

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CSC HOLDINGS, LLC

and

**COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO**

Case 29-CA-190108

**CSC HOLDINGS, LLC'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

The General Counsel’s response to the exceptions and supporting brief filed on behalf of Respondent CSC Holdings, LLC (“Respondent” or the “Company”) is to pretend that all of Michael Wills’ (“Wills”) undisputed disciplinary history did not factor into his termination because, according to the General Counsel, it magically disappeared from his record.¹ But that suggestion is directly at odds with the record in this case, which makes clear that an employee’s entire disciplinary history – regardless of when the discipline took place – always remains with the employee and is reviewed as part of an employee’s overall performance record. (Tr. 818-19) (ALJD 16). And the totality of Wills’ misconduct is extraordinarily troubling. Indeed, as the ALJ concluded, “[i]t is not disputed that Wills had an employment history replete with numerous violations of company policies, insubordination, and disrespectful behavior towards supervisors and managers.” (ALJD 29). Significantly, the General Counsel did not take exception to this finding or any other.

Faced with this “undisputed” record of Wills’ misconduct, the General Counsel devotes a significant portion of his answering brief to cataloguing the protected activity in which Wills supposedly engaged. That is surprising, since the Company did not take exception to the ALJ’s conclusion that Wills engaged in protected activity. The problem for the General Counsel – and the fatal flaw in the ALJ’s decision – is that there is not a scintilla of evidence that protected activity motivated the decision to terminate Wills for his extensive and “undisputed” misconduct. The Act does not protect serial problem employees like Wills from termination *if* they engage in protected activity. The Act protects them only if the termination is *because* of their protected

¹ This reply brief incorporates the Company’s Brief in Support of Exceptions (referred to as “Resp. Br. _”) and all references therein. References to the General Counsel’s Answering Brief are identified as “GC. Br. ___.”

activity. Here, there is no evidence of the latter, and the General Counsel's attempts to distort the record and misstate the law do not plug that gaping hole.

ARGUMENT

I. The General Counsel's Prima Facie Case Fails Because There Is No Evidence That Wills' Termination Was Motivated By Anti-Union Animus.

A. There Is No Basis To Impute Knowledge Of Wills' Protected Activity To The Sole Decision-Maker.

The General Counsel goes to great lengths to argue that Daniel Ferrara was not the ultimate decision-maker, precisely because the record is clear that Ferrara lacked knowledge of Wills' protected activity. The ALJ found that Ferrara made the decision to discharge Wills; though others "provided guidance" regarding the discharge, Ferrara had the ultimate say. (ALJD 24). *See also* (Tr. 687, 746, 787). Because the General Counsel did not take exception to that finding, the Board should reject the General Counsel's belated attempt to argue otherwise now. N.L.R.B. Rules & Regulations Section 102.48 (a).

Ferrara testified that he was not aware of Wills' protected activity. (Tr. 804). The record is chock-full of evidence that is consistent with Ferrara's denial (Tr. 612-13, 647, 686-87, 747, 804, 825), and the ALJ's decision to discredit his testimony is completely unsupported.² The General Counsel suggests the Board must automatically impute knowledge to Ferrara unless the Company "affirmatively established" that the supervisors did not share their knowledge with him. (GC. Br. 29). This is not the law, and is a blatant attempt to prematurely flip the burden to the Company to "affirmatively establish" a lack of knowledge that would relieve the General Counsel of proving this essential element of his prima facie case. In *In Re Music Exp. E., Inc.*,

² Although the ALJ made a passing reference to witness "demeanor" generally (ALJD 24), the record is devoid of anything to suggest that Ferrara's demeanor specifically factored into the ALJ's arbitrary decision to discredit Ferrara's testimony.

340 NLRB 1063 (2003), the Board held that “[i]n the absence of direct evidence, the Board examines all the circumstances to determine whether the employer’s knowledge of the employee’s union activities can be inferred.” *Id.* at 1063. There, after reviewing all the circumstances, the Board found there was no basis to impute a lower-level supervisor’s knowledge to the manager who made the termination decision. Not even the timing of the employee’s discharge, one week from the time he disclosed to the lower-level supervisor that he was a union supporter, was “so suspicious” to support an inference of the decision maker’s knowledge. *Id.* at 1064. Given the absence of knowledge on the part of the decision-maker, the Board found the General Counsel failed to meet the initial *Wright Line* burden and dismissed the Section 8(a)(3) claim. *Id.* at 1065.

