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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

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PARKVIEW LOUNGE, LLC, DBA ASCENT LOUNGE,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

—————
On Appeal from the National Labor Relations Board

REPLY BRIEF FOR PETITIONER-CROSS-RESPONDENT

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INTRODUCTION

Petitioner-Cross-Respondent Parkview Lounge LLC (“Parkview”) respectfully submits this Reply Brief in further support of its petition for review of the NLRB’s Decision and Order in NLRB Case No. 02-CA-178531, 366 NLRB No. 71.

Just like the Board’s decision, the NLRB’s Brief relies on one sole factor to justify the finding of a violation of NLRA § 8(a)(1): suspicious timing. Parkview is undeniably in an unfortunate situation; Parkview does not deny that it terminated former employee Susann Davis (“Davis”) two days following her alleged engagement in one instance of protected concerted activity. However, a review of the entire record in this case indisputably establishes that the two events were not causally linked to each other; the fact that Davis’ termination came two days after her alleged engagement in concerted activity was nothing more than an unfortunate coincidence. The NLRB further argues that Parkview’s reasons for Davis’ termination (i.e. confrontations with management and performance issues) were “shifting and inconsistent”; however, the NLRB never alleges, nor can it credibly do so, that such reasons were false.

Parkview urges this Court to look past this “suspicious timing” and review Davis’ termination in the entire context of events that transpired in the few weeks, or days, prior to her alleged engagement in concerted activity. Parkview

further urges this Court to consider the intervening events that transpired in-between Davis' alleged engagement in protected concerted activity and her termination. Finally, Parkview urges this Court to consider other circumstantial evidence surrounding the treatment of similarly-situated employees (i.e. other employees that had also engaged in concerted activity), as well as, evidence of Parkview's – and specifically Brian Packin's – prior response to Davis' workplace concerns.

A comprehensive review of the entire record establishes that Davis was terminated for legitimate reasons, not because of her alleged engagement in protected concerted activity. For the aforementioned reasons, and as further stated below, it is respectfully submitted that this court should grant Parkview's petition for review, deny the Board's cross-application for enforcement, and reverse the Decision and Order of the Board in its entirety.

RESPONSE TO NLRB'S ARGUMENT

a. Packin, Owner of Parkview, had no knowledge of Davis' Engagement in Protected Concerted Activity at the Time of her Discharge

In its principal brief, Parkview does not dispute that Davis may have engaged in protected concerted activity during a staff meeting that transpired on

January 27, 2016. However, mere engagement in concerted activity is not enough; the NLRB must further establish that the employer was aware of the “concerted nature” of Davis’ activity. *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 88 (2d Cir.1990).

In their Brief, the NLRB attempts to sidestep the issue of whether Brian Packin, the individual agent who actually fired Davis, had knowledge of the concerted nature of Davis’ activity; instead, they argue that “Quinones and Daley—both high-level managers who report directly to CEO Packin—were present when Davis spoke at the January 27 meeting.” NLRB Brief, p. 25.

However, Daley’s and Quinones’ mere presence in the January 27 meeting and presumed knowledge of Davis’ engagement in protected concerted activity cannot be imputed to Parkview. Daley and Quinones did not fire Davis, nor did they hold any authority to make any such decision. Instead, it was Brian Packin, owner of Parkview, who, acting as Parkview’s agent, terminated Davis’ employment. *See Vulcan Basement Waterproofing of Illinois, Inc. v. N.L.R.B.*, 219 F3d 677, 685 (7th Cir 2000) (citing cases and noting that “courts have generally rejected the NLRB's attempts to simply attribute a foreman or supervisor's knowledge of an employee's [concerted] activities to the company. Automatically imputing such knowledge to a company improperly removes the General Counsel's burden of proving knowledge.”)

Furthermore, the fact that Quinones and Daley “report directly”, or generally promised to report, to Packin the concerns raised at the staff meeting does not lend itself to the conclusion that Quinones and Daley *did in fact* report what had transpired to Packin, and specifically, the “concerted nature” of Davis’ activity.

Indeed, there is no evidence that Quinones had any type of conversation with Packin following the staff meeting. In addition, while Daley “mentioned something [to Packin] about Ms. Davis talking about health benefits, [h]e didn't go into specifics.” JA369. From Daley’s perspective, Davis merely “spoke on behalf of her and the things that she wanted to change and have done”. JA182.

