

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 02

UNITED STATES POSTAL SERVICE,)	
)	
Respondent)	
)	
and)	Case 02-CA-219434
)	
)	
NATIONAL ASSOCIATION OF LETTER, CARRIERS,)	
)	
Charging Party)	

RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION
AND SUPPORTING BRIEF

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Respondent, United States Postal Service (“Postal Service”), pursuant to Section 102.46 of the Board’s Rules and Regulations, hereby timely submits its exceptions to the Administrative Law Judge’s (ALJ’s) decision, issued on May 3, 2019. Respondent incorporates its supporting brief, including the citation of authorities, with its exceptions herein.

Respondent does not take issue with the ALJ’s credibility findings. As such, Respondent does not take issue with the ALJ’s findings of facts that Mr. White sufficiently raised his Weingarten rights (1) when talking alone with Supervisor Bardis in the supervisors’ office, (2) when he first entered the conference room with Supervisor Bardis and Supervisor Cail, before Postmaster DiPasquale entered, and (3) after Mr. DiPasquale verbally told him he was terminated. Respondent files exceptions only with respect to the following rulings made by the ALJ.

1. The ALJ erred when he factually determined that Mr. White asked to speak to someone after Mr. DiPasquale entered the conference room and before Mr. DiPasquale verbally terminated him

The ALJ’s ruling is set forth at pages 5 [lines 1-7] and 7 [lines 23-34] of the decision.

Specifically, at page 5, the ALJ found as follows:

Postmaster DiPasquale entered a few minutes later, and White began to tell him that he was not refusing to go to Scarsdale, just that he was already on the bus en route to New Rochelle. **White asked again for someone to speak to, but Mr. DiPasquale told White that this was not his time to talk. White responded saying that ‘I have rights, and I want to talk to somebody,’ to which Mr. DiPasquale replied, ‘you have no rights.’** White insisted that ‘I’m an American, and I know I do,’ but DiPasquale just told him at that point that he was terminated, and told Cail to call the police.

ALJ Decision (emphasis added).

Later, at page 7, the ALJ found as follows:

Moreover, I credit White's testimony that he asked for someone immediately upon DiPasquale's arrival, which is consistent with the fact that he had already asked both Bardis and Cail for someone to speak to and had his request denied and/or ignored. And I credit White's testimony that DiPasquale dismissed his request, as it was consistent with DiPasquale's admitted belief that he was not entitled to one.

Finally, I do not credit DiPasquale's claim that White did not ask for a representative until after he was terminated. Both he and Cail acknowledge that White was speaking from the moment that DiPasquale entered the room, before any action was taken. Additionally, it is undisputed that White repeatedly told all three supervisors that he had rights, and I find that having already requested a representative from each of them, it was plain to all three managers what rights he was referencing.

ALJ Decision (emphasis added).

However, there is absolutely no evidence to support these factual findings. Even accepting Mr. White's own testimony as true, he never asked to speak to someone in Mr. DiPasquale's presence, until after Mr. DiPasquale terminated him. He certainly never stated, as the ALJ quotes, "I have rights, and I want to speak to somebody," to which Mr. DiPasquale allegedly stated "you have no rights." The ALJ, plainly and simply, made up this testimony, as it appears nowhere in the transcript. To the contrary, Mr. White testified as follows about first entering the conference room:

Q Okay. When you entered the conference room, you and Anthony went into the conference room?

A Yes.

Q Did anyone else come into the conference room?

A Angela was already in the conference room when we entered the conference room.

Q And Angela is the person you identified before as a supervisor?

A Yes.

Q So at this point, there's you, Anthony, and Angela in a room; is that correct?

A Yes, in the conference room.

Q And at some point, Mr. DiPas -- Ed DiPasquale came into the room?

A Yes.

Q Now before he came into the room, tell us what, if anything, was said while you, Anthony, and Angela were in the room.

A I asked for help, and I asked for someone -- to speak with someone that could help me again. And no one answered me.

