

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 18 – SUBREGION 30**

NESTLÉ USA, INC.

And

Cases 18-CA-231008

TOU VANG, an Individual

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

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Dated: June 10, 2020

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I. INTRODUCTION

The General Counsel’s answering brief¹ asks the Board to set an untenable standard that compels an employer to believe one employee over all others. Under the General Counsel’s analysis, Respondent must ignore consistent information it receives from multiple co-workers that establishes Charging Party fabricated allegations of racial discrimination against his co-worker to obtain a new position. If the Board affirms the judge’s decision, employers would be unable to question the very individual who requests an investigation into alleged discrimination and claims to have knowledge of others who can support his allegations. The General Counsel would have such circumstances be a bitter pill the employer must swallow.

The Act simply does not create such an impenetrable shield from any consequence for an employee. The General Counsel’s chosen authorities are highly distinguishable and inapplicable to this matter. The Board should reject the General Counsel’s arguments, and it should reverse the judge’s decision.

¹ Citations to the Answering Brief to the National Labor Relations Board on Behalf of the General Counsel are abbreviated as “GC Br. ____.” Citations to the hearing transcript are abbreviated as “Tr. ____.”

II. REPLY ARGUMENT

A. The Evidence Refutes the General Counsel's Claim that Charging Party Engaged in Protected Concerted Activity

Glaringly absent from the General Counsel's brief is any attempt to address Charging Party's testimony that conclusively establishes he acted for purely self-interested reasons lacking any semblance of protected concerted activity. Rather than address this evidence, which places a direct spotlight on Charging Party's purpose, the General Counsel chooses to ignore it by claiming there was "no evidence" of his true intent. (GC Br. at 27.)

The General Counsel cannot and does not refute that Charging Party testified that he presented the February 2018 petition so Respondent would coach Mr. Lee, rather than to see him terminated. Yet, Charging Party persisted with his allegations against Mr. Lee after Ms. Sipiorski advised him at the February 21 meeting that he accomplished his goal and Respondent would coach Mr. Lee.² Charging Party did not allege that Mr. Lee engaged in any new misconduct thereafter. Specifically, Charging Party testified during the General Counsel's direct examination:

Q: [W]hat were you hoping to do with [the February 2018] petition?

A: I was hoping for HR to investigate and to see what they can find so we can – so HR and us and Jack, we can come to – you know, if Jack needs some coaching or anything like that, to see if Jack Lee needs anything to improve on.

(Tr. 30.) Charging Party then testified on cross-examination:

Q: Did the company ever tell you that they were going to coach Jack Lee?

A: Yes.

² This uncontested evidence distinguishes this matter from *Phoenix Transit System* where a key fact highlighted by the Board was "[t]here is no evidence that employees were ever informed that any corrective action had been taken upon their complaint." 337 NLRB 510, 513 (2002). This difference is significant because the fact that Respondent updated Charging Party of Mr. Lee's suspension, discipline, and coaching removes the possibility that Charging Party continued to hold an interest in improving workplace conditions related to Mr. Lee's past behavior.

...

Q: And after that conversation, you hadn't seen any new abusive conduct by Mr. Lee, correct?

A: No.

(Tr. 160-161.) Far from “inept,” Respondent successfully remediated Mr. Lee’s problematic behavior.

Charging Party’s own words thus confirm that his subsequent actions were not grounded in any attempt to improve workplace conditions. His true intent was fully clarified by Xe Xiong’s testimony that confirmed Charging Party asked her to participate in his scheme against Mr. Lee so that Charging Party could take his line coordinator position. (Tr. 435, 442-443.)

Consistent with Charging Party’s admission, the General Counsel fails to identify any evidence that Charging Party initiated, induced, or prepared for group action or raised truly group complaints regarding Mr. Lee’s alleged racial animus after the February 21 meeting. To the contrary, Ms. Xiong and Mr. Rugama affirmatively rejected Charging Party’s overtures to join him in raising aggravations over Mr. Lee’s conduct. No other employees testified to support Charging Party’s complaints after February 21. Ms. Xiong declined to participate in the February 2018 petition. Charging Party did not raise the possibility of group action with Mr. Rugama. Instead, he recalled his own allegation against Mr. Lee when he advised Mr. Rugama that Respondent’s management may question him about it. (Tr. 202.) Mr. Rugama considered Charging Party’s allegation against Mr. Lee “nothing” (Tr. 188) and “[he did not] care what they said” (Tr. 189). Charging Party lacks any evidence that his actions constituted concerted activity.³

³ These facts are wholly unlike the circumstances in *Avery Leasing, Inc.*, 315 NLRB 576, 580 n.5 (1994), where the employer directly referred to the terminated employee as an “instigator” in his termination report. This reference was a primary factor that led to the Board’s conclusion that the employer held a discriminatory animus. *Id.* at 581.