The NLRB misquotes the transcript when it selectively cites Daley’s comment that he “offered a direct response to all the staff that were there at the time.” NLRB Brief, p. 24. By making this comment, Daley was not saying that he responded to all the staff in response to concerns raised specifically by Davis; instead a review of the transcript (JA 203-04) indicates that a lot of staff, apart from Davis, raised issues about the work environment, to which Daley responded to. *See* JA 204 (“I told Brian Packin what all the staff had mentioned and did not say who specifically it came from because there were issues and concerns from all staff.”)

Finally, while the NLRB notes that Davis used the plural form when addressing employee concerns at the staff meeting and, further, that fellow employees nodded their heads with approval, there is simply no evidence in the record that Davis' use of the plural form, as well as, those nods of approval were ever communicated to Packin.

Accordingly, since Packin did not have knowledge of the concerted nature of Davis' activity, he could not have terminated Davis for engaging in such activity.

b. The NLRB Placed, and Continues to Place, Undue Emphasis on the “Suspicious Timing” of Davis’ Discharge

As the Board found, and as the NLRB repeatedly points out in its brief, Davis was discharged a mere two days after one instance of alleged engagement in protected concerted activity. Parkview does not deny, and has never denied, this sequence of events. However, once more, the NLRB places undue emphasis on the timing of these two events (i.e. the January 27, 2016 staff meeting and Davis' termination on Jan. 29) that were merely coincidental. A review of the entire record and the context upon which Davis' termination transpired reveals that these two events were not even remotely causally linked. Where “timing is the only thing....that is not enough [to establish] animus and causation.” *Vulcan*

Basement Waterproofing of Illinois, Inc. v. N.L.R.B., 219 F.3d 677, 688 (7th Cir 2000). See further *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-18 (7th Cir.1992) (“mere coincidence is not sufficient evidence of antiunion animus”).

In support of its overwhelming reliance on temporal proximity, the NLRB argues that “[b]ecause direct evidence of employer motivation is seldom available, it is “perfectly proper,” as this Court has put it, for the Board to establish motivation based on “circumstantial evidence and inferences of probability drawn from the totality of other facts.” NLRB Brief, p. 21.

However, in this case direct evidence of Parkview’s motivation for Davis’ discharge *is* available; such evidence was disregarded, *in toto*, in the Board’s Decision and Order. Through various internal emails – the existence and veracity of which has never been disputed – Davis’ managers, Daley, Aksentyeva, and Torres, all separately bring to Packin’s attention various issues they had with Davis, all stemming from Davis’ insubordination, mere weeks prior to her termination. On January 18, 2016, in an email to Aksentyeva, Packin referenced Daley’s comments about Davis that “she was unruly and out of line” and suggested that they have a meeting with Davis to see if she could be “rehabilitated”. JA481. The meeting transpired on January 22, 2016 and Davis, Packin, Aksentyeva and Daley were all present; a transcript and recording of the meeting was provided by Davis.

The transcript clearly shows that the nature of the meeting was disciplinary in nature and not simply intended to “smooth things over”, as the NLRB argues. During that meeting, Packin expressed his concerns to Davis about her “combateness” and was at pains to emphasize that “[u]ltimately” Davis had “to get along” with management and her managers “have to feel they can manage you, give you constructive criticism and try and help make the situation better.” JA460. Packin also warned Davis: “I don't want to be in a situation where everyone at least management wise can't feel they can deliver a message to you because you may react.” JA461-462.

Despite this meeting and Packin’s clear warnings to Davis, the problems persisted and appeared even more exacerbated in the few days just prior to her termination. In an email sent by Davis to Daley on January 28, 2016, (JA455) the day prior to her termination, Davis repeatedly refused to acknowledge and correct issues brought to her attention by Daley the day before. Amongst the issues discussed with Davis, were (in Davis’ own words) that she was “difficult to speak to” and that she spoke “poorly to Aderley (Servers Asst), Rachel (Cocktail Waitress) and Jonathan [Torres] (Asst. Manager/Servers Asst).” JA455. After Daley communicated the contents of that email to Packin – another fact that is undisputed – Packin had no option but to terminate Davis’ employment. In that respect, the Administrative Law Judge correctly concluded

that Packin terminated Davis because of comments “she conveyed to Daley on January 28.” JA491.

In utter disregard of all the testimony and documentary evidence presented by Parkview, the NLRB argues that “Davis was never issued any warning or otherwise disciplined” for her confrontations with management. NLRB Brief, p. 28. This is a complete misstatement; while Davis may not have been issued with a *written* disciplinary notice (as this was not Parkview’s practice), she received ample criticism and warnings about her confrontational behavior both from her managers and from Packin. Only a few days prior to her termination, Davis had two separate meetings (on Jan. 22, 2016 and on Jan. 27, 2016) whereby two separate individuals with managerial authority – Packin and Daley – told her that she needed to reform her behavior.

