 221-24, RX 13.)

On January 24, employees Coleman and Halbert notified Manager McMurrian that Craft had driven his forklift to Coleman’s work area, which contravened the stay-away directive. They added that Craft had positioned himself within 10 feet of Coleman, bragging about what had happened to him as a result of Coleman’s complaints. Specifically, Craft stated that McMurrian had done him a favor by moving him to a different department because he would no longer have to

lift the heavy ballasts. Craft added that he was “untouchable,” and showed coworkers his final warning. (D&O 1-2, 8-9; Tr. 224-27, 355-59, 383-90, 494-99, 506-08, RX 14.)

On January 25, the Company discharged Craft. In the discharge notice, the Company stated that Craft was “being terminated effective immediately due to disrupting the operation and sharing confidential documentation and information during working hours and continu[ing] to use intimidating language towards management.” The notice added that he had previously received a final written disciplinary notice warning “against these exact behaviors” on January 20, and that he “had requested a copy of the write-up and was informed of the confidentiality of the discussion and form.” (D&O 2; GCX 7.)

II. THE BOARD’S CONCLUSION AND ORDER

On the foregoing facts, the Board (then-Members Miscimarra, Johnson, and Schiffer) adopted, in the absence of exceptions, the administrative law judge’s finding that Craft engaged in protected activity by discussing and showing his final warning to other employees, and that such activity was a motivating factor in his discharge. (D&O 1 n.2.) The Board found, however, in agreement with the judge, that the Company “would have discharged Craft for legitimate reasons even in the absence of his protected activities.” (D&O 1 n.2, 10-13.) Accordingly, the Board dismissed the complaint allegation involving Craft’s discharge. (D&O 3.)

The Board (Member Miscimarra dissenting) also found, in disagreement with the judge, that the Company violated Section 8(a)(1) of the Act by maintaining a rule that discipline is confidential and prohibiting employees from sharing or discussing their discipline with their coworkers. (D&O 1-5.)²

On August, 14, 2014, the Board denied Craft's motion for reconsideration of its finding that the Company did not violate the Act by discharging him. (Order Denying Motion.)

SUMMARY OF ARGUMENT

The Board's dismissal of the complaint allegation that the Company violated Section 8(a)(1) of the Act by discharging Lee Craft was rational and supported by substantial evidence. The Board reasonably found, that the Company carried its burden of showing, under *Wright Line*, that it would have discharged Craft for legitimate reasons even absent any protected activity. Accordingly, the Board dismissed the complaint allegation that the Company violated Section 8(a)(1) of the Act by discharging Craft. The Board's finding is entitled to considerable deference.

Thus, the credited evidence establishes that before Craft engaged in any protected activity, the Company had already decided to discharge him based on his misconduct and performance problems. Although the Company gave him a

² The Board is not seeking enforcement of the Section 8(a)(1) violation.

reprieve by issuing a final warning notice instead of discharging him right away, the notice squarely warned him that any further incidents would result in immediate termination. When Craft repeated the exact same type of intimidating and harassing behavior just four days later, the Company discharged him for those offenses, and also for sharing and discussing his warning notice with other employees. In these circumstances, the Board reasonably found that, although Craft engaged in protected activity by sharing and discussing the warning notice, the Company met its burden of showing under *Wright Line* that it would have discharged him for legitimate reasons even absent such protected activity.

On review, Craft denies engaging in inappropriate conduct, claiming that the Board based its contrary findings on testimony that was “not at all credible.” However, the mutually corroborative testimony of multiple witnesses, which was further bolstered by company records, fully supports the Board’s finding that the Company discharged him for repeated acts of misconduct and performance problems. Given Craft’s failure to meet his heavy burden of showing that the Board’s credibility rulings lack a rational basis, the Court should deny the petition for review.

STANDARD OF REVIEW

The Board’s underlying findings of fact are ““conclusive”” ““if they are supported by substantial evidence on the record as a whole.”” *Williamson v.*

NLRB, 643 F.3d 481, 485 (6th Cir. 2011) (quoting Section 10(e) of the Act, 29 U.S.C. § 160(e)). Where, as here, the Board finds that the challenged conduct does not violate the Act, and accordingly dismisses complaint allegations, judicial review is extremely limited. A Board conclusion that a party did not violate the Act “must be upheld unless it has no rational basis or is irrational or unsupported by substantial evidence.” *Williamson*, 643 F.3d 481, 485 (6th Cir. 2011) (internal quotation marks omitted); *accord Int’l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992).

Substantial evidence consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if there is also substantial evidence for an inconsistent conclusion.” *Williamson*, 643 F.2d at 485 (internal quotation marks omitted). “Deference to the Board’s factual findings is particularly appropriate where the record is fraught with conflicting testimony and essential credibility determinations have been made.” *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted); *accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). In such cases, this Court’s review is “severely limit[ed],” and the Board’s credibility determinations should be affirmed “unless they have no rational basis.” *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003); *see also Tel Data Corp. v. NLRB*, 90

F.3d 1195, 1199 (6th Cir. 1996) (credibility determinations should be affirmed “unless they are inherently unreasonable” or “self-contradictory”).

