

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1160

September Term, 2015

FILED ON: MAY 18, 2016

MODERN MANAGEMENT SERVICES, LLC, DOING BUSINESS AS THE MODERN HONOLULU,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 14-1184

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: TATEL, SRINIVASAN and PILLARD, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* D.C. Cir. R. 34(j). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is hereby

ORDERED AND ADJUDGED that the petition for review be **DENIED** and the National Labor Relations Board's cross-application for enforcement be **GRANTED**.

Modern Management Services, LLC (Modern), which operates the Modern Honolulu hotel in Honolulu, Hawai'i, petitions for review of an order of the National Labor Relations Board (the Board), in which the Board found Modern committed multiple unfair labor practices in violation of the National Labor Relations Act (the Act). Modern challenges only two of the five violations found by the Board: that Modern unlawfully terminated a housekeeping employee, Juliana Alcaraz, for

raising concerns with the Housekeeping Director Emma Clemente about a term of employment during a question-and-answer session at a housekeeping department meeting (the termination violation); and that Modern later unlawfully barred Alcaraz from the property when she was serving as a union representative (the access violation). The company first asserts that the Board's findings and conclusions lack the support of substantial record evidence. Second, Modern contends that the Board erred in finding that Alcaraz's conduct was not so serious that it lost the protection of the Act. Both arguments lack merit.

Modern's first contention is a run-of-the-mill substantial-evidence and credibility challenge. Its case on both the termination and access violations largely depends on its alternative version of events, as testified to by Housekeeping Director Emma Clemente. But the ALJ, whose decision the Board adopted in full, expressly and repeatedly discredited Clemente's "self-serving, contradictory and improbable account," J.A. 787, instead crediting another employee's version of events, as corroborated by ample additional evidence. The Board therefore necessarily—if implicitly—discredited the scant other testimony consistent with Clemente's account. Modern objects that the Board overlooked testimony that tracked Clemente's account, but "[i]t is well established that explicit credibility findings are unnecessary when a judge has 'implicitly resolved conflicts in the testimony by accepting and relying on the testimony of [one party's] witnesses.'" *Am. Coal Co.*, 337 N.L.R.B. 1044, 1044 n.2 (2002) (quoting *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1331 (7th Cir. 1978)); see *Amber Foods, Inc.*, 338 N.L.R.B. 712, 713 n.7 (2002). We must accept the Board's credibility determinations where, as here, they are not patently unsupportable. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012).

Nor did the Board err in concluding that Alcaraz's conduct was not "so violent or of such serious character as to render the employee unfit for further service," *St. Margaret Mercy Healthcare Ctrs.*, 350 N.L.R.B. 203, 204-05 (2007), such that she lost the Act's protection under the four-factor inquiry set forth in *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979). Modern is correct that the Board erred in stating that the fourth factor, "provocation," was met. As the parties agree, no unfair labor practice provoked Alcaraz's conduct. See *id.* But that error is immaterial to the Board's conclusion. Its analysis under the third *Atlantic Steel* factor—which inquires into the nature of the outburst—makes clear that no outburst even occurred. There was, therefore, no need to consider under the fourth factor the cause of any such outburst. Cf. *Kiewit Power Constructors Co.*, 355 N.L.R.B. 708, 710 (2010) (finding employees did not lose the protection of the Act where "only the factor of provocation does not favor protection"), *enforced*, 652 F.3d 22 (D.C. Cir. 2011); *Noble Metal Processing, Inc.*, 346 N.L.R.B. 795, 799 (2006) (finding that although there was "no evidence" that conduct was "provoked by unfair labor practices and thus *Atlantic Steel Co.*'s fourth factor cannot be applied[,] . . . [t]he application of the remaining three factors, . . . reflects that [the employee] did not lose the protection of the Act").

Accordingly, we deny Modern's petition for review and grant the Board's cross-application for enforcement of its order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. See Fed. R. App. P. 41(b); D.C. Cir. R. 41(b).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk