Richmond District Neighborhood Center *and* Ian Callaghan. Case 20–CA–091748

October 28, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On November 5, 2013, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order dismissing the complaint.

The only issue before us is whether an August 2, 2012 protected concerted Facebook conversation between two of the Respondent's employees lost the Act's protection. For the reasons discussed below, we affirm the judge's finding that the Facebook posts lost protection, and we adopt his conclusion that the Respondent did not violate Section 8(a)(1) by rescinding the employees' rehire offers because of the posts.

The Respondent operates the Beacon Teen Center at San Francisco's George Washington High School, providing afterschool activities to students. For the 2011–2012 school year, Ian Callaghan was one of the Beacon's activity leaders, and Kenya Moore occupied the program leader position, which included data-entry, recordkeeping, and oversight duties. In May 2012, Supervisor Rena Payan held a year-end staff meeting at which she asked the employees to write down the pros and cons of working at the Beacon. After she left the room, the employees anonymously wrote 8 pros and 23 cons.[2] After the May meeting, some of the employees perceived that the managers and other administrative staff had taken their complaints personally and were giving them the "cold shoulder." Callaghan and Moore sought to schedule a follow-up meeting multiple times, but Payan never agreed to it.

After the school year ended, Moore continued her position at the Beacon for the summer program, and Callaghan worked for the Respondent at an offsite summer camp. Before each school year, the Respondent sends offer letters to those employees whom it wants to return. The Respondent sent rehire letters to both Callaghan and Moore for the 2012–2013 school year, but it offered Moore a demotion to activity leader because her summer supervisor rated her performance negatively.

The evening of August 2, Callaghan and Moore (with a former student chiming in) had the following exchange on Callaghan's Facebook page:[3]

> MOORE: U gOin baCk or nO??
>
> CALLAGHAN: I'll be back, but only if you and I are going to be ordering shit, having crazy events at the Beacon all the time. I don't want to ask permission, I just want it to be LIVE. You down?
>
> MOORE: Im gOin to be a activity leader im not doin the t.c[4] let them figure it out and when they start loosn kids i aint helpn HAHA
>
> CALLAGHAN: hahaha. Sweet, now you gonna be one of us. Let them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach the kids how to graffiti up the walls and make it look cool, get some good food. I don't feel like bein their bitch and making it all happy-friendly-middle school campy. Let's do some cool shit, and let them figure out the money. No more Sean.[5] Let's fuck it up. I would hate to be the person takin your old job.
>
> MOORE: Im glad im done with that its to much and never appriciated sO we just gobe have fuN dOin activities and the best part is WE CAN LEAVE NOW hahaha I AINT GOBE NEVER BE THERE even thO

[1] The General Counsel also filed a motion to strike several portions of the Respondent's answering brief. We grant his motion only as to the portions that contest the judge's finding that Ian Callaghan and Kenya Moore's Facebook posts were concerted activity for the purpose of mutual aid or protection. The Respondent did not file exceptions to that finding, and it is "procedurally foreclosed" from asserting cross-exceptions in its answering brief. *White Electrical Construction Co.*, 345 NLRB 1095, 1096 (2005); see also *Bohemian Club*, 351 NLRB 1065, 1067 fn. 6 (2007). We deny the rest of the General Counsel's motion. We do not find the remainder of the Respondent's brief to assert any cross-exceptions. To the extent the General Counsel takes issue with the Respondent's characterizations of his arguments or of the record, we find his motion to strike to be an inappropriate vehicle. See *Hydrologics, Inc.*, 293 NLRB 1060, 1060 fn. 2 (1989).

[2] The cons included "[n]o helpful supervision/participation," "[n]ot enough support or communication," "[w]e would like more responsibility," "[o]ur ideas go nowhere," "[s]taff turnover," "[n]ew Amps for BANDS," "[b]etter snack," and "[n]eed to take youth on better outings i.e. great america, bowling, skating, movies."

[3] The judge modified the exchange for readability. We reproduce it exactly as it appeared.

[4] Moore evidently meant "teen center."

[5] Shawn Brown was a manager at the Beacon.

shawn gone its still hella stuCk up ppl there that dont appriciate nothing

CALLAGHAN: You right. They dont appreciate shit. Thats why this year all I wanna do is shit on my own. have parties all year and not get the office people involved. just do it and pretend they are not there. i'm glad you arent doing that job. let some office junkie enter data into a computer. well make the beacon pop this year with no ones help.

MOORE: They gone be mad cuZ on wednesday im goin there aNd tell theM mY title is ACTIVITY LEADER dont ask me nothing abOut the teen cenTer HAHA we gone have hella clubs and take the kids ;)

CALLAGHAN: hahaha! Fuck em. field trips all the time to wherever the fuck we want!

MOORE: U fUckn right see u wednesdaY

CALLAGHAN: I won't be there wednesday. I'm outta town. But I'll be back to raise hell wit ya. Dont worry. Whatever happens I got your back too.

FORMER STUDENT CHLOE GARABATO: WTF !!! As soon as I leave you guys want to hella fun as shit and I can be there !! HELLA MEAN !!!

MOORE: U can come why u cant

GARABATO: Because I'll have school . And I'm trying to work during school too . If you can get me job working with you guys , I'm there for sure !!! Aha

MOORE: You see what we gO thrU we there fOr the kids I dOnt knOw abOut everybOdy eLse

CALLAGHAN: It's all for the kids. You gotta come in and visit. Everyone is invited.

The next day, a Beacon employee sent screenshots of the conversation to management. On August 13, 2012, relying solely on the Facebook posts, the Respondent rescinded Callaghan and Moore's rehire offers. The Respondent explained, "These statements give us great concern about you not following the directions of your managers in accordance with RDNC program goals. . . . We have great concerns that your intentions and apparent refusal to work with management could endanger our youth participants."

The parties did not except to the standard the judge used to evaluate Callaghan and Moore's Facebook conversation, which standard he articulated as whether their conduct was "'so egregious as to take it outside the protection of the Act, or of such a character as to render the employee[s] unfit for further service.'" *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2, 1233–1234 (1994) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)).[6] The General Counsel contends that the judge inappropriately relied on what the Respondent subjectively "could . . . conclude," rather than applying the analysis objectively. The General Counsel is correct that the standard is an objective one. See *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011); *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), enfd. 561 F.2d 1196 (5th Cir. 1977). But, viewing the facts objectively, we still agree with the judge's conclusion that the employees lost the Act's protection.[7]

Callaghan and Moore's Facebook exchange contains numerous statements advocating insubordination. See *DaimlerChrysler Corp.*, 344 NLRB 1324, 1325 (2005) (finding encouragement of slowdown unprotected); *Midwest Precision Castings Co.*, 244 NLRB 597, 598–599 (1979) (dismissing allegation where shop steward urged employee to slow down work); cf. *Can-Tex Indus.*, 256 NLRB 863, 872 (1981) ("mere talk" about potentially unprotected shutdown protected), enfd. in relevant part 683 F.2d 1183 (8th Cir. 1982); *KQED, Inc.*, 238 NLRB 1, 2 (1978) (where no-strike clause was in place, rhetorical allusion to work stoppage was protected), enfd. mem. 605 F.2d 562 (9th Cir. 1979). The employees referenced refusing to obtain permission as required by the Respondent's policies before organizing youth activities ("ordering shit, having crazy events at the Beacon all the time. I don't want to ask permission . . ."; "Let's do some cool shit, and let them figure out the money"; "field trips all the time to wherever the fuck we want!"), disregarding specific school-district rules ("play music loud"; "teach the kids how to graffiti up the walls . . ."),[8] undermining leadership ("we'll take advantage"; "I would hate to be the person takin your old job"), neglect-

[6] In the absence of exceptions, we do not decide the appropriateness of the judge's test for analyzing private Facebook conversations. Member Miscimarra agrees with the test the judge applied. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 9 fn. 1 (2014) (Member Miscimarra, dissenting in part).

