

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4

In the Matter of:	)	
	)	
Ground Zero Foundation d/b/a	)	
Academy for Creative Enrichment,	)	
	)	
Respondent,	)	
	)	
and	)	Case No. 04-CA-245956
	)	
Stefanie Hamill, an Individual,	)	
	)	
Charging Party.	)	

**RESPONDENT’S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION**

Pursuant to § 102.46(a) of the National Labor Relations Board’s Rules and Regulations, Respondent, Ground Zero Foundation d/b/a Academy for Creative Enrichment (“Respondent”) respectfully submits its exceptions and argument in support to the Decision of the Administrative Law Judge (“ALJD”) Robert A. Giannasi (the “ALJ”) issued on March 25, 2020 and the related proceedings.

**EXCEPTIONS**

**Exception #1**

Respondent takes exception to the ALJ’s failure to consider the very text message that triggered Fine Washington’s decision to terminate charging party, Stefanie Hamill, as evidence supporting Ms. Washington’s lawful motive and lack of animus. The text message at issue is contained in a text message exchange between Ms. Hamill and Ms. Washington submitted into evidence as General Counsel Exhibit 2. In that exchange, at 10:14 a.m., Ms. Washington texted

Ms. Hamill: “you should probably be active involved in whatever is going on on the bus but instead you are on your cell phone which I notice you do often.” Tr. 26:11-14, GC Ex. 2 at 5.

Ms. Hamill responded at 10:16 a.m.: **“When I am being underpaid that is going to be my main concern. I am checking on the kids while I am texting but I don’t think the attention should be taken off the subject at hand, which is my pay being docked.”** GC Ex. 2 at 5.

Nowhere in the ALJD is this latter text considered in relation to Ms. Washington’s motivation to terminate Ms. Hamill. In fact, text message evidence shows that, within minutes of receiving this message, Ms. Washington communicated her intent to another supervisor, Ms. Porter, to terminate Ms. Hamill. *See* Respondent’s Ex. 1 (message time stamped 10:19 a.m. from Ms. Washington to Ms. Porter stating, “Houston we have a problem. If you were still here I’d fire Stefanie on the spot.”).

This evidence, especially the timing, is important because it demonstrates that the Respondent would have taken the same action even absent Ms. Hamill’s protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (if the General Counsel meets its initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee’s protected activity); *see, also In re Exterior Systems, Inc.*, 338 NLRB 677, 678 (2002) (affirming judge’s finding that animus “did not contribute” to the employer’s hiring decision); *Lou’s Transport, Inc.*, 361 NLRB 1446, 1458 (2014), *enfd.* 644 F. App’x 690 (6th Cir. 2016) (timing of employee’s discharge is not suspicious even though it occurred on the same day as protected activity where it also occurred on the same day that the employer discovered that the employee had responded to an instruction to continue

working by saying “f—ck you”). The Board should therefore reverse the ALJ’s finding as to motivation since the ALJ ignored crucial contemporaneous document-based evidence of motive.

**Exception #2**

Respondent takes exception to the finding that “Respondent discharged Hamill for engaging in protected concerted activity—discussing group concerns about rounding hours of work with fellow employees and bringing those group concerns to the attention of management,” (ALJD 11:31-34) and that the Respondent’s proffered reasons for termination were pretextual because they were “inconsistent” or “shifting” (ALJD at 13:6-8). These related findings are controverted by the record in that they ignore the text message exchange timing as discussed above in reference to Exception #1.

In addition, there is other record evidence that supports the conclusion to the contrary – that Hamill was discharged for the non-pretextual reasons of insubordination and neglecting the children in her care. When Ms. Washington was asked whether she fired Ms. Hamill because she was discussing working conditions, Ms. Washington responded that she did not – that:

I fired her because when I asked her to stop texting she continued to do so. And she made that statement basically telling me that she wasn’t going to stop.

Tr. 106:9-15. To the extent the ALJ discredited Ms. Washington’s testimony “as a general matter,” he noted that it could be credited if it were “against interest or supported by other credible evidence.” ALJD 6:37-39. The text message exchanges as discussed in Exception #1 is such credible evidence that supports Ms. Washington’s testimony. *See* GC Ex. 2 at 5, Respondent’s Ex. 1.

In addition, the termination letter for Ms. Hamill, dated contemporaneously with the termination – July 31, 2019 – provides, in part, that:

Stefanie was still texting the Admin, Ms. Washington regarding her questions she had about her pay. The texts lasted until 11:09 even though the Administrator texted her at 10:14 a.m., “This matter should be discussed when she returned and she should be giving her full attention to the campers.” Her response was, “When I am being underpaid that is going to be my main concern.” She continued to text. On the bus ride back to the camp Stefanie proceeded to text three other counselors on the bus for the duration of the trip.

