United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 17, 2017

TO: William Cowen, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Williams-Sonoma Direct, Inc.
Cases 21-CA-187613; 21-CA-187636

506-4033-1200-0000
512-7550-3700-0000
512-5096-8400-0000
506-2017-0800-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) when it discharged [redacted] employees for making alleged threats during a pre-shift meeting concerning workplace safety issues. Because the statements—where [redacted] said that [redacted] might as well hit fellow employees if a near-miss would be treated the same as a collision and [redacted] responded "dead men can't talk"—were not objective threats of physical harm to fellow employees and because a balancing of the four *Atlantic Steel*[1] factors weigh in favor of protection, we conclude that the Employer violated Section 8(a)(1) by discharging the Charging Parties for their statements during the meeting.

FACTS

A. Background

Williams-Sonoma Direct, Inc. (hereinafter "the Employer") operates a warehouse and distribution center in Walnut, California. It employs merchandise processors who have different duties, including "pickers," whose job function is to operate forklifts, cherry pickers, and other heavy machinery to move pallets of goods throughout the warehouse. The Charging Parties, [redacted] were both employed as [redacted] until [redacted] 2016 when they were discharged.

Beginning around December 2015, Teamsters Local 63 (hereinafter "the Union") began an organizing drive at the facility. [redacted] Charging Parties were active Union supporters and wore clothing with Union insignia at work. [redacted] also had a pro-union

[1] 245 NLRB 814 (1979).

bumper sticker on [redacted] car that [redacted] parked in the Employer's parking lot. The Employer admits that it was aware of the Charging Parties' support for the Union.

The organizing drive was contentious. On [redacted] 2016, an employee filed a charge against the Employer, alleging that [redacted] was harassed, suspended, and given undesirable assignments in response to [redacted] protected concerted activity. The charge also alleged that the Employer had threatened, surveilled, and interrogated employees over their support for the union. On June 30, 2016, the Region issued complaint, alleging the Employer violated Section 8(a)(1) of the Act by threatening plant closure and withholding pay raises if the workers supported the Union. The Employer ultimately agreed to an informal settlement on January 23, 2017.

On May 12, 2016, the Union filed a representation petition seeking to represent 160 merchandise processors, merchandise processors-forklift, and lead merchandise processors. The Region rejected the Union's petition because the Regional Director was unable to determine, based on the record evidence provided, that the employees in the petitioned-for-unit formed the requisite readily identifiable group separate from the rest of the workforce. The Board upheld the Region's dismissal.

B. **Events Leading to Charging Parties' Discharge**

The Employer's practice was to hold a pre-shift meeting prior to the start of each shift. The purpose of the meeting was to give workers and management an opportunity to discuss daily assignment and administrative matters. The practice was also to allow workers and management to discuss working conditions, including safety concerns, if and when they arose. A leadman headed the meeting and was typically present for all of them. A manager was also present for most of the meetings, but not all.

On August 29, 2016[2], the Employer held a pre-shift meeting at roughly 4:30 a.m. attended by the Charging Parties, [redacted] and approximately 35-50 other employees. [redacted] began the meeting with some administrative announcements. After, [redacted] announced to the group that workers who did not operate machinery and worked on foot would now be allowed to walk near the "end caps" of the warehouse shelves and in the aisles while pickers were operating their heavy machines.[3]

[2] All dates herein are in 2016 unless otherwise noted.

[3] "End caps" are where warehouse storage shelves end and connect with aisles.

