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David Saxe Productions, LLC and Vegas! The Show, LLC, Joint/Single Employers and Anne Tracy Carter

David Saxe Productions, LLC and Fab Four Live, LLC, Joint/Single Employers and Anne Tracy Carter Cases 28–CA–075461 and 28–CA–084151

July 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

This case is on remand to the National Labor Relations Board pursuant to a decision by the United States Court of Appeals for the District of Columbia Circuit.¹ The principal issue is whether the Board properly found in a prior decision, reported at 364 NLRB No. 100 (2016), that the Respondents violated Section 8(a)(1) of the National Labor Relations Act by discharging dancer Anne Carter from two Las Vegas productions—*Vegas! The Show* and *The BeatleShow*. Having accepted the court’s opinion as the law of the case, we now find that the Respondents did *not* violate the Act in discharging Carter from these productions.²

I. FACTS³

David Saxe was the CEO and owner of Respondent David Saxe Productions, LLC. He also had ownership interests in both *Vegas! The Show* and *The BeatleShow*. Saxe and choreographer Tiger Martina selected dancer Anne Carter to be part of the initial cast of *Vegas! The Show*, and she signed a 6-month contract on May 10, 2010. Martina credibly testified that within a few months he became concerned that Carter was not a good fit because she did

not have a strong grip on the show’s style, she appeared stiff, and she was not a versatile dancer. He instructed the show’s dance captains, Ryan Kelsey and Claudia Mitria, to work with Carter in an effort to improve her performances.

When Carter’s initial contract came up for renewal, Martina informed Saxe that he wanted to let Carter’s contract expire because of her performance issues. Saxe, however, decided to retain Carter and give her an opportunity to improve. Carter signed a new contract for *Vegas! The Show* in December 2010. In April 2011, Carter signed an extension of her *Vegas! The Show* contract through January 2, 2012. Around the same time, Saxe decided to use some dancers from *Vegas! The Show* in a new production—*The BeatleShow*. Carter was informed that she would dance with *The BeatleShow* 2 to 3 days per week, in addition to her work on *Vegas! The Show*.

Martina credibly testified that, in October or November 2011,⁴ he again informed Saxe that he wanted to replace Carter because of her performance and attitude issues. Martina believed he was “fighting a losing battle” because Carter’s performance issues were the same as they had been all along. Martina also testified that, as *Vegas! The Show* gained traction, he was getting more interest from other dancers. As a result, David Saxe Productions held an audition on November 18 to get new dancers. With respect to Carter’s attitude issues, there is substantial credited testimony from dancers, dance captain Kelsey, and Martina about Carter’s frequent backstage complaints and negative attitude that adversely affected others.

On December 13, Saxe met with the dancers in the women’s dressing room. Carter, as well as several other dancers, raised concerns including holiday and rehearsal pay, time off for attending to injuries, and scheduling issues. Saxe told the dancers that he understood, but he referred to their concerns as “bitching” and stated that he did not want “all this bitching.”

In addition, although not requested in the General Counsel’s motion, the court remanded the issue of whether the Respondents’ maintenance of a nondisclosure rule violated Sec. 8(a)(1). The judge found that this rule was unlawful because it explicitly restricted Sec. 7 activity, and the Board adopted this finding in the absence of exceptions from the Respondents. We acknowledge the court’s remand of the nondisclosure rule, but note that, as no exceptions were filed to the judge’s finding, that issue was never properly before the court. See *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 5 (D.C. Cir. 2012) (Sec. 10(e) of the Act jurisdictionally bars a party from seeking review of a decision by the Board to which it did not file exceptions). In any event, having accepted the remand, we reaffirm here the Board’s original decision to adopt, in the absence of exceptions, the judge’s finding that the Respondents violated Sec. 8(a)(1) by maintaining the nondisclosure rule.

³ We summarize here the facts fully set forth in the underlying administrative law judge’s decision.

⁴ Unless otherwise noted, all dates are in 2011.