Further, the evidence does not support the General Counsel's argument that Charging Party's April 2018 and May 2018 actions were an outgrowth of the February 2018 employee petition. These latter actions were far removed in time from the February 2018 petition and occurred months after Respondent received and addressed that petition. This is wholly unlike the close proximity of time that the Board concluded connect individual activities with group action in *Meyer Tool, Inc.*, 366 NLRB No. 32 (2018) (individual complaint filed on May 26 logical outgrowth of May 25 meeting). After February 21, Charging Party pursued his fabricated allegations against Mr. Lee without the interest or support of anyone else.

B. The General Counsel Improperly Seeks to Substitute Its Hindsight Business Judgment for the Decisions Respondent Made in Real Time

In evaluating Respondent's decision to discharge Charging Party, the General Counsel repeats the error of the judge by holding Respondent to a higher burden than the law imposes on an employer. In essence, both the judge and the General Counsel seek to enforce their preferred business judgment for that executed by the Respondent. Their respective evaluations both ignore the fact that Respondent consistently engaged in reasonable responses to the Charging Party's actions and the information presented by other employees that Respondent received in the course of investigating Mr. Lee's actions – *as Charging Party repeatedly requested*.

Cementing the Board's well-established precedent that prohibits a judge from substituting his or her preferred business judgment, the Board recently overturned a judge's similarly erroneous application of the Act and determined a company lawfully investigated and terminated an employee for workplace misconduct in *Watco Transloading, LLC*, 369 NLRB No. 93, at 3-4 (May 29, 2020). The Board explained:

We find the judge impermissibly imposed her own judgment as to how and when the Respondent should have conducted the investigation and discharge of Peters. The possibility that the Respondent's officials could have done certain things differently at

different times does not vitiate the legitimacy of the actions taken. There is no evidence whatsoever that the Respondent deviated from a past practice Although inherent improbabilities in a respondent's account can cast doubt on it, here . . . the Respondent's actions were triggered by independent employee reports of serious misconduct, which the Respondent investigated with reasonable diligence, and its handling of the discipline did not manifest any irregularities improbable and compelling enough to cast doubt on this straightforward narrative of events. . . . Respondent proved that its actions here were consistent with a bona fide effort to determine the validity of serious allegations against Peters, an otherwise valued employee, and to discipline him for misconduct.

Id. at 4.

Similarly here, neither the judge's opinion and decision nor the General Counsel's answering brief demonstrate that Respondent deviated from past practice or that its actions were unrelated to the information and developments presented to it. Respondent received, investigated and effectively remediated the concerns about Mr. Lee's workplace behavior raised by the February 2018 petition. When Charging Party asked Plant Manager Brenneman to review that process and decision on March 1, 2018, he did. When Charging Party asked different management representatives to look into his allegations against Mr. Lee on May 9, 2018, they did. (Tr. 307.) Only after Respondent received new information from Charging Party's co-workers on May 10, 2020 – that he illegitimately re-raised allegations against Mr. Lee for an illicit purpose – did it begin to question his conduct.

Through the course of its investigation, Respondent learned from Charging Party's co-workers that his unrelenting pursuit of allegations against Mr. Lee was not undertaken out of a concern for working conditions but rather a selfish interest in obtaining Mr. Lee's position. Before terminating Charging Party's employment for this misconduct, Respondent provided him an opportunity to explain his actions. Charging Party refused to answer any questions, not because of any reason related to protected concerted activity, but because he thought Ms. Sipiorski might be

withholding the extent of Respondent's knowledge of his actions. (Tr. 147.) Respondent made rational credibility determinations that should be evaluated based on the information it possessed at the time of the incidents rather than Charging Party's testimony months later and after he refused to answer Respondent's questions in the moment. *Watco Transloading*, 369 NLRB at 7.

