

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

**NEXSTAR BROADCASTING, INC.,
d/b/a KOIN-TV**

Respondent Employer,

and

19-CA-232897

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS THE
BROADCASTING AND CABLE TELEVISION
WORKERS OF AMERICA, LOCAL 51, AFL-CIO**

Charging Party Union

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

Pursuant to §102.46 of the National Labor Relations Board's Rules and Regulations, Respondent Nexstar Broadcasting, Inc., KOIN-TV ("Nexstar", "KOIN" or "Respondent") files exceptions to the Decision of the Administrative Law Judge Christine E. Dibble ("ALJ") and states that it takes exception with each of the below listed conclusions of the ALJ because they are not supported by substantial evidence and contain error of fact or law, and states the grounds, and record citation, therefore as to each, reserving further citation and argument to the Brief in support thereof :

1. KOIN excepts to the ALJ's finding of fact at ALJD 5: 1-11 that:

“According to Moore, after Hansen greeted him with talk about the benefits of joining the Union, she accused him of having secret meetings with Brown. He testified that Hansen told him Dean and Brown used this “scheme” to not to tell new people about the Union until they got “out there” and once “here” the new hires would learn about dues and “other things” which would frustrate the new hires and turn them against the Union. I will credit Moore on this point. Hansen acknowledged that she mentioned to him that management frequently changes and is not “always” supportive of its employee; but does not recall her exact words. Moore, on the other hand, was clear in his recollection. Moreover, his version has the ring of truth because it is not so far outside the realm of what Hansen admitted to usually telling new employees. Moore also insists that Hansen continued the conversation by bad mouthing Brown and calling him a “piece of shit” and “rat fuck.” **asserting that the credibility determination in this excerpt in favor of employee witness Moore is sound although it is contradicted elsewhere in the ALJ’s decision, leading to a very confusing and self-contradicting assessment of Moore’s credibility by the ALJ. (see Exception 3)**

2. KOIN excepts to the ALJ’s finding of fact and conclusion of law at ALJD 5 :38-45;.6: 1-5 that: *“Supposedly, the unnamed witness claimed: (1) she heard Moore tell Hansen that he was not interested in the conversation; (2) it appeared to the anonymous witness that their conversation was strained; and (3) she thought Moore looked uncomfortable. Wenger believes that the witness requested to keep her name confidential; and after conferring with Nevin, they agreed. I do not credit any evidence provided by the anonymous witness because*

*the Charging Party and General Counsel did not have the opportunity to question the witness and verify the accuracy of the Respondent's summary of her statement or test any inconsistencies in her statement.*⁷ *Metropolitan Edison Co., 330 NLRB 107, 107 (1999) (name of informant can be withheld only if employer establishes a legitimate and substantial confidentiality defense). Moreover, the witness' statement is hearsay; and the anonymous witness admitted that she "didn't hear any specifics of the conversation." (Tr. 102-103.) Consequently, the statement has no probative value. "asserting that this finding and conclusion is improper as the ALJ erroneously weighed the admissibility of the anonymous witness' statements by virtue of her incorrect decision regarding the confidentiality rights accorded to that witness' identity when the statement by the witness should be given weight based on the admissible and credited testimony of others as to what that witness said.*

3. KOIN excepts to the ALJ's finding of fact at ALJD 7:31-33 that: *I do not credit Moore's testimony that (1) Hansen "accused" him of having a secret meeting with Brown; (2) Hansen asked when he was going to sign documents to join the Union; and (3) Hansen called Brown a "piece of shit" and "rat/rat fuck"* asserting that point 1 of this finding of fact and credibility determination is directly contradictory to the finding noted above at Exception 1. (see ALJD 5: 1-11)

4. KOIN excepts to the ALJ's finding of fact at ALJD 7:34-41 that: *"First, I do not credit his testimony that Hansen pressured him to "sign those papers" and join the Union. (Tr. 86.) Although, Moore makes the claim about Hansen pressuring him to join the Union, this allegation was not in any of the Respondent's*

*investigatory notes documenting Moore's description to management of his conversation with Hansen. (GC Exh. 2; Jt. Exh. 1; R. Exh. 3.) There is no evidence to corroborate Moore on this point or to explain the absence of his claim in the Respondent's investigation. Despite his claim that he felt Hansen was pressuring him to join the Union, he admitted that he continued the conversation with her when he asked her "take" on the usefulness of union membership" **asserting that this finding is not supported by the overall evidence in the record, including the testimony of other witnesses and documentary evidence.***

5. KOIN excepts to the ALJ's finding of fact at ALJD 7:42-45 that:
"Likewise, Moore could not explain management's failure to mention this significant allegation in any of its investigative notes. Consequently, I credit Hansen's testimony that she did not pressure Moore to hurry and join the Union"
asserting that it makes no sense to require employee witness Moore 'explain' the absence of his "significant allegation" in KOIN's "investigative notes".