Q And how long was it before Mr. DiPasquale entered the room?

A It wasn't long, maybe three, five minutes, three to five minutes.

Tr. (pp. 50-51).

Mr. White later confirmed this testimony on cross-examination:

Q Okay. You also testified that when you moved into the room, the conference room next door --

A Um-hum.

Q -- when Angela and Anthony were present.

A Yes.

Q You again asked for help?

A Yes.

Q And that was before Ed showed up?

A Yes.

Tr. (p. 58).

As such, there is no dispute that Mr. White's request to Mr. Bardis and Ms. Cail for "help" or for "someone" occurred before Mr. DiPasquale entered the conference room. Mr.

White also described his subsequent conversation with Mr. DiPasquale in the conference room as follows:

So to my recollection, to the best of my knowledge, I sat down and tried to explain to Ed the misunderstanding, that I was not trying – I was not saying I didn't want – I wasn't going to Scarsdale; I just wasn't going there from the bus at that time. If he would have sent me to Scarsdale, I would have no choice but to do it. Ed told me to be quiet, it's not my time to talk. Then that's when I asked them – that's when I asked if there is anybody I can – I – so Ed asked – Ed told me this – this is not my time to talk. That's when I then – that's when we – that's when I said, I have rights. I said, I have rights; Ed told me I have no rights. And that's when I got a little snappy and said, I'm an American, I know I have rights. And that's when he terminated me.

Tr. (p. 51).

As such, Mr. White did not ask to “speak to” someone or say that “I want to talk to somebody,” as the ALJ found in his decision. At most, Mr. White asked “if there is anybody I can – I ...,” without finishing the thought. This is not conclusive testimony of anything, let alone a request to speak to somebody or for union representation. It is an incomplete thought, a fragment of a sentence that Mr. White never finished. Talley v. Barnhart, 2008 WL 2414841 at *9 (M.D. Tenn. 2008)(a “sentence fragment” in a doctor's report, standing alone, is “the very definition of a mere scintilla” and provides insufficient evidence to challenge plaintiff's credibility). Indeed, Mr. White may have finished this sentence in any number of ways – e.g., “if there is anybody I can ask to go to Scarsdale in my place.” Nor did counsel for the General Counsel or the ALJ follow up on this partial thought to determine precisely what Mr. White meant.

Finally, Mr. White described what happened after Mr. DiPasquale told him he was verbally terminated as follows:

Q What did he say to you. You said he terminated you; what did he say?

A He told me to hand in my badge and my satchel, and he said I'm terminated. And then he told Angela to call the police.

Q Did he tell Angela to call the police before he left the room?

A Yes. It was all in one saying; hand in your stuff, Angela call the police. That's how it was.

Q Did you tell Mr. -- tell Ed DiPasquale that you were not going to leave the room?

A Until I talked to somebody, yes.

Q Until you talked to somebody?

A Talked to somebody, yes. And then that's when I called Joe.

Q Are you referring to Mr. DeStefano?

A Yes.

Tr. (pp. 51-52).

Similarly, Mr. White testified on cross-examination as follows:

Q And then after Ed said you were terminated, and to turn in your ID-badge, you testified earlier that you said, I'm not leaving until I talk to someone, or words to that effect?

A Yes.

Tr. (pp. 58-59).

As such, the evidence conclusively establishes that, after Mr. DiPasquale verbally told Mr. White he was terminated, Mr. White said he would not leave until he talked to somebody. There is no evidence, however, that Mr. White asked to speak to somebody in Mr. DiPasquale's presence before he terminated Mr. White.¹

¹ Mr. DiPasquale testified that he was "one hundred percent" sure that Mr. White did not ask for union representation until after Mr. DiPasquale terminated him. Tr. (p. 88). This testimony was consistent with the testimony of both Mr. Bardis and Ms. Cail. Tr. (pp. 147-48, 193, 208-09 and 247).

