

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

CASTRO VALLEY ANIMAL HOSPITAL, INC.

and

CHRISTINA ARIANNA PADILLA, an Individual

and

AKILAH WILLIAMS, an Individual

Cases 32-CA-251642
32-CA-254220

RESPONDENT CASTRO VALLEY ANIMAL HOSPITAL, INC.'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by,

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND STATEMENT OF THE CASE.....	4
II. QUESTIONS INVOLVED.....	6
III. ARGUMENT.....	6
A. Applicable Law and Standards	6
B. Charging Parties Did Not Engage in Protected Concerted Activity.....	8
C. Respondent Had No Knowledge of Any Protected Concerted Activity.....	13
D. The ALJ’s Proposed Remedies Are Unjust	13
IV. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

Cases

NLRB v. City Disposal Systems, Inc.,
465 U.S. 822, 830 (1984)..... 7

Am. Gardens Mgt. Co.,
338 NLRB 644, 645 (2002) 7

Tracker Marine,
337 NLRB 644, 646 (2002) 7

Meyers Industries (Meyers I)
268 NLRB 493, 497 (1984) 7

Meyers Industries (Meyers II)
281 NLRB 882, 886 (1986) 7, 9, 13

Alstate Maintenance, LLC,
367 NLRB No. 68 (2019) 7, 9, 13

Michael Cetta, Inc. d/b/a Sparks Rest.,
366 NLRB No. 97 (2018) 10

Fresh & Easy Neighborhood Market,
361 NLRB 151, 153-54 (2014)..... 12

Statutory Authorities

29 U.S.C. § 157 6

29 U.S.C. § 158(a)(1) 6

I. INTRODUCTION AND STATEMENT OF THE CASE¹

This case involves a Consolidated Complaint alleging wrongful discharge on behalf of Charging Parties Christina Padilla and Akilah Williams, both of whom are former employees of Respondent Castro Valley Animal Hospital. Padilla filed her Charge on November 12, 2019, alleging that “in order to discourage employees from engaging in protected concerted activities,” she was discharged and disciplined on October 21, 2019 because she engaged in protected concerted activities by “discussing wages[, hours] and/or other terms and conditions of employment” and by “protesting terms and conditions of employment.” (GC Ex. 1(a).) Williams filed her Charge on January 6, 2020, alleging that “[d]uring the past six-month period, the Employer discriminated against [her] by discharging her in retaliation for and in order to discourage protected concerted activities.” (GC Ex. 1(e).) Initially a complaint was filed on January 2, 2020 on behalf of Padilla only (GC Ex. 1(c)), but then on February 20, 2020, the local Regional Director filed an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act by terminating Charging Parties. (GC Ex. 1(h).)

Throughout this matter, Respondent has taken the position that Charging Parties did not engage in protected concerted activity, that Respondent was unaware of any alleged protected concerted activity by Charging Parties, that Padilla was legitimately terminated for stealing, and that Williams voluntarily resigned her position with Respondent by declining to perform her job duties unless she was paid more.

¹ Citations in this brief will be as follows: “Tr. ___” to indicate the hearing transcript’s page and line numbers (referring to the full-sized transcript, not the condensed transcript whose numbering is different for Volume 1), “GC Ex. ___” to indicate an exhibit of the General Counsel, and “Decision, at [page]:[line]” to indicate the Decision’s page and line numbers.

Administrative Law Judge (“ALJ”) Amita B. Tracy heard this matter on March 10 and 11, 2020, in Oakland, California. The parties submitted post-hearing briefs on April 15, 2020. On July 27, 2020, the ALJ issued findings of fact, conclusions of law, and a decision, determining that Charging Parties had engaged in protected concerted activity pursuant to Section 7 of the National Labor Relations Act (“NLRA” or the “Act”) and that Respondent terminated their employment because of that activity, in violation of Section 8(a)(1) of the NLRA. The ALJ also provided recommended remedies.