Charging Party [redacted] objected to the new policy and told the manager that it would potentially be dangerous because it is difficult for a [redacted] to see when moving palates around the floor. [redacted] asked what would constitute a "mirror miss," an offense that occurs when an employee operating machinery gets too close to another worker, given this change in the rules.[4] [redacted] gave a vague response that contained no specifics about what would constitute a violation. [redacted] asked [redacted] for more details and [redacted] said [redacted] would ask Human Resources about the specific distance and get back to the employees. [redacted] then asked if a "mirror miss" would be treated the same as hitting someone. [redacted] did not respond. At that time, Charging Party [redacted]. said either "dead man walking," or that, in the event that [redacted] hit someone, [redacted] would hit them twice because dead men can't talk. The other employees laughed at these statements. Charging Party [redacted] then stated that [redacted] might as well hit the other employee if a mirror miss is going to be considered the same as a collision. [redacted] expressed annoyance and said that if [redacted] had any other questions, [redacted] could see [redacted] in [redacted] office.[5]

Following the meeting, the Charging Parties returned to work as normal. Around [redacted] Charging Party [redacted] was informed [redacted] was suspended pending an investigation into [redacted] actions at the pre-shift meeting. [redacted] was suspended on [redacted] The Employer asked both parties to provide written statements describing what occurred at the pre-shift meeting and their comments there. [redacted] refused. [redacted] did provide a statement, writing that [redacted] made the "dead men can't talk," statement, but added and underlined that it was "just a joke."

On [redacted], both Charging Parties were informed that they were discharged for violating the Employer's violence-free workplace policy.

ACTION

We conclude that the Charging Parties' statements during the pre-shift meeting did not constitute threats of actual violence, nor were they sufficiently egregious as to

---

[4] This offense is also sometimes referred to as a "near miss."

[5] According to the Employer, [redacted] statement was "if people are in my way I am just going to run them over and not stop. There shouldn't be anyone in my way." The Employer also alleges that [redacted] "aggressively" stated that [redacted] would not stop for other employees who were in [redacted] way and that [redacted] would run them over because "dead people can't walk." At the Employer's request, [redacted] and another employee described what both Charging Parties stated at the meeting. They essentially corroborated the Employer's version of events, although they did not say that they felt threatened by or fearful of the Charging Parties.

remove them from the Act's protection. Accordingly, we conclude that the Employer violated Section 8(a)(1) by discharging them for their protected concerted activity during this meeting.

Employee conduct on behalf of health and safety concerns constitutes Section 7 activity.[6] However, an employee's otherwise protected activity may become unprotected if it is sufficiently egregious or offensive.[7] The determination of whether the conduct was sufficiently egregious does not depend on the employer's "subjective perception" of the behavior, but "'[r]ather…an objective one; i.e., whether the alleged misconduct is so serious that it deprives the employees of the protection the Act normally gives for engaging in concerted activity.'"[8] When considering whether an employee's conduct meets this standard, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.[9]

In analyzing the facts of this case under the *Atlantic Steel* factors, we conclude that the Charging Parties did not lose protection of the Act. First, the location of the discussion weighs in favor of protection. The Charging Parties made their statements during a pre-shift meeting at the workplace where employee safety concerns were solicited.[10] Moreover, the incident took place at a time and location chosen, or at least

---

[6] *See, e.g.*, *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (employee engaged in Section 7 activity by complaining about employer's failure to address documented safety threats); *Daniel Construction Co.*, 277 NLRB 795, 795 (1985) (finding employees' work stoppage to be "plainly protected" where it concerned "uncomfortable, potentially health-threatening working conditions").

[7] *See, e.g.*, *United Parcel Serv.*, 311 NLRB 974, 974 (1993).

[8] *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011) (quoting *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), *enforced*, 561 F.2d 1196 (5th Cir. 1977)).

[9] *Atlantic Steel Co.*, 245 NLRB at 816.

[10] *See Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) (outburst during employee meeting did not lose protection where "employees were free to raise workplace issues" during the meeting).

not objected to, by the Employer, making it unlikely that the incident disturbed the work process or impaired management's ability to maintain discipline and order.[11] Next, we agree with the Region that the subject matter of the discussion was plainly protected because the parties were discussing workplace safety and the Charging Parties were discussing an issue of mutual aid and protection, namely the safety of their fellow workers and how pickers might be disciplined for a safety infraction. Likewise, the analysis of the fourth factor is fairly straightforward. The outburst was not caused by any unfair labor practice and that factor weighs slightly against protection of the Act.[12]

The crucial part of the analysis is the third factor, the nature of the outburst. We find that this too weighs in favor of retaining the Act's protection. Taken in context, no reasonable person would construe the Charging Parties' statements regarding hitting their coworkers with (b)(6), (b)(7)(C) as actual threats.