Finally, the ALJ erred when he concluded that, because Mr. White told Mr. DiPasquale he “had rights,” Mr. DiPasquale “knew what rights he was referencing.” First, the ALJ premised this conclusion on the erroneous finding that Mr. White had “already requested a representative” from Mr. DiPasquale at the time he terminated Mr. White. As set forth above, however, this is plainly untrue. Second, there is nothing in the phrase “I have rights” that inherently put Mr. DiPasquale on notice that Mr. White was asserting his Weingarten rights. An employee may have, or perceive he has, many rights. Moreover, Mr. White stated that he had rights in the context of being “an American.” When asked what he thought Mr. White meant when he said “I have rights,” Mr. DiPasquale testified as follows:

I believe his comments to me was he didn't have to follow my instructions; he didn't have to do or – respond to anything that we had to say; that he had rights to be in America, with the verbiage, and he could do what he wants. And of course, in my opinion at that time or my feeling is, you don't have those rights to be abusive to me in any way, shape or form. And that's how I interpret his behavior.

Tr. (p. 117).

Wherefore, Mr. DiPasquale did not know, or have reason to know, that Mr. White was seeking union representation before verbally terminating him.

2. The ALJ erred when, predicated on his erroneous factual determinations, above, he concluded that Mr. DiPasquale was aware of any protected activity by Mr. White or was motivated by unlawful animus when he terminated Mr. White

The ALJ's ruling is set forth at pages 8 [lines 22-33]. Specifically, at page 8, the ALJ found as follows:

Here, I find White clearly engaged in protected activity by virtue of his initially requesting a union representative in his meeting with Bardis, reiterating that request in his meeting with Bardis and Cail, **asking again at the start of his meeting with Bardis, Cail and DiPasquale, and when he insisted during that meeting that he 'had rights' to that requested assistance. As**

discussed in the previous section of this decision, I find that Respondent was aware of White's activity.

As for animus, I find that the Employer's formal letter of discharge, attributing White's termination first to a refusal to follow instructions, then to attendance related issues, and finally to insubordination, to be pretextual excuses designed to avoid liability and therefore, evidence of Respondent's animus. Accordingly, I find that White's concerted activity was a substantial and motivating factor for his discharge, and as such, I find the General Counsel has met its initial prima facie burden.

ALJ Decision (emphasis added).

The Board applies the Wright Line analysis not only to 8(a)(3) discrimination cases, but also to 8(a)(1) concerted activity cases that involve disputes about an employer's motivation for taking an adverse employment action against employees. Hoodview Vending Co., 359 NLRB 355, 359 (2012); Saigon Gourmet Restaurant, Inc., 353 NLRB 1063, 1065 (2009). This is also the case where the alleged protected activity is an employee's request for union representation. T.N.T. Red Star Express, 299 NLRB 894, 895 fn. 6 (1990)(Wright Line analysis appropriate in complaint of discipline imposed because employee asserted Weingarten rights); Wal-Mart Stores, Inc., 351 NLRB 130, 133 (2007)(Wright Line framework utilized where discharge allegedly based on employee's protected insistence on his Weingarten right to a witness).

Therefore, the burden is on the General Counsel to establish that a substantial or motivating factor in the employer's decision to take an adverse employment action against an employee was the employee's protected activity. Under the Wright-Line framework, as developed by the Board, the General Counsel must establish the following elements: (1) the existence of protected activity; (2) the employer's knowledge of that activity; and (3) union animus on the part of the employer. Adams & Associates, Inc., 363 NLRB No. 193, slip op. at 6 (2016); Libertyville Toyota, 360 NLRB 1298, 1301 (2014); enf. 801 F.3d 767 (7th Cir. 2015). "It is axiomatic that an employer could not have been unlawfully motivated if it was unaware of protected activity." Tomafek, Inc., 333 NLRB 1350, 1356 (2001).