Similarly, the NLRB’s argument that Davis’ “explanatory email to Daley.... constitutes no confrontation at all [and therefore] cannot qualify as a “legitimate intervening event”” (NLRB Brief, p. 28) is contradictory to the actual content of the email itself, which both references continuous confrontations Davis had with co-worker and manager Torres, and is clearly written in a confrontational manner, accusing Daley of, *inter alia*, "holding a vendetta" against her. *Id.*

Parkview respectfully urges this court to look at the contents of the transcript of the January 22, 2016 meeting (JA460 – JA465), as well as, Davis’ email dated January 28, 2016 (JA455) since these documents speak for themselves. In light of the sequence of events that transpired a mere few days prior to Davis’ termination, her termination was not “abrupt”, as the NLRB wants this court to believe, but was instead both consistent with the timeline of events and entirely justified.

c. The NLRB Fails to Demonstrate that Parkview’s Proffered Reasons for Davis’ Discharge were False; Further, Parkview’s Proffered Reasons were Neither Shifting Nor Inconsistent

As argued in Parkview’s principal brief, an employer’s reason for discharge cannot be proved to be “a pretext for discrimination” unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary’s Honor Ctr. V. Hicks*, 509 U.S. 502, 515 (1993). The NLRB does not address the U.S. Supreme Court authority on this issue; instead, it relies on *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), for the proposition that Parkview’s purportedly “shifting and inconsistent reasons for its sudden discharge of Davis strengthen the inference that it acted with a retaliatory motive.” NLRB Brief, p. 28.

Yet a close review of the record shows that Parkview's proffered reasons for Davis' discharge were both legitimate and entirely consistent. The NLRB cannot seriously dispute that, by the time of her discharge, Davis could not "get along with management"; the reason given to her by Packin at the time of her termination. In its principal brief, Parkview describes, at length, Davis' various confrontational incidents with all three of her managers; the NLRB does not even attempt to address all these incidents. The fact that Parkview had initially "tolerated Davis's slights towards Torres and Aksentyeva" (JA 491; NLRB Brief, p. 30) does not mean that Parkview was forced to continue to tolerate Davis' exacerbating confrontational behavior, especially in light of repeated warnings given to Davis. *See Vulcan Basement Waterproofing of Illinois, Inc. v. N.L.R.B.*, 219 F.3d 677, 689 (7th Cir 2000) ("[a]n employer who has tolerated bad behavior in the past is not forced to continue to do so, let alone required to tolerate *increasingly* bad behavior.")

In addition, the NLRB's remarks that Parkview removed "Torres from the facility", that "Packin and Aksentyeva praised Davis's work as a server" during the January 22, 2016 meeting, and that "Aksentyeva apologized for any disrespect she may have shown Davis" (NLRB Brief, pp. 30-31) are all taken out of context. A plain reading of the transcript of the January 22 meeting (JA460 – JA465) shows that Packin repeatedly raised concerns about Davis' attitude and

“combativeness” towards Jonathan Torres (JA461-462), and Aksentyeva’s and Packin’s seemingly complimentary words were made simply in an effort to encourage Davis to work better with management on the floor, or, in Packin’s own words, “to allow [her] to feel a sense of motivation or a bit of confidence in an environment where we are having a lot of concern and challenges to be able to give her an opportunity to feel like she could go out and have a change to actually do well.” JA386.

Furthermore, the mere fact that Packin – in the course of his two-minute phone discussion with Davis – presented Davis’ inability to work with management as the reason for her discharge and did not mention other reasons, does not make his much more extensive and lengthy testimony at trial, citing other considerations, incredible. Indeed, “[a]n employer is not required to give reasons when it fires its employees” (*Vulcan Basement, supra*, 688 (7th Cir 2000)), nor was Packin somehow obliged to explain to Davis his entire thought process behind his decision to terminate her.

Nor is Daley’s correspondence with the Department of Labor somehow suspect because it mentions performance issues on the floor, in addition to Davis’ “confrontational relationships with management”, as a reason for Davis’ discharge. As an initial matter, it was Daley, not Packin, that prepared the DOL response and there is no evidence that Packin ever discussed *in verbatim* with

Daley what Packin had told Davis regarding the reasons for her termination. In that respect, Daley's somewhat "different emphasis" in the reasons behind Davis' termination "should not be discarded as "shifting reasons"...[where] there are multiple bona fide reasons for firing an employee, the fact that different supervisors with different experiences cite or emphasize different legitimate reasons does not give rise to a reasonable inference of an unlawful motive." *Vulcan Basement, supra*, 689 (7th Cir. 2000). "It is not reasonable to pigeonhole [the employer's] reasons in this way." *Id.*

Second, it is unclear that Daley, a non-lawyer filling out correspondence with the DOL, would have appreciated the semantic difference between the reasons for Davis' discharge and what Davis was specifically "told" about the reasons for her discharge.