[7] Inasmuch as the appropriate standard is an objective one, we need not address the Respondent's claim that it believed that the Facebook comments jeopardized the program's funding, but we note in this regard that the Respondent offered no evidence that the posts were viewed by any students, parents, administrators or other funders, and no such concern was cited in the Respondent's letter rescinding the rehire offers.

[8] The Beacon shares a wall with one of George Washington High School's classrooms and needs to limit noise to respect its neighbors. The school has a strict zero-tolerance policy on graffiti.

ing their duties ("I AINT GOBE NEVER BE THERE"), and jeopardizing the future of the Beacon ("they start loosn kids i aint helpn"; "Let's fuck it up"). We find the pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection and render Callaghan and Moore unfit for further service.[9]

The General Counsel argues that, viewed against the backdrop of the complaints articulated at the May meeting and Moore's recent demotion, and considering that neither Callaghan nor Moore had any history of insubordination, the Facebook posts could not reasonably be understood as seriously proposing insubordinate conduct. We disagree. Callaghan and Moore's lengthy exchange repeatedly described a wide variety of planned insubordination in specific detail. *Broyhill & Associates, Inc.*, 298 NLRB 707, 709–710 (1990) (no protection for employee who "expressed quite clearly over and over again . . . that he was not going to work the night schedule"). We are not presented here with brief comments that might be more easily explained away as a joke, or hyperbole divorced from any likelihood of implementation. See, e.g., *Hahner Foreman & Harness, Inc.*, 343 NLRB 1423, 1424 (2004) (employee's joke about work slowdown did not lose protection of the Act); *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988) (finding that an employee did not lose the Act's protection by telling a company official that "if you're taking my truck, I'm kicking your ass right now," as it was not a serious threat of physical harm in the context of the workplace's culture). The magnitude and detail of insubordinate acts advocated in the posts reasonably gave the Respondent concern that Callaghan and Moore would act on their plans, a risk a reasonable employer would refuse to take. The Respondent was not obliged to wait for the employees to follow through on the misconduct they advocated. *Broyhill*, 298 NLRB at 707–710 (where employee said he "could not and would not work 12 nights," "would just take time off," and "get sick a lot," "[r]espondent was not obliged to wait for [him] to carry out his threat").

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. October 28, 2014

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Yasmin Macariola, Esq. for the General Counsel.
Nicole L. Meredith, Esq. (Vogl, Meredith Burke LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at San Francisco, California, on July 23, 2013. On October 19, 2012, Ian Callaghan (Callaghan) filed the charge alleging that Richmond District Neighborhood Center (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The charge was amended on December 4, 2012, and January 14, 2013. The Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing on May 29, 2013, against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. An amended complaint issued on July 9, 2013. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California nonprofit corporation, with a principal place of business in San Francisco, California, has been engaged in the operation of community programs including after school and summer programs for youth. During the 12 months prior to the issuance of the complaint, Respondent received gross revenues in excess of $250,000. During the same period of time, Respondent purchased and received goods valued in excess of $5000 which originated outside of California.

[9] In so finding, we do not rely on the employees' use of profanity or disparaging characterizations of the Respondent's administrative and managerial personnel.

[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent is a nonprofit corporation that develops and provides high quality youth, adult, and family programs that address critical community needs. One of these programs provides after school activities for high school students in the Beacon Teen Center space located at George Washington high school in the Richmond District of San Francisco. Ian Callaghan, the Charging Party, and Kenya Moore worked for Respondent at the Beacon Teen Center. General Counsel contends that Respondent discharged Callaghan and Moore because they engaged in protected concerted activities. Respondent contends that Callaghan and Moore were not engaged in concerted activities and that their conduct was not protected.

B. Facts

Callaghan worked as a teen activity leader. Moore was the teen center program leader. On July 30, 2012, Callaghan was sent a rehire letter as a teen activity leader. Moore was demoted and sent a rehire letter as a teen activity leader and not as teen center program leader.