¹ *David Saxe Productions, LLC, et al. v. NLRB*, 888 F.3d 1305 (D.C. Cir. 2018). Subsequent to the court’s decision, the Board notified the parties to this proceeding that it had accepted the court’s remand and invited them to file statements of position. Only the Respondents filed a statement of position.

² Pursuant to the General Counsel’s unopposed motion, the court also remanded for further consideration the issue whether the Respondents’ maintenance of a nonunion rule violated Sec. 8(a)(1) under the standard set forth in *Boeing Co.*, 365 NLRB No. 154 (2017) (*Boeing*), which overruled the “reasonably construe” prong of the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*). We find that the nonunion rule is governed by the standard announced in *Boeing*. Because the parties have not had the opportunity to address the impact of *Boeing* on this rule, we shall sever the complaint allegation pertaining to it and remand that allegation to the judge for further proceeding in light of *Boeing*.

Following the December 13 meeting, some dancers approached Saxe and complained about Carter's attitude. Saxe also solicited feedback from Martina and the dance captains about Carter's performance. They recommended that Carter's contract not be renewed, reiterating the same performance and attitude concerns they had expressed previously. On December 21, Saxe sent Carter an email informing her that her contract with *Vegas! The Show* would not be renewed due to her "constant negative attitude and lackluster performance." The email further stated that "[c]onstant complaining and negativity just can't be tolerated anymore." Shortly thereafter, in a telephone conversation, Saxe informed Carter that she had also been taken off the schedule for *The BeatleShow*.

II. PRIOR BOARD AND COURT PROCEEDINGS

A.

Administrative Law Judge Eleanor Laws recommended in her May 7, 2013 decision that the allegations pertaining to Carter's discharges from *Vegas! The Show* and *The BeatleShow* be dismissed. Applying *Wright Line*,⁵ the judge found that although the General Counsel had met his initial burden of proving that Carter's protected concerted complaints during the December 13 meeting motivated her discharge from *Vegas! The Show*, the Respondents nevertheless proved that they would have discharged Carter even absent her protected activity. The judge noted that the Respondents asserted two reasons for Carter's termination—her dance style and her attitude. Based on credited testimony from Martina, Mitria, and Kelsey that they had expressed concerns about Carter's performance and attitude to Saxe, as well as testimony from other dancers about Carter's constant complaints and negativity, the judge found that Saxe's December 21 email reference to attitude and performance issues relied on its face on some conduct other than Carter's December 13 concerted complaints.

The judge also addressed Saxe's conflicting testimony about the reasons for discharge, which she described as "very troubling." Saxe initially testified that he made the decision to discharge Carter after the December 13 meeting, based on his discussions with Martina, Kelsey, Mitria, and other dancers about Carter's negative attitude. However, after being recalled to the witness stand, Saxe testified that he made the decision not to renew Carter's contract much earlier, in October, and did not base his decision on concerns about Carter's attitude. Nevertheless, the judge found that Martina's explanation of the reasons for Carter's discharge was credible, as was the testimony of

other witnesses that they conveyed concerns about Carter's negativity and performance to Saxe after December 13. The judge concluded that "the only way to square Saxe's inconsistent testimony" with the other evidence was to discredit his later testimony about the timing and reasons for the discharge and to credit his earlier testimony to the extent it was consistent with that of Martina, Mitria, and Kelsey, the other dancers, and the documentary evidence. Acknowledging that Saxe was the "ultimate decisionmaker" regarding Carter's discharge and did not rely solely on Martina's input, the judge was persuaded that Saxe based his discharge decision on input from Martina and others about Carter's continuing performance and backstage negativity issues that went beyond her protected concerted complaints during the December 13 meeting. Accordingly, the judge found that the Respondents met their *Wright Line* defense burden of proving that Carter would have been discharged for these legitimate reasons even in the absence of her protected complaints. Regarding Carter's discharge from *The BeatleShow*, the judge found that Carter's continued employment with that production was already in question for artistic reasons and that her discharge from *Vegas! The Show* "spurred" the decision to discharge her from *The BeatleShow*. The judge thus found that discharge was lawful as well.

B.