Stefanie was terminated due to:

- Excessive use of her cell phone
- Neglect of the campers in her charge
- Insubordination

GC Ex. 7 at unnumbered page 3. On September 4, 2019, in a letter to the NLRB Investigator, Ms. Washington explained that Ms. Hamill was terminated for “neglect of her duties involving the care of children” and for “jeopardizing the safety and welfare of the children she is responsible for (neglect).” GC Ex. 8 at 1. In that same letter, Ms. Washington also recounts the June 26, 2019 incident in which Ms. Hamill left a child unsupervised on a field trip. *Id.* Ms. Washington also explains the text exchange with Ms. Hamill on the morning of July 31, 2019 that led to her decision to terminate Ms. Hamill “due to negligence and insubordination.” *Id.* In further documentation part of the record, Respondent provided a statement that “Ms. Hamill’s discussion of wages with coworkers did not play a role in our decision to discharge her.” *Id.* at 2. These are not “shifting” reasons for termination – rather, they demonstrate that at the core of Ms. Hamill’s termination was her placement of her own interests above the interests of the children, as Ms. Washington was redirecting her to mind. That other, related reasons were provided does not undermine the common thread of insubordination and neglect of children. The ALJ’s reliance on these other reasons is therefore contradicted by the record evidence.

### **Exception #3**

Respondent takes exception to the finding that “. . . Washington objected to the content of the Hamill texts and her involvement of other employees rather than the act of texting itself.”

ALJD 12:13-14. This ignores text message evidence that Washington stated that she would “check” on Hamill’s concerns (GC Ex. 2 at 3) and that employees were provided an opportunity to discuss general work related concerns during weekly group meetings (Tr. 37:10-18, 20-21). It also ignores the text message that Ms. Washington sent, after texting Ms. Porter at 10:30 a.m. that she was “letting [Ms. Hamill] go” when the group returned from the field trip (Respondent’s Ex. 1), that stated at 11:12 a.m. “[Ms. Hamill is] still texting me!!!” (*id.*). This evidence supports the finding that Ms. Washington was not concerned with the content as much as she was that Ms. Hamill continued to text when she had asked her to stop. As such, this finding is not supported by credible record evidence.

#### **Exception # 4**

Respondent takes exception to the finding that “[t]he text exchanges do not show that Hamill insulted Washington or treated her in any way but respect. In fact, it was Washington who injected a certain nastiness to the exchanges. Nor do the text exchanges show a direct order to stop texting or a refusal to do so.” ALJD 14:3-4. This mischaracterizes the evidence. First, the ALJD points to nothing particularly “nasty” in characterizing Ms. Washington’s text messages and unreasonably ignores the context surrounding this text exchange – childcare is a heavily regulated industry, especially when it comes to cell phone use around children, and this text exchange should be interpreted in that light (Respondent’s Ex. 2). Against this backdrop, Ms. Hamill’s statement that her “main concern” in that moment is her personal pay issues (GC Ex. 2 at 5) cannot reasonably be viewed as respectful.

Nor is it reasonable to construe the following text message as anything but an order to turn her attention to the children on the bus: “you should probably be active involved in whatever is going on on the bus but instead you are on your cell phone which I notice you do often.” Tr.

26:11-14, GC Ex. 2 at 5. The ALJ mischaracterizes this as simply an “accusation,” (ALJ 3:41) which does not accurately describe the first portion of that message. A more reasonable reading supported by the evidence and considering the context of the childcare services industry is that Washington was concerned with the children’s safety and Hamill’s apparent lack of concern for the children in her charge.

**Exception #5**

Respondent takes exception to the finding that “Washington did not mention insubordination in the termination meeting, thus further showing that this was not an actual reason for the termination.” ALJD 14:14-17. This is not supported by the record – even Ms. Hamill acknowledged that she was being terminated for “texting on the bus, texting [Williams] about it on the bus and that [she] should have been supervising the children.” Tr. 42:2-5. While the word “insubordination” might not appear in the record at this point, the conduct that amounted to insubordination certainly was communicated to Ms. Hamill during the termination meeting. *Id.* And, as stated above, that other reasons were identified in the termination meeting – in addition to the failure to care for the children on the bus as asked – does not otherwise discredit that insubordination and neglect of children was the true motive for termination. In addition, the text message evidence in Respondent’s Exhibit 1 as discussed above also supports the fact that Ms. Washington intended to fire Ms. Hamill for continuing to text on the bus despite being asked to stop and asserting that she knew better what was to be her “main concern” at that point. GC Ex 2 at 5.

**Exception #6**

Respondent takes exception to the finding that: “. . . even focusing only on the text mentioned by Respondent in its brief, the timing of the decision strongly supports the inference

of discrimination.” ALJ 12:34-36. For the reasons stated in Exception #1, Respondent submits that the record evidence surrounding this timing supports a finding that Ms. Williams was motivated by Ms. Hamill’s insubordination and failure to care for the children in that moment.

**Exception #7**

Respondent takes exception to the Remedy portion of the ALJD to the extent it orders Respondent to “compensate Ramos for search-for-work and interim employment expenses. . .” ALJD at 15. There is no person identified in the record as “Ramos.”

**CONCLUSION**

For the reasons stated above, Respondent requests that the Board reverse the findings of the Administrative Law Judge that Respondent violated Section 8(a)(1) related to the allegations contained in paragraphs 5 and 6 of the Complaint.

Respectfully submitted,

*/s/ Lauren P. DeLuca*

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DATE: April 22, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of April, 2020, I served a full, true, and correct copy of the foregoing by email and/or regular mail addressed as follows:

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Respectfully submitted,

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DATE:           April 22, 2020