

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 REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION**

Respondent, Ground Zero Foundation d/b/a Academy for Creative Enrichment (“Respondent”) respectfully submits the following reply brief in support of its exceptions to the ALJD,<sup>1</sup> pursuant to § 102.46(e).

**I. Ms. Hamill’s insubordinate statement served as the trigger for her termination.**

The General Counsel in his Answering Brief to Exceptions (“Answering Brief,” cited herein as “AB”) argues Ms. Hamill’s statement at 10:16 a.m. the morning she was terminated as a mere “intemperate” or “impulsive” comment and argues that this does not deprive Ms. Hamill of the Act’s protections. AB 22. But Ms. Hamill’s statement at 10:16 a.m. is crucial to the analysis of what motivated her termination, not simply whether she still enjoyed the Act’s protections. When Ms. Hamill said “When I am being underpaid that is going to be my main concern,” (GC Ex. 2 at 5) after Ms. Washington instructed her to return her attention to the children on the bus in her care, Ms. Hamill refused to obey her supervisor’s directive and

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<sup>1</sup> Abbreviations are the same as those referenced in the Exceptions.

revealed an attitude focused on herself over the children. This was no mere impulsive comment made out of frustration. Ms. Hamill later that same day texted other counselors: “I don’t play when it comes to my money.” GC Ex. 3 at 2. Ms. Washington’s reaction to Ms. Hamill’s text message at 10:16 is in fact relevant to the analysis of motive. Three minutes later, Ms. Washington texted Ms. Porter that she intended to terminate Ms. Hamill “on the spot” if Ms. Hamill had been there physically at that moment. Respondent’s Ex. 1. Contrary to the Answering Brief’s suggestion that the ALJD dealt with this timing “at length,” (AB at 29), the ALJD does not consider the impact of this statement in particular on Ms. Washington’s decision to terminate Ms. Hamill and instead analyzes the surrounding text messages in the context of whether Ms. Washington was aware of protected, concerted activity at the time she made her decision. ALJD at 12.

“An employer establishes an affirmative defense by proving that a legitimate reason for the discharge would have brought about the discharge notwithstanding the General Counsel’s proof of an unlawful motive. . . . Even within the bounds of otherwise protected concerted activity, an employer need not tolerate employee misconduct that is ‘flagrant or [that] render[s] the employee unfit for employment.’” *St. Luke’s Episcopal-Presbyterian Hospitals, Inc. v. N.L.R.B.*, 268 F.3d 575, 581-82 (8th Cir. 2001). Ms. Washington’s testimony as to why she terminated Ms. Hamill is consistent with the text message evidence: “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. Ms. Washington’s testimony should be credited because it is consistent with contemporaneous text message evidence of her expression of intent to terminate Ms. Hamill following her defiant statement to Ms. Washington.

Moreover, the Delaware childcare licensing regulations corroborate that this particular statement by Ms. Hamill warranted her termination. *See* Respondent’s Ex. 2. Those regulations provide: “Staff members providing care for children may not be given other duties or participate in personal activities, such as using a cell phone that would interfere with providing care to children. A licensee shall ensure providing care is the primary focus for all direct-care staff members during the hours of operation and that supervision of each child is provided at all times.” Respondent’s Ex. 2 at 38 at § 26.G. Ms. Hamill made clear to Ms. Washington that providing care was not her primary focus in that instance, even after Ms. Washington (who was not present on the bus with Ms. Hamill and had no way of knowing what she was doing other than texting) instructed her to return her attention to the bus. This is further relevant, objective evidence that not only provides context to why Ms. Washington reacted the way she did but corroborates Ms. Washington’s testimony as to why she terminated Ms. Hamill. While the Answering Brief focuses on the ratio portions of the regulations and attempts to argue these regulations are irrelevant, nothing about this part of the regulation refers to maintaining state-mandated ratios and is, contrary to the General Counsel’s assertion, highly relevant here. *See* Respondent’s Ex. 2.

**II. Other record evidence supports the reasons of insubordination and neglect of children as the legitimate, non-pretextual reasons for termination.**

The General Counsel’s argument that insubordination and neglect of children are pretextual ignores that these consistently appear throughout the record as the reasons for termination. *See* GC Ex. 7 (termination for “excessive use of her cell phone, neglect of the campers in her charge, insubordination”); GC Ex. 8 at 1 (discharge due to “neglect of her duties involving the care of children . . . negligence and insubordination. . . jeopardizing the safety and welfare of the children she is responsible for (neglect)”); *id.* at 15 (offense/counseling regarding

“Supervision/Insubordination”); CG Ex. 11 at 6:4-5 (“I fired Hamill because of the neglect of her duties involving the children and insubordination by refusing to stop texting.”); *see also* Tr. 106:13-15.