The evidence at hearing demonstrates that Respondent's actions "were consistent with a bona fide effort to determine the validity of serious allegations against" Charging Party "and to discipline him for misconduct." *Id.* at 4. Any potential alternative outcome that the judge or the General Counsel might believe could or should have occurred is an illegitimate basis to hold Respondent's actions as unlawful.

C. The Board Should Apply *Wright Line* to Evaluate Respondent's Actions

The Board's *Wright Line* burden shifting analysis should apply to Respondent's decision to end Charging Party's employment because the question at hand relates to Respondent's motivation. Such analysis is consistent with the Board's decision in *Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065, 1065 (2015), where it also scrutinized an employer's decision to terminate an employee for dishonesty during an investigation. Similarly, Respondent ended Charging Party's employment based on Charging Party's dishonesty during its investigation into his allegations of racial discrimination.

The General Counsel's reliance on *Santa Fe Tortilla Co.*, 360 NLRB 1139 (2014) as establishing the proper "framework" for analysis of Respondent's decision is misplaced. As a preliminary matter, the Board's opinions citing to *Santa Fe Tortilla Co.* have never reflected that this decision establishes a unique framework separate and apart from *Wright Line*.

Additionally, *Santa Fe Tortilla Co.* is highly distinguishable from the present case. Specifically, unlike the facts in *Santa Fe Tortilla Co.*, Respondent investigated Mr. Lee's purported misconduct; Respondent advised Charging Party verbally and in writing of the reasons

for his discharge; Charging Party refused Respondent's opportunity to defend his actions; multiple other employee terminations show Respondent terminated Charging Party consistently with other incidents of comparable employee misconduct; and Charging Party was the only individual who experienced any adverse action of the multiple employees who the General Counsel claims participated in protected concerted activity. *Id.* at 1141-42.

Moreover, the General Counsel also errs when it argues that the Board cannot consider the litany of employee statements Respondent received during the course of relevant events when evaluating Respondent's *Wright Line* defense because those individuals were not called to testify at hearing. (*E.g.*, GC Br. 14, n.18.) As the Board observed in *Watco Transloading, LLC*, such an analysis of evidence "completely misses the point" of whether Respondent held a good-faith belief Charging Party engaged in misconduct to discipline him at the time it acted. 369 NLRB at 6-7. Respondent received credible information and made rational decisions based on that information. Charging Party chose not to respond to Respondent's questions when it presented him with an opportunity to account for his actions. "[T]here is no apparent reason why the Respondent, at that earlier time, should have found [Charging Party] to be inherently credible and all other witness versions of what transpired to be untrustworthy." *Id.* at 7.

D. Charging Party Did Not Engage in Protected Activity When He Refused to Answer Questions About His Attempts to Influence Employee Information Responsive to the Investigation He Requested Respondent Undertake

The Board does not absolutely protect an employee's conduct during an investigatory interview as the General Counsel claimed. (GC Br. at 31.) Indeed, an employee's dishonesty during an investigation serves as a lawful basis for suspension and discharge. *Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065, 1066 (2015). In *Fresenius*, the employer terminated an employee based on his dishonesty when he deceitfully denied that he authored vulgar statements on union newsletters left in an employee breakroom to encourage support for the union in an

upcoming election. *Id.* Notwithstanding that the Board concluded the employee's statements themselves were protected, the Board applied a *Wright Line* analysis and held that the employer lawfully terminated the employee for his dishonesty during the investigation. *Id.* The Board found that the evidence of the employer's past practice satisfied the employer's *Wright Line* burden and demonstrated that "dishonesty has served as an independent (if not sole) reason for prior terminations, or that a practice of discipline for similar acts of dishonesty exists." *Id.*

Like the employee at issue in *Fresenius*, Charging Party engaged in multiple acts of deceit on which Respondent lawfully relied when it terminated his employment. Respondent determined that Charging Party's dishonesty consisted of his false allegation that Ms. Xiong said another team leader was racist, his false allegation that Mr. Lee had called a group of three African American employees monkeys, and his false allegation that Mr. Rugama said he would have signed the February 2018 petition if he had known about the monkey comment. (Tr. 377-38, 423.) Respondent's evidence of past practice fully supports that it previously terminated employees' employment for similar acts of dishonesty. (Respondent Hearing Exhibit 5.)⁴ Respondent's decision to end Charging Party's employment was motivated by lawful reasons and consistent with the Board's precedent in *Fresenius*.