6. KOIN excepts to the ALJ's finding of fact at ALJD 8:1-4 that *'Likewise, I find that Hansen is more credible in her denial that she called Brown derogatory names. Moore admits that he was "just covering for myself" when he reported his discussion with Hansen because he was afraid Brown would hear about it before he had an opportunity to give them his "side of things." (Tr. 86.)* **asserting that this determination is not supported by the overall evidence in the record as will be discussed in the supporting brief.**

7. KOIN excepts to the ALJ's finding of fact at ALJD 8:7-11 that:
"Consequently, he would have more incentive to exaggerate and misconstrue the

remarks Hansen made to him in order to remain in management's good favor to ensure his desired transfer to the Portland facility. Further, Moore acknowledged that over his career he has had that contentious conversations with coworkers but, except for Hansen, he did not "report all of those conversations.", **asserting that this credibility should be disregarded as the opposing witness (Hansen) to these conversations had more incentive to exaggerate than Moore and witness Moore's acknowledgement that he did not report other contentious conversations that he had during his life is completely irrelevant to any proper credibility determination.**

8. KOIN excepts to the ALJ's finding of fact at ALJD 8:11-17 that: *"Moreover, Nevin admitted that for the past 1½ to 2 years of observing Hansen in contract negotiations, his impression of her was that of a notetaker. While in bargaining sessions Biggs-Adams would sometimes use profanity and derogatory terms to refer to management, Nevin acknowledged that Hansen never used that type of language. He also agreed that despite Moore's assertion that he was uncomfortable with the discussion with Hansen, Moore "continued" the conversation with Hansen as she turned to leave by asking her several questions"* **asserting that this finding is not supported by the overall evidence in the record, including the testimony of other witnesses and documentary evidence.**

9. KOIN excepts to the ALJ's finding of fact at ALJD 8:17-21 that: *"Last, there is no evidentiary value to the Respondent's anonymous witness. The Respondent's failure to produce the witness for cross-examination and my inability to assess her credibility discredits her as a witness. Equally important, the*

Respondent admits the witness didn't hear any specifics of the conversation. Consequently, I find Hansen more credible in her denials about using derogatory terms to describe Brown." **asserting that this finding and conclusion is improper as the ALJ erroneously weighed the admissibility of the anonymous witness' statements by virtue of her incorrect decision regarding the confidentiality rights accorded to that witness' identity when the statement by the witness should be credited given documentary evidence and testimony of others as to what that witness said.**

10. KOIN excepts to the ALJ's conclusion of law at ALJD 10: 17-21 that: *The Board has consistently ruled that 8(a)(1) is violated if an employer takes an adverse action against an employee for "misconduct arising out of a protected activity, despite the employer's good faith belief, when it is shown that the misconduct never occurred."* *Burnup & Sims at 23.* **asserting that this statement of law is irrelevant to a proper finding in this case as Hansen in engaged in serious misconduct.**

11. KOIN excepts to the ALJ's conclusion of law and fact at ALJD 10:25-31 that: *I find that the General Counsel has met its initial burden. Hansen's discussion with Moore about the benefits of unionization is the classic definition of union activity. Section 7 of the Act. It is undisputed that towards the end of the workday Hansen greeted Moore to speak with him about the advantages of joining the Union. It is also undisputed that Moore was not a passive participant in the conversation but rather asked Hansen to explain "what the Union actually does for her. I was pretty curious to ask her if do (sic) you need it for protection." (Tr. 96.)"*

asserting that Hansen's discussion with Moore was hardly the 'classic definition of union activity' as even the ALJ's own credibility finding, discussed above, concluded that Hansen started off the 'discussion' by accusing Moore having a 'secret meeting' with Rick Brown and then quickly added' that Brown was a 'rat fuck' and a 'piece of shit'.

12. KOIN excepts to the ALJ's conclusions of law at ALJD 11:12-21 that:

"I find that Hansen did not engage in misconduct, serious or otherwise. Determining whether Hansen made the statements attributed to her is based in large part on credibility findings. In this instance I found that based on her demeanor and other evidence Hansen was more credible than Moore. There is no evidence that Hansen had a history of using profane language when referring to management. Likewise, there is no credible evidence that Hansen had a reputation for using profanity towards or about management. The record lacks testimony from Hansen's coworkers, supervisors, or other management officials attesting to such a pattern of behavior. Nevin acknowledged that, unlike Biggs-Adams, during the difficult and intense bargaining sessions, Hansen never spoke, did not use profanity, nor spew vitriolic names at the management team" asserting that the record evidence properly evaluated demonstrates that Hansen engaged in serious misconduct in violation of KOIN's code of conduct, falsely accusing a fellow employee of engaging in a 'secret meeting' a supervisor that she labelled as a 'piece of shit' and a 'rat fuck'.