The circumstances of this case do not provide any basis to impute knowledge to Ferrara, and the General Counsel’s attempt to do so fails. First, the General Counsel argues direct knowledge of Wills’ union activity possessed by “Pero, Simon, Hilber and the numerous other Respondent management officials” present at the meeting in May 2016 should be imputed to Ferrara. (GC. Br. 29). But, the only testimony in the record is that none of those individuals ever told Ferrara about that meeting or what was discussed. (Tr. 647, 686-87, 804, 825). And there is no basis whatsoever to infer that Ferrara would have known, particularly because he was not supervising direct sales at that time. (Tr. 786, 810-11). In addition, all of the individuals with whom Ferrara consulted concerning Wills’ termination testified they *did not tell* Ferrara about Wills’ purported union activity. (Tr. 612-13, 787, 686-87, 747, 804). The ALJ did not discredit any of their testimony in this regard.

Second, the General Counsel contends that Ferrara had knowledge of Wills’ protected activity based on his review of Wills’ “Boss Timeline”, the document utilized by management to

catalogue employee misconduct. (GC Br. 30). This argument ignores the incontrovertible evidence that the Boss Timeline was devoid of any entry that could be construed as Wills having engaged in protected activity. At most, even according to the General Counsel, Ferrara saw an entry describing an obscene comment that Wills made during a May 2016 meeting. (GC Br. 30). Although the General Counsel describes the *meeting* as being “anti-Union”, the *Boss Timeline* that Ferrara reviewed reflected only Wills’ obscene comment – namely, “what we have to take it in the a***” (ALJD at 13; GC Ex. 18 at 4) – without any reference whatsoever to the context of the meeting. (GC Br. 11, 18, 30). Simply put, there is no way to tell whether Wills engaged in any protected activity based on a review of his Boss Timeline.

Third, the General Counsel urges the Board to impute knowledge to Ferrara based on an *inference* that Hugh Johnson and Matthew Haggerty may have known of Wills’ union activity. (GC. Br. 28 – 30). The General Counsel overstates the record, claiming “Respondent acquired knowledge of Wills’ organizing activity when its supervisors at the Jericho office observed Wills soliciting employees there to sign Union authorization cards.” (GC. Br. 28). To the contrary, Wills’ testimony refutes any inference that either Haggerty or Johnson knew of Wills’ union activity, much less that they shared it with Ferrara. Wills testified that that he was “talking to a Jericho employee” in the parking lot when Manager Matthew Haggerty greeted them. (Tr. 170). Wills testified that he briefly spoke to Manager Haggerty in the parking lot, but did not discuss the union. (Tr. 170-71). The evidence concerning Hugh Johnson is even sparser. Putting aside the lack of evidence in the record that Hugh Johnson was even a statutory supervisor, the General Counsel admits that “neither Johnson nor Haggerty said anything to Wills about his union activity.” (GC. Br. 28).

B. The General Counsel's Evidence Of Anti-Union Animus Is Woefully Insufficient.

According to the General Counsel, “it was appropriate for the ALJ to infer animus” because the Company’s “proclaimed basis for triggering a discharge investigation against Wills was false.” (GC. Br. 33). In the General Counsel’s view, because Wills was only “disrespectful” towards Supervisor Zimmerman and not insubordinate, the premise of the Company’s investigation was “false.” *Id.* That argument is flawed in several respects. First, whether Wills was disrespectful or insubordinate is completely beside the point because the basis for the investigation was Wills’ misconduct during the Starz meeting on June 23, 2016 – a meeting during which Wills does not even allege to have engaged in protected activity; the label attached to his misconduct is irrelevant. In this regard, the General Counsel attempts to minimize the severity of Wills’ misconduct by characterizing the incident as “benign” horseplay at the office. (GC Br. 13, 16). That is a gross understatement. The un-rebutted testimony was that Zimmerman feared for his safety as a result of Wills’ actions, and thought the incident was sufficiently serious to warrant calling the police to intervene. (Tr. 608-09, 680, 743).

In any case, Wills’ misconduct during the Starz meeting that was the impetus for the investigation was substantiated during the hearing. As set forth more fully in the Company’s Opening Brief, the ALJ’s conclusion that Wills’ misconduct did not rise to the level of insubordination is not only a quintessential substitution of his own judgment (Resp. Br. 35-39; *see also* infra at 9-10), it is also at odds with Wills’ own testimony because he expressly *admitted* that Zimmerman instructed him to put down the phone. (GC. Br. 32-33; ALJD 30) (Tr. 231) (Wills testified “Eric [Zimmerman] told me to get off the phone”).⁴ At bottom, there was

⁴ The ALJ’s conclusion that Wills was not insubordinate, which was based on his finding that Zimmerman did not instruct Wills to put down his phone, is therefore inconsistent with both Wills’ and Zimmerman’s testimony.

absolutely nothing “false” about the investigation that resulted in Wills’ termination, and there can be no inference of anti-union animus based on the ALJ’s faulty conclusion that Wills was disrespectful but not insubordinate.