It is self-evident that protected activity must have a lawful objective and be carried out lawfully; therefore, threats of bodily harm and other illegal activity are not protected under the Act.[13] Contrarily, ambiguous statements[14] and idiomatic

---

[11] *See e.g. Kiewit Power Constructors Co.*, 355 NLRB at 709 (holding that first *Atlantic Steel* factor did not weigh against protection where employer "chose to distribute the warnings in a group employee setting in a work area during working time, and should reasonably have expected that employees would react and protest on the spot"). *Cf. NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982) ("Having chosen to argue in front of the other workers, the Company can hardly be heard to complain about the public nature of the…discussion."); *Brunswick Food & Drug*, 284 NLRB 663, 664–65 (1987) (employee did not lose protection by addressing outburst to customers when employer initiated confrontation in front of customers), *enforced mem. sub nom. NLRB v. Kroger Co.*, 859 F.2d 927 (11th Cir.1988).

[12] *See, e.g.*, *Long Ridge of Stamford*, 362 NLRB No. 33, slip op. at 2 (Mar. 24, 2015) (finding employee's walk-in on the employer's administrator retained the protection of the Act even though the fact that it was not provoked by employer unfair labor practice weighed against protection).

[13] *See, e.g.*, *Georgia Kraft Co.*, 275 NLRB 636, 637, n.12 (1985) (threats made by two employees that they would "take care of" another worker refusing to strike, coupled with an admission that one of the parties warned the co-worker that other people might hurt him if he returned to work, were not ambiguous and were actual threats given the context); *Christie Electric Corp.*, 284 NLRB 740, 744 (1987) (Board found that threats by an employee to bomb the company and physically harm a coworker were actual threats because there was some realistic basis to interpret remarks as threatening).

expressions that do not connote violence[15] generally *are* protected. Even language that would be threatening if taken at face value may, in context, be figurative speech that remains protected.[16] The Board considers a number of factors in making this determination, including the party's history of violence or threats, whether the statement is linked to or accompanied by an act of violence, and whether the party's conduct was menacing, physically aggressive, or belligerent.[17] Additionally, the Board and reviewing courts have consistently held that the language used "must be evaluated in context."[18]

For instance, in *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011), the Board and DC Circuit held that two employees' statements that a supervisor "better bring [his] boxing gloves" and that "things would get ugly" if the two workers were fired or disciplined over a dispute concerning a change in break time policy were not actual threats and did not lose the Act's protection. Noting that it is undisputed that employers are allowed to maintain rules that bar harassment and abusive and threatening language, the DC Circuit upheld the Board's finding that, in context, the workers were not actually threatening their

---

[14] *Kingsport Press*, 269 NLRB 1150, 1157, 1161 (1984) (statement by employee being escorted from the plant, "that when he came back in on Tuesday for his meeting, that… if he was fired, that he wouldn't have to be walked out of the plant, that he would have to be carried out" too ambiguous to constitute a threat).

[15] *AT&T Broadband*, 335 NLRB 63, 63 n.1, 69 (2001) (finding "marked man" an idiomatic expression suggesting that individual would be subject to the "loathing" of fellow workers for disloyalty and not a threat of death or bodily harm).

[16] *Leasco, Inc.*, 289 NLRB 549, 549 n.1 (1988) (finding that employee's statement to a supervisor, "If you take my truck, I'm kicking your ass right now," made in the course of engaging in concerted activity, was "a colloquialism that standing alone does not convey a threat of actual physical harm"). *Cf. Phoenix Transit System*, 337 NLRB 510, 514 (2002) (holding that an employee's "use of rhetorical hyperbole to emphasize disapproval of management does not remove [otherwise protected statements] from the Act's protections"), *enforced*, 63 F. App'x 524 (D.C. Cir. 2003); *El San Juan Hotel*, 289 NLRB 1453, 1455 (1988) ("[T]he Act protects statements that are false, misleading, or inaccurate, as well as rhetorical hyperbole that is likely to be recognized for what it is . . . .").