13. KOIN excepts to the ALJ's conclusions of law at ALJD 11:23-30 that:

"Even assuming Hansen made the statements attributed to her, I agree that discussions about unionization or encouragement of union organizing are protected by the Act "even when it annoys or disturbs the employees who are being solicited."

(GC Br. 23 citing *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000)); *Frazier Industrial Co.*, 328 NLRB 717 (1999); *Automotive Plastics Technologies*, 313 NLRB 462 (1993); *Greenfield Die and Mfg. Corp.*, 327 NLRB 237 (1998) and cases there cited (footnote omitted). Hansen cannot be guilty of serious misconduct merely for speaking to Moore about the Union, especially since Moore actively participated in the conversation by asking her questions” **asserting that Hansen’s conduct went well past ‘speaking about the union’ as she accused fellow employee of engaging in a secret meeting with their common supervisor who she called a ‘piece of shit’ and a ‘rat fuck’.**

14. KOIN excepts to the ALJ’s conclusions of law at ALJD 11:30-42 that: “Moreover, calling management two derogatory names on one occasion while discussing the alleged tactics the employer uses to discourage union membership falls far short of the standard for establishing serious misconduct under *Burnup & Sims*. *Id.* Additional facts supporting a finding that Hansen did not engage in serious misconduct are: (1) the conversation was held in a semi-private location at the end of the work day; (2) the discussion was brief, lasting about 10 minutes; and (3) as Hansen ended the conversation Moore restarted it by asking her multiple questions. Consequently, the evidence simply does not support a finding that, even if true, Hansen’s statements rise to a level of serious misconduct necessary to lose protection of the Act. Nevertheless, I will again emphasize that the evidence establishes that the misconduct did not occur. Accordingly, I find that under the *Burnup & Sims* analysis, the Respondent violated the Act when it issued Hansen the written warning.” **asserting that the evidence adduced at the hearing showed that Hansen engaged in “serious misconduct” under *Burnup & Sims*.**

15. KOIN excepts to the ALJ’s conclusions of law at ALJD 11:46-47; 12:1-4 that: “A *Wright Line* analysis is not appropriate in this case because the Respondent’s motivation is not at issue. I found that the written warning was issued

because of Hansen's union activity. Phoenix Transit System, 337 NLRB 510, 510 (2002), enf'd. 63 Fed. Appx. 524 (D.C. Cir. 2003) (Wright Line analysis is not applicable when there is no dispute that the employer acted against the employee because the employee engaged in protected concerted activity) **asserting that a Wright Line analysis is appropriate in this case as the Board has now made clear in General Motors 369 NLRB No. 127 (July 21, 2020).**

16. KOIN excepts to the ALJ's conclusions of law at ALJD 12 5-16 that:

*“Assuming arguendo Wright Line is an appropriate analysis, I find that the General Counsel has established its initial burden. It is undisputed that Hansen engaged in concerted protected activity. She is on the Union's executive board and participates in the negotiating sessions for a new CBA. Moreover, Hansen has been an active and open union supporter since about 2005 or 2006. More importantly, I previously found that her conversation with Moore about the benefits of joining a union is quintessential protected union activity. Second, the evidence is clear that the Respondent was aware of Hansen's protected union activity in that Moore told management about his conversation with Hansen, management was aware of her prior discussions with employees about the benefits of union membership, and she participated in the bargaining sessions with all of the management officials involved in the complaint at issue. Last, the letter of warning clearly shows that it was issued because of Hansen's conversation with Moore, **asserting that while it is true that Hansen had engaged in union activity, KOIN's sole motive for issuing the written warning as that Hansen had engaged in very serious misconduct that violated important KOIN policies relating to harassment and proper business conduct.***