Respondent respectfully excepts to the findings, conclusions of law, and recommended remedies in the Decision of the ALJ based on the ALJ’s erroneous and self-contradictory interpretation and application of the meaning of “protected concerted activity.” The record is abundantly clear that Charging Parties did not engage in such activity, but rather expressed merely their own personal concerns about certain workplace matters. As the Decision itself confirms, there is no evidence that Charging Parties ever engaged in any conduct that crossed the line from unprotected personal gripes into protected concerted activity whereby they were seeking to “improve their terms and conditions of employment” for the workplace at large. The ALJ manufactured an arbitrary distinction out of thin air based on the apparent notion that raising concerns with one other employee is not protected, but speaking to multiple other employees – absent any evidence of an intent to change workplace conditions generally for those other employees, none of whom had any complaints of their own – is protected. The ALJ cited no authority for the principle that the existence of protected concerted activity hinges on the number of co-workers with whom an employee speaks, with one co-worker being insufficient to warrant protection but some number greater than one being sufficient. Because the ALJ’s

determination that Charging Parties engaged in protected concerted activity was erroneous, and the Decision was based on that erroneous determination, the entire Decision collapses.

Based on the foregoing, Respondent respectfully requests that the Decision of the ALJ be set aside and that the Board dismiss all allegations in the Consolidated Complaint.

II. QUESTIONS INVOLVED

1. Whether the ALJ employed and applied the correct definition of “protected concerted activity.” (Exceptions 1-9, 12-13)
2. Whether Charging Parties actually engaged in protected concerted activity. (Exceptions 1-9, 12-13)
3. Whether Respondent was aware of Charging Parties’ alleged protected concerted activity. (Exceptions 10-11)
4. Whether the ALJ recommended the appropriate remedies. (Exceptions 14-17)

III. ARGUMENT

A. Applicable Law and Standards

The Act prohibits an employer from interfering with, restraining, or coercing employees engaged in any protected concerted activity as outlined in Section 7 of the Act. 29 U.S.C. § 158(a)(1) (otherwise known as Section 8(a)(1) of the Act). Section 7 of the Act grants employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157. To establish a *prima facie* case that an employer violated Section 8(a)(1) by taking action against an employee because that employee engaged in protected concerted activity under Section 7, the General Counsel must prove: (1) that the employee engaged in protected

concerted activity; (2) that the employer knew of the employee’s protected concerted activity; (3) that the employee was subjected to an adverse employment action; and (4) that the employer harbored unlawful animus or that some other nexus existed between the employee’s protected concerted activity and the adverse employment action. *Am. Gardens Mgt. Co.*, 338 NLRB 644, 645 (2002); *see also Tracker Marine*, 337 NLRB 644, 646 (2002).

Crucial to the present case, for an employee to engage in “other concerted activities for the purpose of . . . other mutual aid or protection” under Section 7 of the Act, the employee must satisfy the following two elements: “the activity they engage in must be ‘concerted,’ and the concerted activity must be engaged in ‘for the purpose of . . . mutual aid or protection.’” *Alstate Maintenance, LLC*, 367 NLRB No. 68, at * 2 (2019). Activity is concerted if it is “engaged in[,], with[,], or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984); *see also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984) (“[t]he term ‘concerted activit[y]’ is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals”) (emphasis added). In *Meyers Industries*, 281 NLRB 882, 886 (1986) (“*Meyers II*”), the Board held: “When the record evidence demonstrates group activities, whether ‘specifically authorized’ in a formal agency sense, or otherwise, we shall find the conduct to be concerted” (emphasis added). The Board further held in *Meyers II* that the definition of concertedness “encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management.” *Id.* at 887 (emphasis added).

The Board’s recent decision in *Alstate Maintenance*, which Respondent cited in its post-hearing brief and the ALJ mentions only briefly in the Decision without attempting to distinguish

it from the present matter, is instructive on the meaning of protected concerted activity. In that case, the charging party was discharged for griping about not being tipped. The Board held that there were no facts that “would support an inference that an individual employee was seeking to initiate or induce group action.” 2019 NLRB No. 68, at *21. “Instead, there was a brief encounter between a supervisor and his supervisees, the giving by that supervisor of a work assignment, and a gripe about the assignment by an employee” *Id.* The Board further held that “[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity.” *Id.* at *31 (emphasis added). “Rather, to be concerted activity, an individual employee’s statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management’s attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action.” *Id.* (emphasis added).