[17] *Plaza Auto Ctr., Inc.* 360 NLRB 972, 974 (2014).

[18] *Kiewit*, 652 F.3d at 28.

employer. The Board found that the comments were an expression of, "vocal resistance to a policy they thought was unfair and unsafe,"[19] and that the lack of physical gestures or other reasons to think the employees were threatening actual violence supported the Board's view.[20] Importantly, both the Board and the DC Circuit noted that interpreting the comments at face value was unreasonable, with the court saying that, "to state the obvious, no one thought that [the employees] were literally challenging their supervisor to a boxing match."[21]

Likewise, in *Leasco, Inc.*, 289 NLRB 549 (1988), the Board found that, under all the factual circumstances, an employee's statement, "if you're taking my truck, I'm kicking your ass right now," told directly to a company official was not a threat of physical harm.[22] In that case, a group of truck drivers were informed that the company would be changing its equipment assignment procedure and would no longer be assigning particular vehicles to particular drivers. After drinking at a bar, the Charging Party in that case approached a company official and, in a profanity-laced exchange, made the above statement. The Board upheld the ALJ's finding that the phrase was a "profane colloquialism" and was not accompanied by any actions or other circumstances that would allow someone to reasonably interpret the statement as an actual threat.[23]

These cases stand for the proposition that there is an important difference between an actual threat of physical harm and using language that, given the context, is merely idiomatic, hyperbolic, or ambiguous. The Board has thus held that, under *Atlantic Steel*, the Act protects workers who use language that is not actually threatening.

Based on the context here, no objective observer could conclude that the Charging Parties were actually threatening to run over their coworkers. There is no indication that either one was menacing, physically aggressive, or belligerent. There is no evidence that either Charging Party was ever disciplined for violent or threatening behavior in the past. And neither Charging Party engaged in any actions that would give a reasonable, objective observer a reason to believe they were making actual

---

[19] *Kiewit*, F.3d at 296 (citing *Kiewit*, 355 NLRB at 709, 710).

[20] *Id.* at 296–297.

[21] *Id.* at 296.

[22] *Leasco*, at 549 n.1.

[23] *Id.* at 552.

threats. What is significantly more credible is that the workers were speaking in metaphor and using rhetorical hyperbole to express their concern with an Employer policy that they reasonably believed would put their fellow workers in danger of serious injury. Treating these statements as actual threats does not make sense when one considers the context.

For one, it is plain from the record that the Charging Parties were voicing concern for the employees that the Employer contends they threatened with physical harm. It strains credibility to argue that someone who was discussing their worry about accidentally harming a person could, in the next breath, threaten to intentionally harm them. There is no indication that any of the workers construed the Charging Parties' statements as threatening, and there is no evidence that the alleged threats were reported to management by other employees.

Further, the Employer did not initiate an investigation and suspend the Charging Parties until several days after the purportedly threatening comments were made. The fact that the Charging Parties were permitted to continue operating their machinery in the warehouse, presumably with workers still traveling the warehouse aisles and end caps on foot, not only demonstrates that these were not the kind of statements that should lose the protection of the Act but also calls into question the sincerity of the Employer's concern about these statements. Additionally, the fact that the Employer immediately resorted to discharge, "the industrial equivalent of capital punishment",[24] suggests that the Employer's alleged concerns about these statements may have been prextextual.[25]

Accordingly, we conclude that the Region should issue complaint alleging an 8(a)(1) violation, absent settlement, because the Charging Parties were discharged for conduct that was protected under the Act.

/s/
B.J.K.

H:ADV.21-CA-187613.Response.WilliamsSonoma(b)(6), (b)

[24] *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972).

[25] Based on the surrounding circumstances, including the failed union organizing drive, the previous alleged 8(a)(1) violations that were included in the settled complaint, and the fact that the Charging Parties were active and known union supporters, the Region should consider whether to add an allegation that there the Charging Parties were discharged because of their union activities, in violation of Section 8(a)(3) of the Act.