17. KOIN excepts to the ALJ's conclusions of law at ALJD 12:18-27 that:

"I find that the Respondent has failed to sustain its burden. First, I do not find, as previously explained, Moore's version of the incident more credible than Hansen's testimony of the encounter. Moreover, there is no comparative or other substantive evidence showing that the issuance of the written warning was not a deviation from past practices. See also Tr. 126 – 127. The plain language of the written warning is clear Hansen was disciplined for exercising her § 7 rights. Further, throughout the decision, I have rejected the Respondent's argument that Hansen's statements to Moore were serious, egregious or constituted harassment. Last, even assuming there is no suspicious timing between the conversation and the written warning, there is sufficient evidence, as discussed, to support a finding that the Respondent has failed to sustain its burden of production" **asserting that the ALJ's application of the Atlantic Steel test is no longer appropriate and that the General Counsel failed to sustain its' burden under any test to establish that Section 7 activity was the motivating factor for the issuance of the written warning to Hansen in the light of her serious and egregious misconduct constituting harassment of a fellow employee.**

18. KOIN excepts to the ALJ's conclusions of law at ALJD 13:9-16 that:

The record is absolutely devoid of evidence that Hansen's conversation with Moore disrupted the Respondent's operation. Even assuming she characterized Brown as a "rat," "rat fuck" and "piece of shit", nothing in the record shows that the Respondent's operation was severely or even moderately or minimally affected by it. There is no credible evidence that anyone heard the conversation. Even if I were to consider the anonymous witness' statement, she acknowledged that she could not

hear anything “specific.” Also, the evidence failed to show, and Moore did not complain, that Hansen’s remarks interfered with him or any other employee completing their work assignments” **asserting that ALJ improperly applies the *Atlantic Steel* test and a ‘subjective analysis’ to determine whether or not the conduct was sufficiently egregious so as to be disruptive to KOIN’s operation when Hansen’s conduct was egregious when measured objectively as it should have been under the former *Atlantic Steel* test.**

19. KOIN excepts to the ALJ’s conclusions of law at ALJD 13 16-23 that:

“Second, the evidence is clear that Hansen’s discussion with Moore about the benefits of joining a union goes to “the very heart of § 7 and Union activity.” The Respondent’s argument notwithstanding, earlier in this decision I found that the evidence establishes Hansen did not use the derogatory terms attributed to her and even assuming that she used those terms, it was not a “sufficiently egregious” outburst. *Burle Industries*, 300 NLRB 498, 500, 504 (1990), *enfd.*, 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a “fucking asshole” without losing protection of the Act); *United States Postal Service*, 250 NLRB 4 (1980) (employee did not lose protection of the Act when calling supervisor a “stupid ass”), **asserting that Hansen’s vulgar and obscene conversation with Moore is sufficiently egregious so as to lose her the protection of the Act, under any standard, including the now overridden *Atlantic Steel* test.**

20. KOIN excepts to the ALJ’s conclusions of law at ALJD 13:38-39 that:

“Accordingly, I find that under *Burnup & Sims*, *Wright Line*, and *Atlantic Steel*, the Respondent violated § 8(a)(1) and (3) of the Act when it issued Hansen a written warning”, **asserting that this ultimate conclusion of law is not supported by**

record evidence, and that it no longer appropriate to apply the *Atlantic Steel* test.

21. KOIN excepts to the ALJ's conclusions of law at ALJD 13:43-44 that:

"In view of my findings above ruling on the merits of this issue is unnecessary. Nevertheless, I will analyze it for the sake of appeal", **asserting that a ruling on the issue of the confidentiality of the identity of the witness is necessary regardless of the disposition of the lawfulness of the disciplinary warning issued to Hansen, as this issue was alleged as a separate violation of the Act, specifically section 8(a)(5).**

22. KOIN excepts to the ALJ's conclusions of law at ALJD XXXXX that:

"Based on the evidence, I find that the General Counsel has sustained its initial burden. The General Counsel argues that the RFI is necessary and relevant for the Union to fulfill its role as the exclusive representative of bargaining unit employees. Biggs-Adams gave credible testimony that acquiring the name of the anonymous witness would assist the Union in determining whether the disciplinary action against Hansen was warranted. Likewise, in her letter to the Respondent dated July 12, Biggs-Adams made clear that the Union needed the information "to make our own independent investigation as to the facts of the incident" (Jt. Exh. 3.) The Respondent does not dispute that the RFI is relevant and it did not provide the requested information. Also, the witness' name is relevant because the Respondent did not fulfill its legal obligation and engage in accommodative bargaining so there was no other way for the Union to get the information except to solely rely on the word of the Respondent, which places the Charging Party at a severe disadvantage in representing Hansen, asserting that once the summary was provided to the

Union at the hearing and made otherwise available to the Union, the identity of the witness was no longer relevant a point KOIN made at the hearing by reliance on *Michigan Bell*.