Third, while initially "a skilled and senior server" (NLRB Brief, p. 32), certain performance issues came to the surface in the days prior to Davis' termination that the NLRB cannot credibly dispute; these issues were also taken into consideration prior to her discharge. JA385. These performance issues were documented by Aksentyeva in an email to Packin on January 15, 2016 (JA470), in the transcript of the January 22, 2016 meeting with Davis (JA461), in an email by Daley to Davis on January 26, 2016 informing her that he needed "to see changes and improvement in [her] service" (JA453), and in Davis' own

email to Daley, sent on January 28, 2016, memorializing a conversation that the two of them had the day before, whereby Daley criticized Davis for failing to pay attention to her table causing customers to leave without paying (JA455). In its brief, the NLRB does not deny, or attempt to justify, Davis' performance issues.

Finally, the NLRB challenges Daley's statements in the DOL form that Davis had a "problem "getting along" with other floor staff" as "equally baseless". NLRB Brief, p. 33. While addressed in a footnote in the ALJ's decision, there is no evidence that the Board credited the part of the ALJ's decision that questioned Davis' deteriorating relationship with her co-workers. In any event, the testimony of co-worker Matija Rajak, noting that it was "harder to work more and more with her" (JA222), as well as, Davis' January 28, 2016 email to Daley clearly documents the conflicts that Davis had, not only with management, but also with "Adderley (Servers Asst)" and "Rachel (Cocktail Waitress)" to whom Davis had evidently "spoke[n] poorly to". JA455.

Given the record evidence, it is absurd that the NLRB implies that Parkview concocted Davis' inability to work with management in an attempt to hide its "true motivation" behind Davis' discharge. NLRB Brief, p. 31. It should be noted that the majority of the evidence that Parkview relies upon in demonstrating Davis' deteriorating relationships with management was actually

provided by Davis; it was Davis that recorded the January 22 disciplinary meeting and provided a transcript thereof, and it is Davis that chose to write a lengthy confrontational email to Daley on January 28, 2016, documenting concerns Daley had raised to her the day before. Davis' email was entirely unprompted by Daley, or any agent of Parkview; therefore it is a bizarre assumption to make that such email "provided Packin with a ready excuse for a discharge that was actually motivated by Davis's protected concerted activity the previous day." *Id.*

It is not clear and Davis never explained why she felt compelled to make multiple recordings of events that transpired mere days prior to her termination (including a recording of her participation in protected concerted activity); such behavior stands in stark contract with the NLRB's argument that Davis' position was secure prior to the January 27 staff meeting. However, if any inferences are to be made about anyone's "motivation" behind their conduct, the inference should be that Davis knew that her termination was imminent and started documenting material in anticipation of filing her NLRB charge, rather than Parkview having concocted any reason for terminating Davis.

d. The NLRB Failed to Assess Other Circumstantial Factors That Support an Inference that Parkview did not violate NLRA § 8(a)(1)

In its Brief, the NLRB does not dispute the fact that other employees spoke out at the January 27 staff meeting, but suffered no adverse employment action. Instead, it cites authority for the proposition that “an employer’s failure to retaliate against some employees who engaged in protected activity does not disprove a conclusion that it retaliated against others.” NLRB Brief, p. 34. To that effect, the NLRB cites *McGaw of Puerto Rico, Inc. v. N.L.R.B.*, 135 F.3d 1, 9 (1st Cir. 1997) which held that “adverse action may be unlawfully discriminatory whether or not all union adherents suffer at once.”

While it is true that an employer cannot escape liability for their discriminatory acts against one employee, by showing that they did not discriminate against another, it remains the case that disparate treatment of similarly situated employees is a type of “circumstance evidence” that this court is allowed to consider in reaching a determination as to the motive behind an employer's adverse employment action. *N.L.R.B. v. Homer D. Bronson Co.*, 273 Fed. Appx. 32, 37-38 (2d Cir. 2008).

Indeed, *Union-Tribune Pub. Co. v. N.L.R.B.*, 1 F.3d 486 (7th Cir. 1993), a case relied upon by the NLRB in its brief, clearly states that “[a] finding of pretext, standing alone, does not support a conclusion that a firing was

improperly motivated”. *Id.* at 491. In *Union-Tribune*, the Seventh Circuit took into consideration the employer’s response to other similarly-situated employees’ engagement in protected activities, in reaching its conclusion on whether the NLRA was violated. However, in the instant matter, the NLRB failed, *in toto*, to take into account Parkview’s actions (or inactions) with respect to other employees who participated in concerted activity in the January 27 staff meeting.

In its brief, the NLRB is asking this Court to consider circumstantial evidence surrounding the “suspicious timing” of Davis’ discharge, yet it objects to this court taking into account other circumstantial evidence that is clearly relevant in determining the motive behind Davis’ discharge. The NLRB should not be allowed to have its cake and eat it too.

Furthermore, while the NLRB correctly notes that the Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole, the court's review of “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 at 488 (1951). “Judicial deference is not warranted where the Board fails to adequately explain its reasoning, or where the Board leaves critical gaps in its reasoning.” *David Saxe Productions, LLC v. Natl. Labor Relations Bd.*, 888 F.3d 1305, 1311 (D.C. Cir. 2018).

In the instant matter, while the NLRB apparently reviewed certain circumstantial evidence in arriving at its conclusion that Parkview had committed an unfair labor practice, i.e. the timing of events and the proffered reasons for termination, it completely failed to account other factors that further shed light to Packin's state of mind when he terminated Davis.

e. Assuming, *arguendo*, that Davis' Engagement in Concerted Activity was a Motivating Factor to Her Termination, the Remedies of Reinstatement and Back Pay are Inappropriate Because she was Fired For Cause

As pointed out in Parkview's principal brief, Section 10(c) of the NLRA provides, in relevant part, that "[n]o order of the Board shall require reinstatement of any individual as an employee who had been suspended or discharged, or the payment of any back pay, if such individual was suspended or discharged for cause."

The NLRB effectively ignores Parkview's argument and citation to authorities and argues, instead, that the mere finding of a violation of NLRA § 8(a)(1) automatically renders the remedies of reinstatement and back pay appropriate. Yet, in arguing that "the Board is authorized without doubt to order reinstatement and backpay as a remedy under Section 10(c) where an employer's adverse action is motivated by an employee's protected activity" (NLRB Brief,

p. 37), the NLRB effectively renders Section 10(c) of the NLRA redundant.

However, there have been cases where an appellate court found that the employer violated the NLRA § 8(a)(1), yet refused to order reinstatement and back pay because the employee(s) in question was fired “for cause”. *See Pac. Tel. & Tel. Co. v. N.L.R.B.*, 711 F.2d 134, 138 (9th Cir. 1983); *see further N.L.R.B. v. Kahn's and Co., Div. of Consol. Food Co.*, 694 F.2d 1070, 1072 (6th Cir. 1982) (precluding order of back pay and reinstatement where employee was discharged “for good cause”).

As the U.S. Supreme Court has held, Section 10(c) of the NLRA “was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct.” *Fibreboard Paper Products Corp. v N. L. R. B.*, 379 U.S. 203, 217, 85 S Ct 398, 406, 13 L Ed 2d 233 (1964). Citing a House Report, the U.S. Supreme court noted that “the provision was intended to put an end to the belief...that engaging in [protected] activities carries with it a license to...waste time, break rules, and engage in incivilities.” *Id.*

In the instant matter, the NLRB does not dispute that Davis exhibited a persistently confrontational behavior towards management, which was not remedied following repeated warnings. Davis’ behavior amounted to “misconduct”; Davis even threatened physical violence against manager Jonathan Torres. JA458-459. Reviewing the evidence of the record as a whole, it cannot

be seriously disputed that Davis' confrontations with management had an impact to Parkview's decision to terminate her. Accordingly, even if this court finds that Davis' engagement in protected concerted activity was also a motivating factor behind her termination, reinstatement and back pay is inappropriate under the NLRA, because Davis was terminated for cause.

CONCLUSION

For these reasons, the Court should grant Parkview's petition for review, deny the Board's cross-application for enforcement, reverse the decision and order of the Board in its entirety, and order any such other relief as it deems appropriate.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

This Reply Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and Local Rule 32.1 because it contains a total of 4,600 words.

This Brief complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6) because it uses 14-point Times New Roman proportional font.

Dated: February 4, 2019

 /s/Ariadne Panagopoulou
Ariadne Panagopoulou

CERTIFICATE OF SERVICE

I certify that on February 4, 2019, the foregoing Reply Brief was filed with the Clerk of this Court using the CM/ECF system, which will send electronic notice of such filing to counsel of record for all parties.

Dated: February 4, 2019

/s/Ariadne Panagopoulou
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