Here, it is undisputed that Mr. DiPasquale, alone, made the decision to terminate Mr. White during their meeting in the conference room, and notified him of such. Tr. (pp. 51, 80, 118). Furthermore, as set forth above, Mr. DiPasquale was not present in the meeting between Mr. White and Supervisor Bardis, before they were called into the conference room with Mr. DiPasquale. Once in the conference room with Mr. DiPasquale, Mr. White did not say anything that would put Mr. DiPasquale on notice that he had previously requested union representation beforehand. Likewise, Mr. White did not ask to “speak to somebody” or otherwise say anything while in the conference room to put Mr. DiPasquale on notice that we was requesting union representation – until after he was terminated and told to leave, when he said “I’m not leaving until I speak to the union/someone.” Finally, neither of the written statements prepared by Mr. Bardis and Ms. Cail, to the extent Mr. DiPasquale reviewed them before issuing his formal letter of removal, in any way referenced Mr. White’s prior requests for help or to speak to someone. Tr. (pp. 149, 210-11); R. Exhibits 6 and 7.

As such, General Counsel has necessarily failed to satisfy its burden of proof that Mr. DiPasquale was aware of Mr. White’s protected activity or that animus toward the protected activity was a substantial and motivating factor.²

² The ALJ appears to cite to the April 7, 2018, formal letter of discharge both to show animus by Mr. DiPasquale [which is part of the Charging Party’s burden of proof] and as pretext to show that the Mr. DiPasquale would not have taken the same action absent the protected activity [which is part of Respondent’s shifted burden of proof]. This is contrary to the Board’s admonition that “in assessing whether a prima facie case has been presented ... a judge must view the General Counsel’s evidence in isolation, apart from a respondent’s proffered defense. See, e.g., Bali Blinds Midwest, 292 NLRB 243 fn. 2 (1989); Hillside Bus Corp., 262 NLRB 1254 (1982). Regardless, since Mr. DiPasquale’s decision to remove Mr. White was made during the meeting in the conference room on April 6, 2018 – the day before the formal letter of discharge was issued – it cannot be evidence of anti-union animus. It is undisputed that Mr. DiPasquale made the decision to remove Mr. White based on the information he had at the time he verbally terminated Mr. White. Respondent will address the formal letter of discharge in the context of pretext, below.

3. Alternatively, the ALJ erred when he concluded that Mr. DiPasquale would not have taken the same action in the absence of protected activity by Mr. White

The ALJ's ruling is set forth at pages 8 [lines 28-38] and 9 [lines 1-17]. Specifically, at pages 8 and 9, the ALJ found as follows:

With the burden shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct, I find that Respondent has failed to meet its burden. **First, as noted above, I find that Respondent's attempt to supplement and bolster the rationale for White's termination with additional bases that even DiPasquale acknowledged were not real reasons was plainly pretext.** See Inter-Disciplinary Advantage, Inc. , 349 NLRB 480, 509 (2007).

Moreover, I find that Respondent would not have discharged White had he not requested the assistance of a union representative for his interview with management on April 6, 2018, and insisted that it was his right to have that assistance. I find nothing of significance occurred between his request for a union representative and his discharge except for his insistence that he was entitled to that. That timing, given the totality of the circumstances in this case, cannot be ignored.

Therefore, I find that Respondent has not met its burden under Wright Line, and that it cannot prove it would have taken the same action against White even in the absence of his protected conduct. Indeed, I find that it would not have discharged White but for the intervening act of his asserting his *Weingarten* rights.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when it terminated White on April 6, 2018, and therefore, recommend that White be made whole for the unlawful actions taken by Respondent.

ALJ Decision (emphasis added).

Once the General Counsel has met its initial showing that the protected activity was a motivating or substantial reason in the employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. Hoodview Vending Co., *supra*, 359 NLRB at 359. Ultimately, the General Counsel retains the ultimate burden of proving

unlawful motivation. Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

Here, even assuming that General Counsel satisfied its initial burden, Respondent has met its burden of production under Wright Line by presenting evidence that Mr. DiPasquale would still have terminated Mr. White absent the protected activity. As discussed above, Mr. DiPasquale made the decision to terminate Mr. White during the meeting in the conference room on April 6, 2018, and so advised him. This decision was not based on Mr. White's protected activity because Mr. DiPasquale was not aware of any protected activity at that time. Rather, Mr. DiPasquale's decision was based on two things.