In a desperate attempt to manufacture a prima facie case, the General Counsel claims that there was “significant *direct* evidence” of animus in the record. (GC. Br. 34) (emphasis added). However, the ALJ explicitly found that there was no direct evidence of anti-union animus based on any of the statements attributed to the Company (ALJD 33, n.11), a finding to which the General Counsel took no exception. The General Counsel’s arguments concerning direct evidence of animus should be rejected for this reason alone. *See* N.L.R.B. Rules & Regulations Section 102.48 (a). In any event, the statements on which the General Counsel relies are not evidence of animus at all. To the contrary, statements that the Company “prefers a union-free relationship with its employees” and “opposes” the union (GC. Br. 35) were indisputably made without threat of reprisal or force or promise of benefit and are therefore protected under Section 8(c) of the Act. *See Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1347 (2d Cir. 1990).

Accordingly, where, as here, “the General Counsel has failed to establish the ‘requisite element’ of animus, the case ends here, and the complaint must be dismissed on this basis alone.” *New Otani Hotel & Garden*, 325 NLRB 928, 941 (1998).⁵

Further, Wills admitted that it was part of his job duties to pay attention during presentations by vendors, and, that he had been previously counseled about paying attention during meetings. (Tr. 60, 147, 357).

⁵ The General Counsel places form over substance fussing over the elements of a prima facie case under *Wright Line*. (GC. Br. 25). In *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (2018), Chairman Ring clarified that the identification of a causal nexus as an element of a prima facie case was “superfluous” because “*Wright Line* is inherently a causation test.” *Id.* at fn. 25. ‘The ultimate inquiry’ is whether there is a nexus between the employee’s protected activity and the challenged adverse employment action.” *Id.* There is no such nexus here.

II. The General Counsel's Evidence Of Pretext Is Equally Unavailing.

A. The Timing Between Protected Activity And Disciplinary Action Is Irrelevant Because Wills' Discharge Followed Additional Misconduct.

The General Counsel's arguments regarding the timing between Wills' protected activity and his discharge is a study in contradiction. On the one hand, the General Counsel contends that the issuance of the Final Warning in February 2016 was in response to Wills' protected activities that took place prior to that time (GC. Br. 37) – notwithstanding that neither Wills nor the union ever challenged the imposition of the Final Warning (or any prior discipline). On the other hand, the General Counsel concedes (and the ALJ found) that Wills engaged in a variety of misconduct *after* the February 2016 Final Warning, which supposedly issued in response to protected activity, that did not result in his termination. (GC. Br. 20). This sequence of events negates any inference of anti-union animus. In an attempt to fix that problem, the General Counsel distorts facts by arguing “[t]here is no evidence that Respondent was aware that Wills engaged in further protected concerted activities between the time just after he received the Final Warning in late February and late May.” (GC. Br. 37). That is not true. The ALJ found that Wills engaged in protected activity in April 2016 in Aruba (ALJD 27), and further that management knew Wills engaged in protected activity there based on his conversations with Tom Farina, Erica Simon, and Colleen Long about the purpose of his trip. (ALJD 27).

The General Counsel's claim that the Company simply waited for an opportune time to terminate Wills is nonsensical. To the contrary, the record reflects that the Company demonstrated extraordinary patience with a deeply troubled employee already on Final Warning. Thus, when Wills intentionally failed to follow the Company's protocols for contacting supervisors on May 3, 2016 (despite having been counseled about this issue the prior month) the Company did not seek to discharge Wills. (Resp. Br. 11–12). Again, when Wills sent

disrespectful and inappropriate emails to Zimmerman on May 7, 2016, the Company did not move to terminate Wills. (Resp. Br. 12). Even after Wills sent similarly insubordinate and inappropriate texts to Farina on June 6, 2016, the Company did not seize that as an opportunity to discharge him. In fact, Simon – one of the individuals who had observed Wills at the May 2016 meeting – counseled Wills for his misconduct at that time rather than escalating his Final Warning to a termination. (Resp. Br. 13-14). Had the Company actually harbored a discriminatory animus, it could have terminated him for any one of those incidents well before July. As stated above, the fact that the Company refrained from escalating the Final Warning to a termination in the wake of multiple instances of misconduct is simply incompatible with the notion that it had a discriminatory animus. *Gaylord Hosp.*, 359 NLRB 1266, 1279 (2013).