ARGUMENT

THE BOARD’S DISMISSAL OF THE COMPLAINT ALLEGATION THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING LEE CRAFT WAS RATIONAL AND SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Applicable Principles

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations,” and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act protects employees’ invocation of those rights by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1). It is well settled that an employer violates Section 8(a)(1) of the Act by discharging an employee because of his protected concerted activity. *NLRB v. City Disposal Sys.*, 465 U.S. 822, 825, 833 n.10 (1984); *NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 539 (6th Cir. 2000).

In such cases, the critical inquiry usually turns on whether the employer’s actions were motivated by union animus. In *NLRB v. Transportation Management*

Corp., 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 410 (6th Cir. 2017); *NLRB v. A&T Mfg. Co.*, 783 F.2d 148, 149 (6th Cir. 1984).

B. Substantial Evidence Supports the Board's Finding that the Company Would Have Discharged Craft for Legitimate Reasons Even in the Absence of Protected Activity

In the absence of exceptions, the Board adopted the judge's finding that Craft engaged in protected activity on January 24, 2012 by showing his final warning to coworkers and discussing it with them, and that this activity was a motivating factor in his discharge. (D&O 1 n.2, 10-11.) The Board reasonably found, however, that the Company would have discharged Craft on January 25 for legitimate reasons — namely, his harassing and intimidating behavior towards

Coleman and other employees, as well as his performance deficiencies. (D&O 1 n.2, 11-13.)

To begin, as the Board found, before discharging Craft, the Company gave him “numerous oral and written warnings—as well as a demotion—for performance deficiencies and acts of misconduct, including repeatedly harassing and intimidating his coworker, Kim Coleman.” (D&O 1.) Indeed, between January and June 2011, the Company issued Craft six warnings for not properly performing his duties as a lead employee. Then, in July 2011, the Company demoted him from his lead position after employees reported that his behavior was “out of control,” “berating,” and “harassment.” (D&O 7; RX 6.)

Moreover, as early as January 3, 2012, well before Craft engaged in any protected activity, Manager Guyot recommended to Manager McMurrin that the Company discharge Craft for creating a “hostile working environment.” (D&O 8; RX 17.) Thereafter, following two additional incidents of poor work performance and a written statement from employee Coleman summarizing Craft’s ongoing inappropriate conduct, Managers McMurrin and Guyot, together with three supervisors, unanimously agreed that the Company should discharge Craft. As Manager McMurrin set forth in a January 20 memo documenting the reasons for discharging Craft, the action was warranted based on his ongoing intimidating and harassing behavior, which he directed, in particular, towards two women:

Supervisor Turner and employee Coleman. As McMurrian further stated in the termination notice that she prepared in conjunction with the January 20 memo, the Company's decision to discharge Craft was fully consistent with its July 2011 warning to Craft that he would be subject to additional discipline if he failed to perform his duties properly, or had further issues with his coworkers.

After drafting the discharge notice, however, the Company discovered that it had not, as was its custom, previously given Craft a final written warning. Accordingly, instead of discharging him, the Company gave him a final written warning on January 20, for "inappropriate behavior," "unsatisfactory performance," "violation of company policy/procedures," and "insubordination." (Tr. 216-17, GCX 6.) The warning notice added that, in addition to his recent shorting and shipping errors, Craft had engaged in "highly disruptive behavior in pre-shift meetings" and "harassing and intimidating behavior towards colleagues and management," and that "[s]everal employees" had "reported feeling threatened" by him. (GCX 6.) The notice squarely warned him that any further incidents would "result in immediate termination." (GCX 6.)

The credited evidence further establishes that the Company ultimately discharged Craft on January 25 because, on the previous day, he repeated the same misconduct that prompted the Company to issue the January 20 final warning. He did so even though the Company had tried to give him a fresh start by transferring

him to a different department under a male supervisor, and by expressly instructing him to stay away from employee Coleman and his old department. Yet, just four days later, on January 24, Craft returned to his old department and Coleman's work area, in violation of the stay-away directive. In addition, while there he engaged in behavior that employees, including Coleman, reported as harassing and disruptive, such as saying that he was untouchable, and that the Company had done him a favor by giving him an easier job.

Craft's conduct on January 24 led the Company to discharge him for disrupting the operation, using intimidating language toward management, and engaging in the "exact behaviors" that prompted his final warning. (GCX 7.) In other words, just four days after receiving his final warning, Craft again engaged in conduct that the Company had described in the final warning notice as grounds for discharge—namely, "highly disruptive" and "harassing and intimidating behavior towards colleagues and towards management." (GCX 6.)