The General Counsel's citation to *Paragon Systems, Inc.*, 362 NLRB 1561 (2015) is also highly distinguishable and inapplicable to Charging Party's conduct. In *Paragon Systems*, the employees at issue who gave evasive answers in response to management's interview questions were concerned that management attempted to pry into plans for a strike. *Id.* at 1562, 1565. In

⁴ The General Counsel clearly grasps at straws in a failed attempt to describe Respondent's past practice responding to employee dishonesty as inconsistent. Mr. Rugama and Ms. Xiong do not stand as examples of individuals who Respondent should have disciplined for refusing to provide statements. Ultimately, each individual provided a statement. Moreover, neither individual was alleged to have engaged in any misconduct. In stark contrast, employees provided Respondent with information of Charging Party's misconduct, and he refused to respond to Respondent's questions when given an opportunity to explain his actions. His decision left those allegations against him uncontested.

stark contrast here, Respondent asked questions about events that were pursuant to an investigation that *Charging Party requested* Respondent conduct. Respondent did not embark on an unsolicited attempt to snuff out protected concerted activity. Rather, it investigated employee knowledge of an allegation at Charging Party's behest.

E. The Timing and Context of Respondent's Confidentiality Instruction Demonstrates It Complied with the Act

The General Counsel responds to the judge's misapplication of *Apogee Retail LLC*, 368 NLRB No. 144 (2019) by raising a broad, speculative list of unsupported concerns purportedly raised when Respondent verbally instructed Charging Party to limit his discussions with co-workers following his May 10 interview. Contrary to the General Counsel's reasoning and conclusion, verbal instructions to maintain confidentiality issued during an ongoing investigation into employee misconduct must be evaluated in light of the context in which they are given. *Watco Transloading, LLC*, 369 NLRB at 8-9.

In *Watco Transloading*, the Board evaluated whether a human resources representative's interview instruction to an employee accused of misconduct that he "was absolutely forbidden to discuss any of this conversation with anyone." *Id.* at 8. The Board applied *Apogee* to find that this confidentiality instruction did not violate the Act. *Id.* at 8-9. Distinguishing a written confidentiality policy like that at issue in *Apogee* with the verbal instruction issued in *Watco Transloading*, the Board explained:

[In *Apogee*], we were articulating a standard for evaluating the lawfulness of written investigative confidentiality policies on their face – not, as here, with an oral confidentiality instruction issued in, and limited to, a single, specific investigation. Peters was presented with an instruction embedded in a particular set of circumstances, which reasonably would have informed him that Beasley's concern was to prevent Peters from attempting to persuade other employees to corroborate his story – a concern that would cease to apply once the investigation had ended.

Id. at 9, n.25. Thus, notwithstanding the fact that the Respondent did not specifically explain the duration or subject matter limitations of its confidentiality instruction, the Board found it to comply with the Act.

Similarly, the timing and context of Respondent's confidentiality instruction to Charging Party demonstrates the inherent limitations that would be apparent to Charging Party. Charging Party received the instruction immediately following his interview related to Respondent's investigation of his allegation against Mr. Lee. (Tr. 95.) During that interview, Respondent raised its concerns that Charging Party impeded its ability to conduct a fair investigation. (Tr. 91-92, 488-489.) Pursuant to *Watco Transloading*, this timing and subject matter made it clear to Charging Party that Respondent's instruction was for the purpose of preserving the integrity of its investigation and the instruction was limited to that investigation.

III. CONCLUSION

The General Counsel seeks to impose a far higher standard of review on Respondent's rational actions than is supported by the Act or Board precedent. Correctly scrutinized, Respondent undertook all actions on a good-faith basis supported by the information and statements it received. Charging Party refused to let his allegations against Mr. Lee go until Charging Party attained his purely personal goal of forcing Respondent to terminate Mr. Lee's employment so Charging Party could take his position. When Respondent learned of his true motives, it questioned him and acted on the unrefuted information it received. The General Counsel's attempt to hyper-scrutinize Respondent's decisions exhibits a search for a violation of law where none exists. The judge's decision is based on similar errors. The Board should conclude that Respondent lawfully investigated and terminated Charging Party's employment and reverse the judge's decision.

Respectfully submitted this 10th day of June, 2020.

OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.

A handwritten signature in black ink, appearing to read 'Timothy C. Kamin', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020 a true and correct copy of the foregoing Nestlé USA, Inc.'s Reply Brief in Support of Exceptions to Administrative Law Judge's Decision, upon the following:

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