Where, as here, there is clear evidence of intervening employee misconduct, the Board refuses to give the time between an adverse action and union activity controlling weight. *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 675 (2004).

B. The Company's Treatment Of Other Employees Negates Any Claim of Disparate Treatment.

The General Counsel contends that Wills' support of the union at the May meeting in Jericho was some watershed moment that prompted the Company to terminate his employment in July. The Company's treatment of other employees who also expressed support for the union at that same meeting give the lie to that assertion. Given the emphasis that the General Counsel places on the May meeting in establishing a discriminatory motive towards Wills, the absence of any adverse action against the majority of the employees who spoke in favor of the union is inconsistent with a discriminatory motive.⁶

⁶ While the Company does not suggest that the absence of adverse action against other employees who engaged in the same protected activity absolves it, this is nonetheless a factor that the General Counsel ignores and is at the very least indicia of a *lack* of anti-union animus.

What the General Counsel is left with is the absence of discipline involving another employee, Ulysses Colon, and the claim that the different treatment can only be due to Wills' union activity. That is rank speculation. The reality is that these two employees were not similarly situated in any respect, other than the fact that they were both on Final Warning. As set forth more fully in the Company's Opening Brief, Wills' had a disciplinary record that dwarfed Colon's – and it was Wills' lengthy disciplinary record that Ferrara reviewed when making his decision to terminate Wills. (Resp. Br. 33-34). Although the General Counsel suggests that Colon was also insubordinate towards Zimmerman at a Boost meeting, his conduct was not nearly as egregious as Wills', which required the intervention of the police. (Resp. Brf. 33).

C. **The General Counsel's Claim That It Was Up To The ALJ To Determine The Appropriate Quantum Of Discipline For All Of Wills' Misconduct Is Contrary To Board Law.**

The General Counsel does not dispute that the ALJ concluded that Wills engaged in misconduct at the Starz meeting, only that Wills' misconduct was “not as egregious as Respondent claimed.” (GC. Br. 41). This argument is an attempt to support the ALJ's conclusion that, in contrast to insubordination, “acting in a disrespectful manner towards a supervisor would not have justified the Respondent discharging Wills.” (ALJD 31). But the General Counsel completely fails to address the fact that it is the *employer* – not the ALJ or the Board – that “has the right to determine when discipline is warranted and in what form. ‘It is well established that ‘[t]he [B]oard cannot substitute its judgment for that of the employer’ and decide what constitutes appropriate discipline.” *Cast-Matic Corp.*, 350 NLRB 1349, 1358 (2007) (citation omitted).

The General Counsel then attempts to argue that Wills' conduct at the Starz meeting did not warrant a suspension, much less a termination. (GC. Br. 16). That also mischaracterizes the

record, as a suspension is not part of the Company’s disciplinary process. Rather, the Company considered a “suspension *pending investigation*” into Wills’ misconduct if he posed an immediate threat to the workplace, but ultimately concluded that Wills could work while the Company conducted its investigation into his misconduct at the Starz meeting. (Resp. Br. 18-19, 37). The Company never considered a suspension at the conclusion of its investigation because that was not an option – termination was.

The General Counsel also contends that the ALJ found pretext because the Company did not take “any significant action” in response to all of Wills’ misconduct between February and July. The record is to the contrary; Wills was counseled and coached on multiple occasions for each incident. (Resp. Br. 11–14; *see also supra* at 7-8). This was not mere “piling on” as the General Counsel suggests (GC. Br. 42), but a proportional response to each incident of misconduct – which was in the Company’s discretion. *See M.A.N. Truck & Bus Corp.*, 272 NLRB 1279, 1293 (1984). And the proportional response to Wills’ misconduct at the Starz meeting, in light of his extraordinary disciplinary history, was termination.⁷

CONCLUSION

For the foregoing reasons, the Board should sustain the Company’s exceptions and dismiss the Complaint in its entirety.

⁷ Respondent preserved its position that the ALJ was not appointed pursuant to the Appointments Clause of the United States Constitution by asserting that as an affirmative defense. (Resp. Br. at 39-43). In light of the Board’s decision in *WestRock Services, Inc.* Case 10–CA–195617 (N.L.R.B. Aug. 6, 2018) and the space constraints in this reply, the Company does not respond to all of the General Counsel’s arguments in its Answering Brief, but hereby expressly reserves the right to raise this issue in any potential appeal.

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Dated: August 17, 2018

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CERTIFICATE OF SERVICE

I, Sophia Alonso, hereby certify that on August 17, 2018, I caused a true and correct copy of CSC Holdings, LLC's Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge to be served via electronic filing and/or electronic mail, as indicated below, upon the following persons:

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