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The Brief in Opposition to Respondent's Exceptions filed by the Counsel for the Acting General Counsel ("General Counsel") fails to acknowledge the pivotal fact in this case; namely, that the comments Kevin "Dale" Grosso ("Grosso") wrote on the newsletters, such as "Dear Pussies – Please Read," "Hey Catfood Lovers, How's Your Income Doing?" and "Warehouse Workers RIP," were deeply offensive and threatening to no fewer than four female warehouse workers and triggered their legitimate complaints to management.

The General Counsel advances arguments as if Grosso's comments contained no references to female genitalia and a threat of physical harm. The General Counsel also ignores the female warehouse workers' understandable reaction and response to the Grosso comments wherein the women expressed their offense and fear. The complaints of the female warehouse employees, which occurred no fewer than three times, cannot be ignored in this case, as the Respondent had a duty to maintain a safe and harassment-free workplace for its employees, including the female warehouse workers. In furtherance of that duty, Respondent lawfully investigated, interviewed, and disciplined Grosso. Further, in order to protect the women who were legitimately offended and frightened by Grosso's conduct, the Respondent encouraged Grosso to not talk to other employees about the investigation during its pendency, a mere three days. Respondent submits that this "encouragement" is not unlawful under the totality of the circumstances and under well established Board law.

I. The Respondent Did Not Violate the Act When It Encouraged Grosso to Keep the Investigation Confidential

First and foremost, the General Counsel mischaracterizes the facts of this case by attempting to portray management's encouragement of Grosso to maintain the investigation as confidential as an "instruction" or directive. The record evidence establishes that Grosso was not instructed nor was he directed to keep the investigation confidential. Grosso was not threatened

with discipline of any kind if he failed to maintain the investigation as confidential. Instead, according to Grosso's own testimony, King said, "during this investigation we appreciate that you don't talk anything about what just happened here. We'd prefer that you not talk about it." Tr. at 285 (emphasis added). King testified that he "encouraged [Grosso] to not talk to other employees" on September 22, 2009. Tr. at 1349 (emphasis added). Maloney, who was also present at the September 22, 2009 meeting, similarly testified that King "encouraged [Grosso] that he shouldn't speak to any other employees." Tr. at 1148 (emphasis added). Finally, there is no evidence in the record suggesting that the request that Grosso keep the investigation confidential was accompanied by any threat of discipline or actual discipline. Therefore, the General Counsel mischaracterizes the "encouragement" by King as an instruction.

The General Counsel cites Westside Community Mental Health Center, Inc., Mobil Oil Exploration and Producing, U.S., Inc., and SNE Enterprises, Inc., all of which are inapposite to the instant case. 327 N.L.R.B. 661 (1999); 325 N.L.R.B. 176 (1997); 347 N.L.R.B. 472 (2006). Most importantly, the employer in the cases cited by the General Counsel did not share Respondent's primary concern as established in this case which motivated the encouragement of confidentiality – the safety of witnesses to the investigation. In Westside Community Mental Health, the Board found that the company's contention that a concern of safety was the reason for the confidentiality instruction was not supported by "sufficient information" other than the employer's "bare claims" of safety concerns. 327 N.L.R.B. at 666. In this case, however, extensive evidence of the women's fear due to Grosso's conduct, namely him threatening them with physical harm when he wrote "Warehouse Workers RIP," was presented at the hearing. King testified specifically that he encouraged Grosso not to talk to other employees because

three women complained that they felt threatened and that they didn't feel safe, and I didn't want Mr. Grosso trying to talk to them and make them feel more

threatened. My experience is that when there are issues like this and somebody is saying that somebody else made a threat, that to allow or not encourage the person not to talk to other employees it can make the threat worse. Because now they're approaching people and trying to conduct their own investigation. I also wanted to preserve the sanctity of the investigation.

Tr. at 1353. In addition to King's testimony, Respondent presented the testimony of the female warehouse employees who testified at length about how they felt threatened by Grosso's comments. Buxbaum, for example, felt that the comment "Warehouse Workers – R.I.P" was a threat and that whoever wrote it was willing to "actually do something . . . they could attack us."

Tr. at 873. Moscatelli, while upset by all three comments written on the newsletters, was particularly upset by the comment "Warehouse Workers – R.I.P." because that comment indicates death. Tr. at 652. Germino testified that she felt intimidated and that the comment "Warehouse Workers – R.I.P." was "like a threat" and was so intimidated that she felt uncomfortable submitting a written statement of her complaint as her confidentiality could not be ensured. Tr. at 172, 800. Moreover, in response to these complaints, Shane Healy, the Distribution Center Manager, took affirmative steps to protect the women due to their safety concerns. Therefore, the Respondent did not simply make "bare claims," nor did Respondent "fail[] to present sufficient information" to satisfy its burden, as alleged by the General Counsel. To the contrary, the record is replete with evidence that the Respondent encouraged confidentiality in order to protect the safety of its employees, namely the female warehouse employees who were threatened by Grosso's conduct.

The General Counsel also cites Mobil Oil Exploration in support of its argument that Respondent did not have a sufficient business justification for requesting that Grosso not talk to other employees about the investigation during its final three days. In Respondent's Brief in Support of Exceptions, Respondent presented multiple reasons why the Mobil Oil Exploration case is distinguishable from the instant case. The General Counsel ignores the many reasons

provided by Respondent as to the differences in the factual background of that case as compared to the present case and articulates no arguments as to why this case supports the General Counsel's argument. Most significantly, the employer in Mobil Oil Exploration had no interest in protecting the safety of its employees. As discussed above, the Respondent had a very strong interest in protecting its employees who had complained no fewer than three times that they were offended and frightened by Grosso's conduct.

Further, the General Counsel's citation to SNE Enterprises, Inc. is misplaced. In SNE Enterprises, the Board found that the employer violated Section 8(a)(1) by discharging an employee for his failure to obey "an overly broad rule prohibiting employees from discussing disciplinary action taken against them with their co-workers" over a month after the completion of the investigation, which clearly indicated that "the rule was not enforced to protect the sanctity of an ongoing investigation." 347 N.L.R.B. 472, 493 (2006). In the instant case, however, the so called confidentiality request was made during the course of the investigation to protect the safety of the female witnesses and the sanctity of the investigation during its pendency, only three days. Further, in SNE Enterprises, the employer discharged an employee for failing to comply with the confidentiality rule, whereas in this case, Grosso was never disciplined or even threatened with discipline as a result of any failure to maintain the investigation as confidential.

Unlike the cases cited by the General Counsel, the Respondent presented extensive evidence regarding its legitimate business interest in conducting an effective investigation while protecting the female employees' safety. As further evidence of the Company's taking the women's complaints seriously, the Company also presented evidence of specific safety measures taken in order to protect the women who complained, as well as the rest of the employees at the

Chester facility. Tr. at 1232. In response to the female warehouse employees' complaints of feeling offended and threatened, Healy:

reached out to several security companies to investigate what it would take to get them to come in the building if it was deemed that it was needed. I stayed late every day specifically to make sure all the women had left the building and were okay. And I had instructed employees on where they can park if they felt like they wanted added security as far as being in sight of what the security cameras picked up.

Tr. at 1232. Protecting the female witnesses who participated in the investigation by encouraging Grosso to not talk to other employees about the investigation was simply one more step the Company took in order to ensure a safe working environment for the employees.

As noted above, the General Counsel notably ignores the fact that Grosso was never disciplined, nor was he threatened with discipline, for violating the confidentiality request even though he discussed the investigation with at least one coworker, Kevin Farrell ("Farrell"), who accompanied Grosso to the interview on September 23, 2009. Tr. at 1239, 1354. The fact that Grosso was not disciplined, nor did the Company even mention the fact that he violated the confidentiality request by discussing the investigation with Farrell, is evidence that the so called confidentiality request was simply that, a request or more precisely an "encouragement" and not a directive or instruction. The General Counsel's argument that requesting confidentiality from Grosso "violates Grosso's Section 7 right to consult with fellow employees for mutual aid and protection, including seeking information that might aid in his defense" (General Counsel's Brief in Opposition to Respondent's Exceptions 4-5)¹ fails, as Grosso was able to, and in fact did, successfully recruit the aid of a fellow employee to aid in his defense, by having Farrell accompany him to the September 23 interview regarding his conduct.

¹ General Counsel's Brief in Opposition to Respondent's Exceptions will hereafter be cited as GC Opp. ____.

II. The Fifth Bourne Factor, the Untruthfulness of Grosso's Reply During the September 22 Interview, Weighs in Favor of the Interview Being Lawful

The General Counsel, in an attempt to reshape the record with respect to Grosso's lack of credibility, disingenuously argues that Respondent mischaracterized Grosso's testimony and the record evidence regarding Grosso's dishonesty. The fact that Grosso admittedly lied many times throughout the course of the investigation and not just in the initial interview on September 21, 2009 is evidence of his dishonesty and not somehow evidence of a coercive interview.