First, Mr. White failed to follow instructions when he refused "to sit down and talk with me." Tr. (p. 84). Specifically, Mr. DiPasquale testified that this was "absolutely" a serious offense because "when employees don't do what their asked to do, then they're – number one, they're no good to us and they become dangerous to themselves if they're not following simple instructions." Tr. (p. 86). Second, Mr. White was insubordinate during their meeting in the conference room. Specifically, Mr. DiPasquale testified that this was "one of the most serious" allegations and elaborated as follows:

Because I'm sitting here talking to you and I stand up and start yelling and screaming personally at you using vulgarity and you have no respect for the person that's in charge, I'm the person in charge of the entire building, and I can't trust you to do anything. I can't trust you to talk to carriers. I can't trust you to talk to other supervisors, customers, anybody.

Tr. (p. 86-87).

The next day, Mr. DiPasquale issued the formal letter of discharge, in which he cited both "refusing to follow instructions" and "insubordination" – the very reasons why he verbally terminated Mr. White the day before. Mr. DiPasquale also added a third charge of "attendance related issues" because he became aware that Mr. White had also been absent

without leave (“AWOL”). It is undisputed that Mr. White was, in fact, absent without leave on April 4, 2018. Tr. (pp. 225-26, 253-54): R. Exhibits 9 (p. 29) and 10 (p. 1). Mr. DiPasquale testified that “AWOL is very serious” and that “[y]ou have a certain amount of time under probation and during that time you should be at work every day, every day.” Tr. (p. 86).

The ALJ erroneously found these reasons to be pretextual on grounds (1) they changed from “first ... a refusal to follow instructions, then to attendance related issues, and finally to insubordination” and/or (2) that Mr. DiPasquale attempted to “supplement and bolster the rationale for Mr. White’s termination with additional bases that even DiPasquale acknowledged were not real reasons.”

First, the reasons did not change. As noted above, Mr. DiPasquale believed that Mr. White refused to follow instructions and was insubordinate on April 6, 2018, the day he verbally terminated Mr. White, and the next day, when he issued the letter of discharge. While Mr. DiPasquale added the AWOL charge to the letter of discharge, there is no dispute that Mr. White was AWOL on April 4, 2018. Therefore, all the charges included in the letter of discharge were true, based on what Mr. DiPasquale observed during the meeting in the conference room and what he learned the next day about Mr. White’s attendance.

Second, the ALJ misrepresents the facts when he stated that Mr. DiPasquale supplemented the letter of discharge with “additional bases that even DiPasquale acknowledged were not the real reasons.” Mr. DiPasquale candidly testified that the “real reason” he terminated Mr. White was not the AWOL or the issue about going to Hartsdale, but was for “the events at the meeting.” Tr. (p. 123). That is self-evident from the fact that he verbally terminated Mr. White during the meeting – before he became aware of Mr. White’s AWOL or the underlying dispute over whether Mr. White did or did not refuse to report to Hartsdale. That, however, does not preclude Mr. DiPasquale from adding the

AWOL charge to the letter of discharge, once brought to his attention. That likewise does not minimize the significance of being AWOL during a probationary period, just because he learned of it after verbally terminating Mr. White. And most importantly, it does not render the letter of discharge pretextual or in any way untrue.

Mr. DiPasquale also terminated probationary CCA Merrero for “failure to report an accident immediately” and probationary CCA Pillai for “[d]elaying of mail,” with no evidence that either of them engaged in protected activity. Tr. (pp. 92-94); R. Exhibits 4 and 5.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that the instant complaint be dismissed in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this this 31st day of May, 2019, I served Respondent's

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