In May 2012, the teen center employees had a staff meeting at which supervisor Rena Payan asked the employees to fill out evaluations regarding her job performance. She then instructed the staff to fill out a large piece of butcher block paper regarding the pros and cons of working for Respondent. The teen center employees wrote down issues such as: feeling unappreciated, not having enough time to create quality programs; lack of supervision: feeling directionless; having problems with transparency with the office staff especially regarding the budget; not knowing how much money they were allowed to spend on projects; their ideas being ignored; feeling mistreated; and high worker turnover during the school year which the youth complained about and made their jobs difficult. Callaghan attempted to set up a follow-up meeting but was rebuffed. Callaghan testified that after the May meeting the office staff turned a cold shoulder to the teen center employees.

On August 2, 2012, Moore contacted Callaghan through Facebook. This was the first and only Facebook conversation Callaghan had with Moore since he had worked with her during the last school year. Callaghan was Facebook friends with Moore, employee Sarah Godfrey and manager Alexandria Tom. Callaghan was also Facebook friends with former student Chloe Garabato who left the program when she graduated from high school. At that time, Callaghan's Facebook page was set to "just my friends" and was not public.

The Facebook conversation, which resulted in the withdrawal of the rehire letters to Callaghan and Moore, stated the following:

Moore: U goin' back or no??

Callaghan: I'll be back, but only if you and I are going to be ordering shit, having crazy events at the Beacon all the time. I don't want to ask permission, I just want to be LIVE. You down?
Aug.2 at 7:23pm

Moore: I'm goin''' to be a activity leader I'm not doing the t.c. [sic] let them figure it out and they start loosin' kids I ain't help'n HAHA
Aug. 2 at 7:25pm

Callaghan: ha ha ha. Sweet. Now you gonna be one of us. Let them do the numbers, and we'll take advantage, play music loud, get artists to come in and teach kids how to graffiti up the walls and make it look cool, get some good food. I don't feel like being their bitch and making it all happy-friendly middle school campy. Let's do some cool shit, and let them figure out the money. No more Sean. Let's fuck it up. I would hate to be the person taking your old job.
Aug 2 at 7:29 pm

Moore: I'm glad I'm done with that its to much and never appreciated so we just go be have fun doing activities and the best part is WE CAN LEAVE NOW hahaha I AINT GON BE NEVER BE THERE even tho [sic] shawn gone its still hella stuck up ppl there that don't appreciate nothing.

Aug 2 at 7:32pm

Callaghan: You right. They don't appreciate shit. That's why this year all I wanna do is shit on my own. Have parties all year and not get the office people involved. Just do it and pretend thay [sic]are not there. I'm glad you aren't doing that job. Let some office junkie enter data into a computer. Well make the beacon pop this year with no ones help.

Aug 2 at 7:40pm

Moore: They gone be mad cuz on Wednesday I'm goin' there add tell them my title is ACTIVITY LEADER don't ask me nothing about the teen center HAHA we gone have hella clubs and take the kids☺

Aug 2 at 7:45pm

Callaghan: hahaha! Fuck em. Field trips all the time to wherever the fuck we want!

Aug 2 at 7:48 pm

Moore: U fuck'n right see you Wednesday

Aug 2 at 7:49pm

Callaghan: I won't be there Wednesday. I'm outta town. But I'll be back to raise hell wit ya. Don't worry. Whatever happens I got your back too.
Aug 2 at 7:56pm

Chloe Garabato: WTF!! As soon as I leave you guys want to hella fun as shit I can't be there!! HELLA MEAN!!!

Aug 2 at 8:16 pm

Moore: U can come why you can't

Aug 2 at 8:18 pm

Chloe Garabato: Because I'll have school. And I'm trying to work during school too. If you can get me a job working with you guys, I'm there for sure!!! Aha.

Aug 2 at 8:22pm

Moore: You see what we go thru we there for the kids I don't know about everybody else

Aug 2 at 8:25pm

Callaghan: It's all for the kids. You gotta come in and visit. Everyone is invited.

Aug 2 at 9:47pm

On August 3, 2012, Sarah Huck, family program coordinator, sent screenshots of Callaghan's and Moore's Facebook conversation to her Supervisor Brock Ogletree and Beacon Director Michelle Cusano. Cusano then sent an email to human resources manager Jan Nicholas requesting that Callaghan and Moore not be rehired. Nicholas, Cusano, and Executive Director Pat Kaussen decided to terminate the two employees on August 6. On August 13, 2012, Respondent sent Callaghan and Moore letters rescinding their rehire offers, citing concerns based on their Facebook conversation that the employees would not follow directions of their manager and could endanger the youth.