The General Counsel makes several contentions with respect to Grosso's credibility that are flatly wrong. First, the General Counsel contends that "Respondent does not cite to any inconsistencies in Grosso's testimony, instead citing to record testimony in which Grosso admits that he was previously dishonest." GC Opp. 7. To the contrary, Respondent's Brief in Support of Exceptions specifically highlighted that Grosso's testimony was at times inconsistent with the bulk of record evidence. For example, Respondent cited to the inconsistency between Grosso's testimony that he told King that "he had acted as a football coach rallying the team" and that "he didn't like bullies" at the September 23 interview and the remaining record evidence pertaining to the September 23 interview, which indicates in direct contrast to Grosso's testimony that he never made such statements. Tr. at 1242; Respondent's Brief in Support of Exceptions 17, n.6. The record evidence as a whole firmly establishes that Grosso never made those statements, as his self-serving testimony is directly refuted by Healy, King, and the notes taken contemporaneously with the interview. Tr. at 1242, 1359; RX 23.²

²

The Respondent further explained that Grosso's testimony with respect to these statements should be discredited since neither the General Counsel nor the Union called either Adrian Huff (the Union Business Representative) or Kevin Farrell (the Union Shop Steward) to testify in order to corroborate Grosso's version of events. Since Huff and Farrell were (1) actually at the hearing, (2) within the control of the Union, and (3) presumed to testify in the Union's and the General Counsel's favor if they had been called, an adverse inference should be drawn with respect to Huff's and Farrell's failure to testify on this point at the hearing and it should be inferred that Huff and Farrell would not have, in fact, corroborated Grosso's version of events. See DaiKichi Corp., 335 N.L.R.B. 622 (2001) ("it is well settled that when a party fails

Respondent also cited to an inconsistency with respect to Grosso's own testimony.

Respondent's Brief in Support of Exceptions states

At the trial, Grosso testified that he wrote the comments on the newsletters in the hope of having the warehouse workers read a specific article in the union newsletter related to the Employee Free Choice Act. Tr. at 264-65. Importantly, Grosso never testified that he actually read any of the contents of the union newsletter let alone any specific articles buried within the body of the newsletter. To the contrary, Grosso testified that he initially saw the newsletters and then immediately sat down and wrote on the newsletters after spending only "half a second" thinking about what words to write. Tr. at 259-61. Grosso's story about wanting the warehouse employees to read a specific article in the newsletter is flatly inconsistent with his story about how he wrote the comments on the newsletters since he never actually read the contents of the newsletter before he wrote on the face of the newsletters.

Respondent's Brief in Support of Exceptions 33. Therefore, contrary to the assertions in the General Counsel's Brief, Respondent has pointed to instances in which Grosso's testimony is inconsistent both with (1) the testimony of other witnesses, which represents the credible weight of the record evidence; and (2) his own testimony.

The General Counsel further contends that "the only dishonest statements which Respondent cites are the statements Grosso made in response to the unlawful interrogation." GC Opp. 7. This contention is patently false since Respondent listed in both its Post-Hearing Brief and Brief in Support of Exceptions, one-by-one, the six instances in which Grosso admitted to having lied during the course of the hearing. Given that the General Counsel apparently has either failed to notice or conveniently overlooked this list to date, it is important to correct the General Counsel's misstatements regarding Grosso's admitted lies. Importantly, Grosso

to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge"). Huff and Farrell are the only other two witnesses who could have corroborated Grosso's version of events, and the fact that neither testified regarding the alleged statements made by Grosso at the September 23 interview further support Respondent's argument that Grosso's testimony is not credible and is inconsistent with the credible record evidence. It is particularly noteworthy that Farrell testified for the General Counsel, but was not asked about the September 23 interview at all.

admitted that he lied no fewer than six times, only four of which occurred during the September 21 interview, the only alleged unlawful interrogation:

- Q: And didn't you indicate in response to that that you didn't have any knowledge of who had written these newsletters and you specifically indicated that you didn't write them, right? / A: That's correct. / Q: That wasn't a true statement you gave him. That answer was not true. Correct? / A: That answer was not true. Tr. at 352.
- Q: And your comment was "RIP is common language," right? / A: That's correct. / Q: "Everyone uses it, but I didn't write the comments on these three newsletters," right? / A: That's right. / Q: And that second time you said it, that was also an untrue statement, correct? / A: That's correct. Tr. at 353.
- Q: Do you remember saying at the end of that meeting once again denying having any knowledge about these comments or who may have written them? / A: I had denied saying it. Yes. / Q: And you said it again at the end of the meeting, right? / A: Yes. / Q: You also denied being the one who wrote them, right? / A: I denied being that person. Yes. / Q: And both of those statements were untrue also, right? / A: Yes. They were both untrue. Tr. at 358-59.
- Q: With Mr. Healy. Right after this meeting didn't you deny writing the comments again? / A: Yes. I stuck to my story. Yes. / Q: Yes. And that was an untrue statement again, wasn't it? / A: Yes it was. Tr. at 362.
- Q: So you will admit that you said "This is not Dale," correct? / A: Yes I did. / Q: And that was not a true statement, was it sir? / A: No it wasn't a true statement. Tr. at 373 – 74.