To be sure, in discharging Craft, the Company also cited activity that was protected, namely, his act of sharing the January 20 warning notice with coworkers. Nevertheless, as the Board found and the January 20 final warning shows, the Company had "already decided to terminate Craft prior to his engaging in any protected activity" based on legitimate reasons—namely, the acts of misconduct and performance problems that followed his demotion. (D&O 11.) In

these circumstances, the Board reasonably found that notwithstanding any protected concerted activity engaged in by Craft on January 24, the Company met its burden under *Wright Line* of demonstrating that it would have discharged him for legitimate reasons. (D&O 12.)

C. Craft's Contentions Are Without Merit

Craft asserts (Br. 3-4) that because the administrative law judge found that he engaged in protected activity by sharing his final warning with coworkers, the Board erred in then finding that the Company would have discharged him for legitimate reasons even absent that activity. Craft's argument is fundamentally flawed. The Board's well-settled *Wright Line* test does not insulate an employee from discharge simply because protected activity was a motivating factor in the discharge. Rather, the test provides the employer with the opportunity to establish that it would have discharged the employee for legitimate reasons even absent the protected activity. *See* cases cited at p. 18. Moreover, as shown, the Board reasonably found that the Company met its burden under *Wright Line* of showing that it decided to end Craft's employment because he had engaged in the same misconduct that triggered his final warning, and therefore that it would have discharged him even absent any protected activity. (D&O 12.)

Craft also asserts (Br. 4) that "none of the allegations made against [him] were supported" by credited testimony. But the Board reviewed and affirmed the

administrative law judge's credibility determinations, which the judge based "[o]n the entire record, including [her] observation of the witnesses," i.e., their demeanor. (D&O 1 n.1, 5.) The credited testimony, presented by multiple witnesses who corroborated each other, established that Craft engaged in numerous acts of misconduct, including inappropriate conduct towards employee Coleman. (D&O 6-9.) For instance, the judge specifically credited the testimony of Manager McMurrin and employees Coleman and Halbert (D&O 11-12), over Craft's denial (D&O 11), that Craft failed to follow a direct order to stay out of the Ballast Department. As shown above (pp. 16-17), this Court will accept the Board's credibility determinations unless they have no rational basis. Given Craft's inability to make such a showing, he necessarily has failed to meet his burden of establishing that substantial evidence does not support the Board's rational decision to dismiss the complaint allegation.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review.

Respectfully submitted,

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July 2017

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LEE CRAFT)	
)	
Petitioner)	
)	No. 17-1544
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	26-CA-085613
)	
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,120 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, DC
this 27th day of July, 2017

**ADDENDUM: DESIGNATION OF RELEVANT
ADMINISTRATIVE DOCUMENTS**

Lee Craft v. NLRB.
6th Cir. No. 17-1544
Board Case No. 26-CA-085613

VOLUME I – TRANSCRIPT

pp. 1-516 Transcript of Unfair Labor Practice Hearing before Administrative Law Judge Margaret G. Brakebusch, dated 3/11/12, 3/12/12

VOLUME II – EXHIBITS

General Counsel's Exhibits

Complaint and Notice of Hearing, dated 11/30/2012

GCX 1(c) Amended Charge, dated 9/28/2012

GCX 1(a) Charge, dated 7/19/2012

GCX 6 Employee Counseling Form for Lee Craft, dated 1/20/2012

GCX 7 Employee Counseling Form for Lee Craft, dated 1/25/2012

Respondent's Exhibits

RX 1 Annual Evaluation for Lee Craft, dated 3/23/200111

RX 2 Employee Counseling Form for Lee Craft, dated 2/9/2011

RX 3 Employee Counseling Form for Lee Craft, dated 4/14/2011

RX 4 Employee Counseling Form for Lee Craft, dated 5/13/2011

RX 5 Employee Counseling Form for Lee Craft, dated 5/13/2011

RX 6 Employee Counseling Form for Lee Craft, dated 7/25/11

RX 7 Employee Statement Regarding Lee Craft, dated 7/8/2011

RX 8 Employee Statement Regarding Lee Craft, dated 7/25/11

RX 9 Employee Statement Regarding Lee Craft, dated 1/4/2012

RX 10 Employee Statement Regarding Lee Craft, dated 12/28/2011

RX 11 Employee Statement Regarding Lee Craft, dated 1/16/2012

RX 12 Company Memo to Discharge Lee Craft and Counseling Form,
dated 1/16/2012

RX 13 Map of the Company's Facility, undated

RX 14 Statements by Employees' Regarding Lee Craft, dated 1/25/2012

RX 16 Summary of Conduct by Lee Craft, undated

RX 17 Summary of Conduct by Lee Craft, undated

RX 18 Employee Statement Regarding Lee Craft, dated 1/3/2012

RX 19 Employee Statement Regarding Lee Craft, dated 12/28/2011

VOLUME III – PLEADINGS

Decision and Order, dated 8/14/2014

Motion for Reconsideration, dated 9/10/2014

Board Order denying Motion for Reconsideration, 11/25/2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served via UPS mail to the address listed below:

Mr. Lee Craft
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/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 27th day of July, 2017