While Ms. Washington may not have texted the specific word “insubordination” to Ms. Porter in expressing her decision to fire Ms. Hamill or uttered the exact phrase “insubordination and neglect of children,” she certainly addressed the underlying conduct in her conversation with Ms. Hamill when she fired her, as Ms. Hamill acknowledges. Tr. 42:2-5.

Further, Ms. Hamill’s conduct fits the policy describing Insubordination:

Standard of Conduct

. . . The following behavior is prohibited and will subject the employee involved to disciplinary action up to and including termination.

[. . .]

\* Insubordination – the refusal by an employee to follow the Administrator, Director, Supervisor’s Instructions concerning a job-related matter or defiant disregard to policy.

CG Ex. 8 at 16. Finally, the reference to another instance in which Ms. Hamill lost a child on a field trip is not an added post-hoc justification – it is consistent with the theme of neglecting children and a prior instance from Ms. Hamill’s performance history.

Nor does the evidence support a finding that Ms. Washington held animus toward protected, concerted activity. In the text exchanges with Ms. Hamill, Ms. Washington attempts to answer her questions about her pay and, when it becomes clear that the text exchange is lasting more than a few minutes, she indicates that she will “check on all the above,” but that Ms. Hamill should resume fully supervising the children. CG Ex. 2 at 3-5. Ms. Washington did not rebuff or dismiss Ms. Hamill’s concerns. And at no point does Ms. Washington express hostility toward Ms. Hamill for raising concerns about her pay. In fact, Ms. Washington pulled Ms. Hamill’s time card to follow through on her promise to look into those concerns. Tr. at 98:8-13.

In addition, Ms. Washington had established the weekly Friday meetings for purposes of addressing employees' concerns, as Ms. Hamill also acknowledged in her testimony. Tr. 37:20-21.

The Answering Brief argues that the reasons given for termination are pretextual because of the above so-called "shifting" reasons (AB at 16) and the focuses on other text messages that occurred on other bus rides in an attempt to show disparate treatment (AB at 19). But, unlike the text message exchange with Ms. Hamill, there was no directive from Ms. Washington to cease texting (and no defiant response to that instruction) in those other exchanges. This important difference demonstrates that, while there may have been a lack of clarity as to the cell phone personal use policy and its implementation, there was a clear indication in the moments leading to Ms. Hamill's termination that at that point in time, it was improper, and Ms. Hamill's refusal to obey that sets her text exchange apart from the other exchanges.

In fact, the previous incident of an employee who, when told to get off the phone responded defiantly, was terminated more closely aligns with Ms. Hamill's situation. The General Counsel attempts to disregard that evidence by casting doubt on the intervening years of Respondent's lack of terminations. AB at 28. But the evidence offered at the hearing was that terminations are rare – it is not unreasonable that these kinds of acts of insubordination do not normally occur and, when they do, they are addressed uniformly with termination. That they happen rarely at this particular institution is, without evidence on the record to explain otherwise, irrelevant and do not lead to a finding of disparate treatment.

\* \* \*

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

Lauren P. DeLuca

CONNOLLY GALLAGHER LLP

1201 North Market Street, 20<sup>th</sup> Floor

Wilmington, DE 19801

Tel. (302) 757-7300

[ldeluca@connollygallagher.com](mailto:ldeluca@connollygallagher.com)

*Counsel for Respondent, Ground Zero Foundation  
d/b/a Academy for Creative Enrichment*

DATE: May 20, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of May, 2020, I served a full, true, and correct copy of the foregoing by email and/or regular mail addressed as follows:

David Rodriguez, Senior Field Attorney  
Counsel for the General Counsel  
[David.Rodriguez@nlrb.gov](mailto:David.Rodriguez@nlrb.gov)

Ms. Stefanie Hamill  
52 Montrose Drive  
Newark, DE 19713  
[ham@udel.edu](mailto:ham@udel.edu)

Respectfully submitted,

/s/ Lauren P. DeLuca  
Lauren P. DeLuca  
CONNOLLY GALLAGHER LLP  
1201 North Market Street, 20<sup>th</sup> Floor  
Wilmington, DE 19801  
Tel. (302) 757-7300  
[ldeluca@connollygallagher.com](mailto:ldeluca@connollygallagher.com)

*Counsel for Respondent, Ground Zero Foundation  
d/b/a Academy for Creative Enrichment*

DATE:            May 20, 2020