In a split panel decision, the Board reversed the judge and found that Carter's discharges were unlawful. The two-member majority found that the asserted attitude and performance reasons for Carter's discharge from *Vegas! The Show* were a pretext for retaliation against her undisputedly protected complaints voiced at the December 13 meeting. The Board based this finding on Saxe's shifting explanations for Carter's discharge, the timing of the Respondents' decision soon after the meeting, and the fact that Carter's alleged performance problems were "long-known and long-tolerated." 364 NLRB No. 100, slip op. at 4–5. Having found pretext, the Board found that the Respondents necessarily failed to meet their *Wright Line* rebuttal burden. *Id.*, slip op. at 5. The Board accordingly also found that Carter's discharge from *The BeatleShow* was unlawful, given that her unlawful discharge from *Vegas! The Show* was the "decisive factor" in her discharge from that production. *Id.*, slip op. at 6.

In dissent, then-Member Miscimarra would have found Carter's discharges lawful. In his view, the judge properly evaluated the inconsistencies in Saxe's testimony, warranting deference from the Board. Member Miscimarra

⁵ 251 NLRB 1083 (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).

was also not persuaded by the timing of Carter's discharge shortly after she engaged in protected activity because the timing also coincided with the imminent expiration of her contract. Regarding Carter's performance and attitude problems, Member Miscimarra noted that "the fact that Carter had been given an opportunity to improve in the past does not mean that the Respondents were obligated to disregard Carter's shortcomings indefinitely." *Id.*, slip op. at 9. Ultimately, then, he was convinced that the Respondents discharged Carter because of concerns with her performance and attitude problems, not as a result of her protected concerted activity.

C.

On review, the D.C. Circuit found faults in the Board's analysis of Carter's discharge from *Vegas! The Show* that required remand for clarification. The court first concluded that the Board's reliance on Saxe's different explanations for Carter's discharge from *Vegas! The Show* to find pretext "functionally overruled" a key credibility finding by the judge—crediting Saxe's testimony that he decided to discharge Carter after December 13 based on performance and attitude issues—and did so without explaining whether the Board found Saxe's testimony to be inherently incredible. 888 F.3d at 1311. The court took further issue with the Board's finding that the Respondents' proffered reasons for Carter's discharge were pretextual and questioned whether the Board properly accounted for the asserted nonpretextual reasons for her discharge. The court specifically faulted the Board for not accounting "for evidence indicating that Saxe, after renewing and extending Carter's contracts, was no longer willing to continue to do so." *Id.* at 1312. The court pointed to Martina's testimony that, in the court's view, provided nonpretextual reasons for both the timing of Carter's discharge and why the Respondents, in December 2011, decided they would no longer tolerate her poor performance and attitude. The court asserted that if the Board's finding of pretext "fail[ed] to account for evidence addressing Saxe's non-pretextual reasons for the non-renewal of Carter's contract, then its findings would be unsupported by substantial evidence in the record considered as a whole." *Id.* Further, the court stated that the Board's "dismissive" response to then-Member Miscimarra's dissent left "critical gaps" in the Board's reasoning. *Id.* Specifically, the court pointed to the dissent's argument that the factors the majority relied on to find pretext were unpersuasive upon considering the record evidence as a whole. The court concluded that before it could

resolve whether the Board's finding of pretext is supported by substantial evidence in the record considered as a whole, clarification is needed on the Board's treatment of the ALJ's credibility finding on the reasons given for the non-renewal of Carter's contract and its treatment of the company's evidence as to non-pretext, particularly in light of the dissenting Member's analysis of the evidence.

Id. at 1313. The court did not separately analyze Carter's discharge from *The BeatleShow*, but it remanded that issue as well.