In addition to lying during the September 21 interview, wherein he was not legally privileged to be untruthful, Grosso also lied after the September 21 meeting in a conversation with Healy initiated by Grosso and on the September 22 phone call with King, Petliski, and Maloney on September 22, also initiated by Grosso. Tr. at 362, 1238; 182, 373-74, 1058, 1143, 1345; RX 15, RX 16, RX 17. Neither Grosso's conversation with Healy after the September 21 meeting, nor the September 22 phone call is alleged to be an unlawful interrogation; those lies therefore occurred outside the scope of the alleged unlawful interrogation.

Further, Tyler specifically testified that he relied upon two instances of dishonesty in making the determination to terminate Grosso – "[b]ased on the documents that I reviewed to make my decision on his discharge, it was being dishonest while being asked questions if he

doctored or authored those documents, as well as a phone call that was placed to Mr. King where Mr. Grosso denied being Mr. Grosso. And so those are both situations of dishonesty.” Tr. at 80. Therefore, the General Counsel’s assertion that Respondent cites only statements Grosso made in response to the unlawful interrogation as examples of Grosso’s dishonesty ignores multiple portions of the undisputed record testimony as well as two briefs submitted by Respondent.

Finally, the General Counsel’s contention that the ALJ counted the fact that Grosso admitted to instances in which he was dishonest during his testimony “in favor of Grosso’s credibility” is baseless and false. GC Opp. 7. Judge Brakebusch made no credibility determinations with respect to Grosso whatsoever – in fact, both Respondent and the General Counsel filed exceptions to the Administrative Law Judge’s decision protesting Judge Brakebusch’s failure to make credibility determinations, the Respondent’s exception specifically addressing Grosso. Respondent’s Exception 74; General Counsel’s Exception 32. The contention that Judge Brakebusch made any credibility determination whatsoever with respect to Grosso’s testimony is simply not accurate.

III. The ALJ Erred In Denying Respondent’s Motion For Partial Summary Judgment and Not Dismissing Certain Allegations of the Complaint As An Improper Enlargement of the Allegations in the Unfair Labor Practice Charges

Regardless of whether the Complaint allegations were timely asserted in the Complaint, the allegations that Respondent unlawfully interrogated Grosso and unlawfully investigated Grosso’s conduct should have been dismissed prior to trial because they improperly enlarged the allegations in the Charge and Amended Charge. In Nickles Bakery of Indiana, Inc., the Board held that “[i]n considering the general sufficiency of a charge to support an allegation in the complaint, the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge.” 296 N.L.R.B. 927 (1989). The Board reasoned that “the language of Section 10(b) of the Act . . .

require[s] a significant factual affiliation between the charge allegations and the complaint allegations.” Id. at 928.

Citing the Redd-I case, the Board reasoned that there is “no sufficient basis in law or policy for continuing to exempt 8(a)(1) complaint allegations from the requirements of the traditional ‘closely related’ test.” Id. (citing Redd-I, Inc., 290 N.L.R.B. 1115 (1988)). The Board stated that such a practice “contravenes 10(b)’s mandate that the Board not originate complaints on its own initiative” and virtually renders meaningless the specificity required by Section 102.12(d) of the Board’s rules and regulations that a charge contain a ‘clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.” Id. at 928. Since the allegations regarding the unlawful interrogation and unlawful investigation were not contained in either the Charge or the amended Charge, the allegations must be closely related, under the Redd-I test, to the Charge allegations. As demonstrated by the Respondent in its Brief in Support of Exceptions, the allegations are not closely related and therefore should have been dismissed as unlawful enlargements of the Charge allegations.

Further, the Respondent’s Motion for Summary Judgment was not procedurally defective, as alleged by the General Counsel. The General Counsel conveniently overlooked the correction made by counsel for Respondent on the record, wherein counsel stated that the Motion for Summary Judgment was being filed “pursuant to Rule 102.35(8).” Tr. at 18. Therefore, the motion was properly filed with the Administrative Law Judge and was not procedurally defective, as recognized by the Administrative Law Judge when she considered the merits of the Motion.

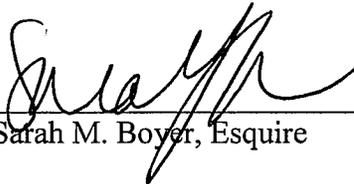
CERTIFICATE OF SERVICE

This is to certify that on November 10, 2010, I caused the foregoing Reply Brief in Further Support of Respondent's Exceptions to the Administrative Law Judge's Decision to be served electronically, properly addressed as follows:

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