B. Charging Parties Did Not Engage in Protected Concerted Activity

By the above standard, neither Padilla nor Williams engaged in protected concerted activity – and the ALJ’s Decision confirms this. The Decision notes that Padilla and Williams complained to each other in early October 2019 about their working conditions, specifically the alleged denial of overtime pay and/or meal breaks. Decision, at 5:10-13; 6:37-7:1; 21:5-6. According to the Decision, these complaints “may not be considered to be protected concerted activity for mutual aid or protection as there is no evidence at that time that the employees had a goal of seeking to improve the terms and conditions of employment.” Decision, at 21:5-8. Padilla then complained to three other co-workers, Ronnie Swart, Luis Cordova and Veronica Garcia, about the same issues, while Williams complained to Swart. Citing no supporting facts,

the ALJ leaped to the conclusion that these latter communications constituted protected concerted activity because Charging Parties had “shifted to a goal of improving their terms and conditions of employment, even if no other employees agreed or experienced the same working conditions.” Decision, at 21:9-11. Nowhere does the Decision identify any facts about any of the communications that would demonstrate a material distinction between the earlier, non-protected communications and the later ones, or that Charging Parties had “shifted” their goal. The Decision does not explain the basis for the conclusion that the later communications had the goal of improving terms and conditions of employment on a group-wide basis, as opposed to merely asserting a personal complaint as the earlier ones apparently did. The making of a personal complaint to multiple people does not create protected concerted activity, as *Alstate Maintenance* confirms (“[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity”). Rather, per *Meyers II* and *Alstate Maintenance*, the employee must “bring a truly group complaint” or seek to “initiate, induce or prepare for group action.” There is no evidence of this here, and the Decision refers to none. Indeed, even the ALJ acknowledged, for example, that Williams “complained to Swart that she [Williams] was irritated because she never receives a lunch break when she works.” Decision, at 7:28-30 (emphasis added). This is unquestionably an individual complaint, not a group one; Williams did not say or imply that her “goal” had “shifted” to taking up the cause for her co-workers.

The primary activity that Padilla identified at the hearing as having supposedly motivated her termination unlawfully was her refusal to sign a “Staff Note” purporting to state that Respondent’s employees had been given sufficient time for their meal breaks. But this was her own refusal only. There is zero evidence that she was part of a group that refused to sign, or that

she raised issues about the document jointly with other employees, or that she did anything other than decline to sign the document solely on her own. Yet the ALJ decided in a conclusory manner that this was “concerted” activity, based on an amorphous reliance on the “totality of the circumstances” that the ALJ never explains as to how it demonstrates a “truly group complaint.” Decision, at 19:45-20:7. The ALJ’s unjustifiably overbroad definition of concerted activity must be rejected.

At the hearing in this matter, the General Counsel had every opportunity to elicit testimony from Charging Parties regarding their intentions in making their alleged complaints. Charging Parties could have been asked what their purpose was in making their statements to their co-workers (who did not share their opinion and did not have complaints of their own, thus making it much less likely that initiating “group action” or achieving mutual aid and protection were truly a motivating factor) and whether they intended to bring about changes for all employees in the workplace. But they were never asked those questions, and the General Counsel produced no other witnesses to testify about the supposed group or concerted nature of Charging Parties’ complaints. Because no such evidence or witnesses were presented, an adverse inference may be drawn that no such evidence exists. *Michael Cetta, Inc. d/b/a Sparks Rest.*, 366 NLRB No. 97 (2018).²

Meanwhile, the record is rife with testimony, including Charging Parties’ own admissions, that the ALJ summarily ignored or discounted but that dramatically undermines their assertions that they engaged in protected concerted activity, or that they were terminated for it:

² The ALJ did not hesitate to repeatedly draw such adverse inferences against Respondent. See, e.g., Decision, at fn. 7, 9:3-6, 10:41-42, fn. 38. The ALJ’s making of adverse inferences against Respondent, while failing to apply the same rule as to the massive gaps in Charging Parties’ showing, unfairly infected the entire Decision and constitutes further cause for the Decision to be overturned.

- Padilla believed she was fired “for my refusal to sign a document falsely stating that I had always been given accurate meal times.” (Tr. 17:20-22; 85:13-24.) She does not say that this refusal was in concert with anyone else or that her termination had anything to do with concerted activity – only her own. She admitted that when she met with Dr. Brar to discuss the document and then supposedly was fired when she refused to sign it, no one else was present. (Tr. 45:20-46:1.)
- Padilla testified that Williams told her that Williams felt that the reason why she (Williams) was allegedly terminated was because she “complained about lunches.” (Tr. 99:6-14.) Williams did not say she had engaged in protected activity or felt she had been terminated for it.
- Padilla never brought up the issue of meal breaks to Dr. Brar jointly with other employees. (Tr. 347:6-8.)
- Williams conceded that she never discussed with her co-workers the fact that she was not allowed to leave the facility to take a meal break. (Tr. 210:16-211:6.)
- Williams theorized that she was terminated because she “[wasn’t] given lunches,” and she did not believe there was any other basis for the end of her employment. (Tr. 215:7-216:1; 223:5-15.) Unable to get her own story straight, she testified that the reason for her removal from the schedule was “very unclear,” but also that it was because she did not get lunches. (Tr. 223:5-15; 219:1-6.) Thus, even she did not believe that she was removed from the schedule or terminated because she engaged in concerted protected activity. In fact, she admitted that there never

came a point when she believed she was being treated inappropriately with respect to meal breaks, or the lack thereof. (Tr. 216:2-5.)