23. KOIN excepts to the ALJ's conclusions of law at ALJD 16: 10-20 that:

The Respondent's argument that the witness should remain anonymous because she works closely with Hansen and the employee handbook assures her anonymity is insufficient without some credible evidence of witness intimidation, coercion or other threats to the witness' safety. There is no evidence nor allegations that Hansen has threatened, intimidated, been verbally or physically violent against the witness or any other employee. Even Moore describes his interaction with Hansen as merely "uncomfortable" which is far short of accusing her of being violent, intimidating or threatening. Moreover, there is no evidence that Hansen's interaction with Moore significantly, if at all, interfered with him completing his work. Last, the Respondent cites no Board or case law to support its argument on this point"

asserting that the evidence adduced at the hearing is sufficient to support the witness' repeatedly stated wish to remain anonymous as a valid consideration of confidentiality.

24. KOIN excepts to the ALJ's conclusions of law at ALJD 17:10-25 that:

"The case at issue, however, is distinguishable from Michigan Bell. In Michigan Bell, the employer did not believe the unit employees engaged in protected concerted activity; and therefore, refused to provide the informant's name because it did not believe the information was relevant. There is no dispute that Hansen engaged in union protected activity, which I have found did not lose protection of the Act. In Michigan Bell, there was evidence of union animosity towards the

informant. There is no such evidence in this case. inconsistencies in her retelling of events. Moreover, the witness' identity in this case has a direct correlation to the Union's ability to conduct an independent investigation into her statements by judging her credibility and probe for inconsistencies in her retelling of events. The dispute in Michigan Bell involved whether the employer was complying with a provision of the CBA. According to the Board, the union's ability to evaluate and prosecute the grievance did not depend primarily on the credibility of the informant. However, in this matter the case is primarily a "he said, she said" and the only allegedly "corroborating evidence" is from an anonymous witness. Here the anonymous witness was the only evidence the Respondent presented to corroborate Moore's claim that he wanted to get away from Hansen's "rants" about management. Consequently, assessing the credibility of the witness is of heightened importance" asserting that the holding in Michigan Bell fully supports a finding that the Act was not violated by KOIN's honoring of the witness' repeatedly expressed desire to keep her identity confidential and that no accommodation of this item was possible or required.

25. KOIN excepts to the ALJ's conclusions of law at ALJD 17:27-32 that:

"Even assuming Respondent sustained its confidentiality defense, it was still obligated to engage in accommodative bargaining with the Union, but the evidence shows it failed to meet its duty on this point. There is no evidence that Respondent made any attempts at engaging the Union in accommodative bargaining. Despite the Respondent's assertion to the contrary, the initial burden lies with the Respondent."¹⁴ Detroit Newspaper Agency, supra at 1072; Northern Indiana Public Service Co., supra at 211; Pennsylvania Power & Light Co., supra at

1105. Accordingly, I find that Respondent's failure to provide the information requested violated Section 8(a)(1) and (5) of the Act.", " **asserting that the holding in Michigan Bell fully supports a finding that the Act was not violated by KOIN's honoring of the witness' repeatedly expressed desire to keep her identity confidential and that no accommodation of this item was possible or required.**

26. KOIN excepts to the ALJ's conclusions of law at ALJD p. 18, lines 12-23 that: " 3..By its failure and refusal to provide the necessary and relevant information requested by the Charging Party on or about July 12, 2018, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. 4. By issuing a written warning to Ellen Hansen on or about July 12, 2018, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act and discriminating in regard to terms or conditions of employment, thus discouraging union activity in violation of Section 8(a)(1) and (3) of the Act. 4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act." **asserting that all reasons for exceptions as stated above lead to the conclusion that KOIN did not violate the Act as alleged.**

27. KOIN excepts to the ALJ's Order and Remedy at ALJD p. 18, line 26-p. 21, line 5: (entirety of Order and Remedy incorporated herein by reference) asserting that the recommended Order and Remedy is not justified by proper findings of fact and the proper application of law.

Respondent Nexstar Broadcasting Inc. d/b/a KOIN-TV respectfully submits these Exceptions, and herewith a Brief in Support of its Exceptions, this 29th day of July 2020.

/s/ Charles W. Pautsch

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CERTIFICATE OF SERVICE

This is to certify that on July 28, 2020 a copy of the foregoing Respondent's Exceptions to Administrative Law Judge's Decision, was filed with the NLRB's electronic filing system. Notice of filing will be sent to all Parties by operation of the NLRB's electronic filing system where the Parties then may access this filing and by email service to each of the following on this date of July 28,2020: Anne Yen, Counsel for the Charging Party at anneyen@unioncounsel.net, Sarah Ingebritsen, Counsel for the General Counsel at SarahIngebritsen@nlrb.gov, and Ronald Hooks. Regional Director for Region 19 at RonaldHooks@nlrb.gov

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