C. Respondent's Defense

Respondent contends that Callaghan and Moore were not looking toward group action or seeking to initiate action in concert with other employees. Respondent further contends that Callaghan and Moore were discharged for insubordination.

D. The Discharges

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

The Act protects employees who engage in individual action which is "engaged in with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglas Corp. v. NLRB,* 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his activity to be concerted. See *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988) (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming). See also *Enterprise Products*, 264 NLRB 946, 949–950 (1982); *Cibao Meat Products*, 338 NLRB 934, 934 (2003). The Board's test for concerted activity is whether the activity is "engaged in, with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Myers II,* 281 NLRB 882 (1986). The question is a factual one and the Board will find concert "when the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense or otherwise." Id. at 886.

In their May meeting, Callaghan, Moore and the other employees were engaged in protected activity when they listed their concerns with Respondent's program. They acted in concert when listing their concerns and presenting them to supervision. General Counsel argues that Callaghan's and Moore's Facebook conversation was a continuation of the complaints made in the May meeting.

In the Facebook conversation, the two employees continued to discuss the complaints that Respondent's office staff viewed the teen center employees as "line workers," the office staff's lack of appreciation for the teen center staff, and Respondent's failure to respond to employees' concerns. Further, the employees discussed Moore's demotion.

I find that these two employees were engaged in concerted activity when voicing their disagreement with management's running of the teen center. The Board finds concerted activities where employees discuss shared concerns among themselves prior to any specific plan to engage in group action since such discussions generally precedes, and, are precursors to group action. *Myers II,* 281 NLRB 882 at 887 (1986).

The issue is whether the remarks of Callaghan and Moore were protected under the Act. When an employee is discharged for conduct that is part of the res gestae of protected activities, the question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. *Dickens, Inc,* 352 NLRB 667, 672 (2008); *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000); *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Fitch Baking Co.*, 232 NLRB 772 (1977). Employees are permitted some leeway for impulsive behavior when engaged in concerted activity, as the language of the shop is not the language of polite society. *Dries & Crump Mfg.,* 221 NLRB 309, 315 (1975); *Phoenix Transit System,* 337 NLRB 510, 514 (2002) (even most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth; federal law gives license to use intemperate, abusive or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point) Protection is not denied to an employee re-

gardless of the lack of merit or inaccuracy of the employee's statements, absent deliberate falsity or maliciousness, even where the employee's language is stinging and harsh. *CKS Tool & Engineering, Inc. of Bad Axe,* 332 NLRB 1578, 1586 (2000); *Delta Health Center, Inc.*, 310 NLRB 26 (1993).

Respondent contends that the Facebook conversation engaged in by Callaghan and Moore was not protected under the Act. Respondent argues that the Facebook comments were detrimental to the teen center's eligibility for grants and other funding. Callaghan stated that he would have crazy events and not seek permission. He stated he would play loud music and get artists to place graffiti on the walls. He stated he would do some "cool shit" and let Respondent figure it out. Callaghan also stated he would have parties all year and field trips all the time.

Moore stated "when they start loosn kid I aint helpin." She stated they would have fun and that she would never be there. Finally she stated that she would have 'clubs' and take the kids.

Respondent receives grants and other funding from the government and private donors. It is accountable to the middle schools and high schools that it services. Respondent believed that the Facebook comments jeopardized the program's funding and the safety of the youth it serves. Respondent was concerned that its funding agencies and the parents of its students would see the Facebook remarks. I find that Respondent could lawfully conclude that the actions proposed in the Facebook conversation were not protected under the Act and that the employees were unfit for further service.

Accordingly, I shall recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not violate Section 8(a)(1) of the Act by withdrawing the rehire offers to Callaghan and Moore in August 2012.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[2]

ORDER

The complaint should be dismissed.

Dated, Washington, D.C. November 5, 2013

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.