- Williams admitted that she never complained to anyone at the hospital about any issue relating to overtime; she just stated that she herself wanted to receive it if she actually worked it. (Tr. 216:24-217:1; 219:25-220:3.) She did not believe that she was ever punished by anyone at the hospital for making that point. (Tr. 220:4-6.)

In light of these admissions, the ALJ grossly erred in determining that Charging Parties engaged in the type of genuinely concerted activity that the NLRA protects, as opposed to mere personal griping, or that they were punished for it. Not even the Charging Parties themselves believe that.

The ALJ relied heavily on *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153-154 (2014) to reach her Decision, ostensibly using it for the propositions that the existence of “concerted” activity depends on “the way the employee’s actions may be linked to those of his coworkers,” that the “concept of ‘mutual aid or protection’ focuses on the *goal* of concerted activity” (emphasis in original), and that concertedness “is not dependent on a shared objective or on the agreement of one’s coworkers with what is proposed.” In the present case, however, there is no evidence that Charging Parties were pursuing a specific “goal” of concerted activity, and the facts of *Fresh & Easy* are easily distinguishable. In that case, the employee actively sought her coworkers’ assistance in raising a sexual harassment complaint to management, by soliciting three of them to sign a piece of paper on which she had copied the offending image in an attempt to support her complaint. The Board held that the employee’s conduct in approaching her co-workers regarding this workplace concern would constitute concerted activity. By

contrast, in the present case there is no evidence that Charging Parties sought or intended to enlist their co-workers' assistance in raising a global workplace issue. Indeed, the ALJ determined that no such intention existed when the Charging Parties complained to each other. But she points to no actual evidence that their intentions or goals changed when they spoke to other employees. She merely concluded so by fiat. Such a conclusion flies in the face of established authority like *Meyers II* and *Alstate Maintenance*, which make clear that a truly group complaint is required for concerted activity, and that merely making a personal complaint in the presence of other employees – as occurred here – is insufficient.

Because the ALJ created and then applied an erroneous definition of protected concerted activity, her Decision that Respondent violated the NLRA is fatally flawed, and must be overturned.

C. Respondent Had No Knowledge of Any Protected Concerted Activity

Essential to any claim of interference with the right to engage in protected concerted activity is that the employer knew of said activity; otherwise, the employer could not have intended to interfere with it. It stands to reason that if protected concerted activity did not occur, the employer could not have known about it and interfered with it. For the reasons explained above, there was no protected concerted activity in this case. Therefore, Respondent could not have known about it or retaliated against Charging Parties, and the Consolidated Complaint fails for that reason as well.

D. The ALJ's Proposed Remedies Are Unjust

Because Charging Parties did not engage in protected concerted activity, Respondent engaged in no lawful conduct against them under the NLRA. Consequently, the imposition of remedies against Respondent would be unjust and contrary to law.

IV. CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Decision of the Administrative Law Judge be set aside and that the Board dismiss all allegations in the Consolidated Complaint.

Date: August 24, 2020

Respectfully Submitted,

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STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

At the time of service, I was over 18 years of age and not a party to the action. My business address is 333 Bush Street, Suite 1100, San Francisco, CA 94104-2872. I am employed in the office of the attorney at whose direction the service was made.

On August 24, 2020, I served the following document(s): **RESPONDENT CASTRO VALLEY ANIMAL HOSPITAL, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I served the document(s) on the following person(s) at the following address(es) (including fax numbers and e-mail addresses, if applicable):

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The document(s) were served on the above individuals by the following means:

- (BY U.S. MAIL) I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and I deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid.

In addition, I served the document(s) on the following person(s) at the following address(es) (including fax numbers and e-mail addresses, if applicable):

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The documents were served on the above individual by the following means:

- (BY E-MAIL OR ELECTRONIC TRANSMISSION) I caused the documents to be sent from e-mail address berenice.barragan@lewisbrisbois.com to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on August 24, 2020, at Antioch, California.



Berenice Barragan