III. DISCUSSION

Having accepted the court's decision as the law of the case and considered the record evidence as a whole in light of the court's decision, we now hold that there is insufficient evidence to warrant finding that the Respondents' reliance on Carter's performance issues was pretextual. In addition, we now affirm the judge's finding that the Respondents met their *Wright Line* defense burden of proving by a preponderance of evidence that they would have discharged Carter from *Vegas! The Show* based on legitimate nonpretextual concerns even absent her protected activity.⁶

As discussed above, the court's main concern was the Board's treatment of Saxe's testimony about his reasons for not renewing Carter's contract, which the court considered the "heart of the matter." The court opined that the Board had "functionally overruled" the judge's credibility determinations regarding Saxe's explanation of the reasons for Carter's discharge and did so without identifying any circumstances that would make Saxe's testimony "inherently incredible." *Id.* at 1311–1312. We accept as the law of the case the court's conclusion that the Board "functionally overruled" the judge's credibility finding as to Saxe's initial testimony about the timing and reasons for his decision to discharge Carter. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Accordingly, Saxe's testimony, to the extent it was corroborated by the credible testimony of Martina, Mitria, and Kelsey, the other dancers, and the documentary evidence, is evidence that the Respondents' decision not to renew Carter's contract was motivated at least in

⁶ The judge found that the General Counsel met his initial burden of showing that Carter's protected concerted activity was a motivating factor in her discharge, and the Respondents did not except to that finding.

part by legitimate, nonpretextual concerns about her continuing performance and negative attitude problems.

Further, we now agree with the judge that the Respondents met their burden of proving by a preponderance of evidence that they would have taken this action for those nonpretextual reasons even in the absence of protected concerted complaints voiced by Carter at the December 13 meeting with Saxe. In this respect, we reject the prior Board majority's emphasis on the timing of Carter's discharge following her protected activity on December 13. Carter's contract was close to expiring. In these circumstances, it is reasonable, as dissenting Member Miscimarra observed, that Saxe would have made the final decision on whether to renew Carter's contract when he did.

As to the Respondents' change of course regarding renewals of Carter's contract despite her shortcomings, the judge and the court accorded significant weight to Martina's testimony that by fall 2011 he had seen no improvement in Carter's performance issues and felt like he was "fighting a losing battle" with her. He also credibly testified that, as the show gained traction, it was attracting more interest from other dancers, and, importantly, that Saxe, the ultimate decisionmaker, had come to agree with Martina that Carter had not improved, despite having been given opportunities to do so. In these circumstances, as the court observed, Martina's testimony demonstrates that by late 2011 Saxe's earlier reasons for extending Carter's contracts—to give Carter a chance to improve—"no longer had the same resonance." 888 F.3d at 1312. And, as dissenting Member Miscimarra stated in the underlying decision, the fact that the Respondents had given Carter chances to improve in the past did not mean they had to continue to do so indefinitely. 364 NLRB No. 100, slip op. at 9. In sum, as the court suggested, the preponderance of credible record evidence shows "the likelihood that Saxe had reached his tipping point in terms of tolerating Carter's deficient performance and demoralizing back-stage behavior," 888 F.3d at 1312, and that he would have made the decision not to renew her contract even absent her protected concerted activity. Accordingly, we find that the Respondents met their *Wright Line* rebuttal burden with respect to Carter's discharge from *Vegas! The Show*.

We briefly turn now to the issue of whether Carter's discharge from *The BeatleShow* also violated Section 8(a)(1). The judge found that Carter's discharge from *Vegas! The Show* "spurred" the decision to discharge her from *The BeatleShow*. We agree and because we find that Carter's discharge from *Vegas! The Show* was lawful, we also find that Carter's discharge from *The BeatleShow* was lawful.

ORDER

The National Labor Relations Board orders that paragraphs 1(a), (h), and 2(a), (c)-(h) be deleted from the

Board's Decision and Order reported at 364 NLRB No. 100 (2016), and the remaining paragraphs relettered.

IT IS FURTHER ORDERED that the allegation that the Respondents violated Section 8(a)(1) by maintaining a non-union provision in their employment agreements, requiring employees to acknowledge that their employment is not under the jurisdiction of any union, with penalties for breaching this provision, is severed and remanded to Administrative Law Judge Eleanor Laws for further appropriate action—including, if necessary, the filing of statements of position and/or reopening the record—and issuance of a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found or remanded.

Dated, Washington, D.C. July 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD