

William Lawrence, Darnell Price, James Simons, Clifton S. Key, and Joe Davis, individually and as partners d/b/a Aiken Underground Utility Services and Mildred Sanders. Case 11–CA–16393

November 20, 2001

SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On June 22, 2000, Administrative Law Judge Keltner W. Locke issued the attached bench decision. Respondent James Simons filed exceptions and a supporting brief, and the General Counsel has filed a brief in reply.¹

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to adopt the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order, and to adopt the judge’s recommended Order as modified.

In *Aiken Underground Utility Services*, 324 NLRB 187 (1997), the Board found that William Lawrence, Darnell Price, and Joe Davis, individually and as partners, d/b/a Aiken Underground Utility Services, violated Section 8(a)(1) and (4) of the Act by denying employment to the Charging Party, Mildred Sanders, and her sister, Zerretta Cave. The Board ordered the named Respondents, as well as the partnership’s “officers, agents, successors, and assigns,” to make whole the discriminatees for loss of pay and benefits.

Thereafter, in this compliance proceeding, the judge found, inter alia, that James Simons was a partner with Price and Davis at the time the unfair labor practices were committed in October 1994. In accordance with the General Counsel’s amended compliance specification, therefore, the judge found that Simons was individually and jointly and severally liable for the backpay due under the Board’s Order.

In his exceptions, Simons contends that he was not afforded notice of the underlying unfair labor practice proceeding, and that absent such notice, imposition of liability in this compliance proceeding violates due process. For the following reasons, we find merit in Simons’ exceptions.

The record shows that Simons was a partner with Price and Davis at the time the unfair labor practices were committed in October 1994, but that he withdrew from the partnership in approximately December 1994. Shortly thereafter, Lawrence joined Price and Davis as a

partner,² and the General Counsel served the complaint upon the partnership in March 1995, naming Aiken Underground Utility Services as the Respondent. On January 10, 1997, the General Counsel amended the complaint to name Lawrence, Price, and Davis as Respondents in their individual capacities as well, and served each of them personally. However, at no point prior to the compliance proceeding did the General Counsel name Simons as a party or personally serve him with notice.

In these circumstances, we find, contrary to the General Counsel’s contention, that Simons did not receive the necessary notice to impose derivative liability on him in the compliance proceeding. It is well established that derivative liability for backpay may be imposed upon a party to a supplemental compliance proceeding even though it was not a party to the underlying unfair labor practice proceeding, if it was sufficiently closely related to the party that was found in the underlying proceeding to have committed the unfair labor practices. See, e.g., *Southeastern Envelope Co.*, 246 NLRB 423, 424 (1979). However, it must also be shown that the relationship existed at the time of the unfair labor practice proceeding. See *Viking Industrial Security, Inc. v. NLRB*, 225 F.3d 131 (2d Cir. 2000) (due process requires that affiliation between two companies existed at the time of the unfair labor practice proceeding, or at least at the time the complaint was served, to impose derivative liability in the compliance proceeding), denying enf. 327 NLRB 146 (1998).³

Here, it is undisputed that Simons was no longer a partner at the time of the underlying unfair labor practice proceeding or at the time the complaint was served. Nor does the General Counsel allege that there was an alter ego, successor, or single employer relationship between Simons and the partnership. Accordingly, we find that service on the named Respondents in the underlying proceeding was insufficient notice to Simons, and that he is therefore not derivatively liable, individually or jointly and severally, for the backpay remedy.

Our finding that Simons is not liable, however, does not shield any extant partnership property in which he may have an interest. Here, Davis and Price were found—after notice and opportunity to be heard—to be among the parties liable for violating Section 8(a)(1) and

² The partnership of Lawrence, Price, and Davis continued the partnership business of Simons, Price, and Davis et al., under the same name.

³ The Board in *Viking* had imposed derivative liability on the basis that the two companies were a single employer at the time of the unfair labor practice; unlike the court, the Board did not directly address whether the affiliation between the companies must be shown to have existed at the time of the unfair labor practice proceeding.

¹ The only exceptions before the Board were filed by James Simons.

(4). These unlawful acts were undertaken in the ordinary course of the partnership business, in October 1994, when Davis and Price were partners with Simons. The liability of Davis and Price is therefore directly imputable to the partnership of Simons, Price, and Davis et al.,⁴ and Simons is thus liable for the backpay remedy to the extent of his partnership property.

REMEDY

We adopt the judge's recommended remedy with respect to the liability of William Lawrence, Darnell Price, Clifton S. Key, and Joe Davis. Having found that James Simons was not afforded notice of the unfair labor practice proceeding, we shall hold Simons liable only to the extent of his partnership property.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondents, William Lawrence, Darnell Price, and Joe Davis, individually and as partners d/b/a Aiken Underground Utility Services, its officers, agents, successors, and assigns, and James Simons and Clifton S. Key, as partners, shall take the action set forth in the Order as modified.

Substitute the following paragraphs for the judge's Order.

Respondents Darnell Price, William Lawrence, and Joe Davis, individually and as partners d/b/a Aiken Underground Utility Services, shall make whole Zerretta Cave and Mildred Sanders by paying them the amounts set forth opposite their names, plus interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) accrued to the date of payment, minus tax withholding required by Federal and State laws:

Zerretta Cave	\$17,850.00
Mildred Sanders	<u>11,574.00</u>
	\$29,424.00

Clifton S. Key and James Simons shall make whole Zerretta Cave and Mildred Sanders only out of their partnership property.

⁴ See S.C. Code Ann. 33-41-350 ("partnership is liable—to the same extent as the partner so acting or omitting to act"). See also Restatement (Second) of Judgments § 60 cmt.d (1982) ("[i]f a person injured—brings an action against one or more but less than all of the partners—the judgment is binding upon the partnership property, making it subject to execution without further judgments against the partners not served with process in the original action"); *Detrio v. United States*, 264 F.2d 658, 663 (5th Cir. 1959) (holding that notice to partnership entity does not make the partnership "entity or the surviving partners—the agent of the withdrawn partner" such that the withdrawn partner could be held individually liable for a judgment against the partnership; withdrawn partner is liable only to the extent of his partnership assets).

Donald Gattaloro, Esq., for the General Counsel.

Kristina M. Anderson, Esq., for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on May 1, 2000, in Aiken, South Carolina. After the parties rested, I heard oral argument, and on May 2, 2000, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹ The remedy and Order provisions are set forth below.

REMEDY

The unfair labor practices will be remedied by paying to the discriminatees, Zerretta Cave and Mildred Sanders, the amounts set forth next to their names below, plus interest accrued to the date of payment computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus the tax withholdings required by Federal and State laws:

Zerretta Cave	\$17,850.00
Mildred Sanders	\$11,574.00

As partners in Aiken Underground Utility Services, William Lawrence, Darnell Price, James Simons, Clifton S. Key, and Joe Davis are liable individually, and jointly and severally, to make the discriminatees whole in the manner stated above, except that Clifton S. Key's liability shall be satisfied only out of partnership property.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

ORDER

Respondent, William Lawrence, Darnell Price, James Simons, Clifton S. Key, and Joe Davis, individually and as Partners d/b/a Aiken Underground Utility Services shall make whole Zerretta Cave and Mildred Sanders by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) accrued to the date of payment, minus tax withholding required by Federal and State laws:

Zerretta Cave	\$17,850.00
Mildred Sanders	\$11,574.00

¹ The bench decision appears in uncorrected form at pp. 179 through 191 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this Certification.

Additionally, I correct the case caption in this matter to reflect the correct spelling of Dr. James Simons' name.

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

The liability of Clifton S. Key to make whole Zerretta Cave and Mildred Sanders shall be satisfied only out of partnership property.

APPENDIX A
BENCH DECISION

May 2, 2000

2:45 P.M.

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JUDGE LOCKE: This is a supplemental decision in the case of William Lawrence, Darnell Price, James Simon, Clifton S. Key and Joe Davis, individually and as partners, d/b/a Aiken Underground Utilities Services, Case 11-CA-16393, and Mildred Sanders an individual. It is a bench decision issued pursuant issued Section 102.35(a)(10) of the Board's Rules and Regulations.

This proceeding raises two types of issues. As usual in compliance proceedings, the Board must determine what remedy will make the discriminatees, Mildred Sanders and Zerretta Cave, whole for the loss of pay and benefits they suffered because of the unlawful discrimination.

This case also presents a more unusual issue: Do two individuals, who were not previously named in this proceeding as partners in the Respondent, share in the liability? In other words, do these persons, James Simons and Clifton S. Key, have the same responsibility as the partners previously named in this case to remedy the unlawful discrimination against Ms. Sanders and Ms. Cave?

For reasons I will discuss, I find that the back pay amounts alleged in the compliance specification, with interest, will make Ms. Sanders and Ms. Cave whole for the discrimination they suffered.

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Additionally, for reasons I will also discuss, I conclude that Doctor Simons does share joint and several liability with the other partners in Aiken Underground Utilities Services. However, I find that the General Counsel has not carried the burden of proving that Mr. Key was a partner at the time the unfair labor practice took place, although he did become a partner at sometime later. Therefore, I conclude that his liability in this matter is qualified by Section 33-41-390 of the Code of Laws of South Carolina.

On April 16, 1997, the Honorable Robert C. Batson, Administrative Law Judge, issued a decision in this case finding that William Lawrence, Darnell Price and Joe Davis, individually and as partners doing business as Aiken Underground Utilities Services, had discriminated against Mildred Sanders and Zerretta Cave. On August 8, 1997 the Board affirmed Judge Batson's findings and conclusions and adopted his recommended order, as modified.

On December 15, 1997 the United State Court of Appeals for the Fourth Circuit issued a judgement enforcing the Board's order.

On April 8, 1998, the Regional Director of Region 11 of the National Labor Relations Board issued a Compliance Specification and Notice of Hearing. This specification, like the decision issued by Judge Batson, the Board's order of April 16, 1997 and the Court's judgement of December 15, 1997

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named only three persons as partners in Aiken Underground Utilities Services.

All of these documents identify the Respondent as William Lawrence, Darnell Price and Joe Davis individually and as partners d/b/a Aiken Underground Utilities Services. They did not name James Simons or Clifton S. Key as partners in the Respondent.

On September 8, 1999, the Acting Regional Director of Region 11 of the Board issued an amended Compliance Specification and Notice of Hearing which did name Simons and Key, as well as Lawrence, Price and Davis, as partners in Aiken Underground Utilities Services. Only Dr. Simons and Mr. Key have filed an answer to the amended Compliance Specification. None of the other named partners has filed an answer to either the original or the amended compliance specification.

Section 102.56(b) of the Board's Rules and Regulations provides in part as follows:

"As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the Respondent's

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position as to the applicable premises and furnishing the appropriate supporting figures."

Section 102.56(c) of the Board's Rules and Regulations provides, in part, as follows:

"If the Respondent fails to file any answer to the specification within the time prescribed by this Section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by Paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation."

The answer to the amended compliance specification filed by Dr. Simons and Mr. Key does not specifically state any disagreement with the manner of computing backpay set forth in the amended compliance specification. Similarly, this answer does not allege any alternative means of computing backpay. As noted, Lawrence Price and Davis did not file any answer at all.

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Therefore, pursuant to Section 102.56(c) of the Board's Rules and Regulations, I shall deem admitted the allegations in Paragraphs 5, 6, 7, 8 and 9 of the Amended Compliance Specification. I find that the obligation of the Respondent to make whole Mildred Sanders and Zerretta Cave will be discharged by payment to Sanders of \$11,574.00 and to Zerretta Cave of

\$17,850.00, plus interest accrued to the date of payment pursuant to the Board's order of August 8, 1997, minus the tax withholdings required by Federal and State law.

The remaining issues in this proceeding concern whether Dr. Simons and Mr. Key are jointly and severally liable along with Lawrence, Price and Davis to make Ms. Sanders and Ms. Cave whole.

I conducted a hearing in this case on May 1, 2000. Mr. Davis, Dr. Simons and Mr. Key were present throughout the Hearing and each of them testified. Mr. Lawrence and Mr. Price were not present.

Ms. Sanders testified that she attended a meeting on October 6, 1994 at Snazzy's Barber Shop in Aiken, South Carolina. Her sister, Ms. Cave, also attended the meeting. Their purpose was to obtain employment from a new company, Aiken Underground Utilities Services, which was starting up. A great number of other job applicants, perhaps one hundred or more, also attended this meeting.

Although Ms. Sanders testified that this meeting took

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place October 6, 1994, I conclude that it is the same meeting which Judge Batson described in his decision as taking place about October 9, 1994. It will serve clarity, at this point, to review briefly some of the findings in Judge Batson's decision.

Judge Batson's decision states that one of the partners in Aiken Underground, Darnell Price, told Ms. Sanders and Ms. Cave to see him the next day, at which time he offered them employment. Specifically, Judge Batson's decision states, in pertinent part, as follows:

"On October 10th, Ms. Sanders testified Mr. Price wanted to talk individually and told Ms. Sanders she could have any job she wanted. She could be a foreman and, apparently, they offered Ms. Cave an option as to various jobs. Mr. Simons, my notes indicate, agreed with that and told her to return the next day."

Judge Batson found that about October 14 or 15, 1994, the Respondent denied Ms. Sanders and Ms. Cave employment because Ms. Sanders had filed charges against the Carpenter's Union and because Ms. Cave also had filed charges against this Union. Judge Batson found that this denial of the employment, previously promised, violated Section 8(a)(1) and (4) of the National Labor Relations Act.

When Ms. Sanders testified in the compliance proceeding, she stated that the meeting at Snazzy's Barber Shop took place

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on October 6th rather than on October 9, 1994, as stated in Judge Batson's decision. However, I do not believe that this minor discrepancy as to date casts any doubt on Ms. Sanders' credibility as a witness.

According to Ms. Sanders, when she attended this meeting at Snazzy's Barber Shop, Mr. Price put her to work right away. She testified, without contradiction, that Price told her to get the crowd together and let them know what to expect, that is, to inform the job applicants about the job requirements, such as passing a drug test.

Ms. Sanders testified that Dr. Simons and Mr. Key were present at this meeting at Snazzy's Barber Shop. Dr. Simons admitted attending this meeting but stated he did so merely to

obtain more information about the new company and to determine whether or not he should invest in it. Mr. Key said that he did not attend the Barber Shop meeting.

According to Ms. Sanders, after the meeting at Snazzy's Barber Shop, a number of people met at the offices of Simons real estate. Ms. Sanders testified that in addition to herself, Price, Key, Simons and Davis attended this meeting. Ms. Sanders said that all of the people attending this meeting talked but that Dr. Simons did more talking than Mr. Key.

Dr. Simons could not recall whether or not he attended the meeting at Simons Realty. He did testify that his wife owns the Real Estate Company and had allowed Darnell Price to

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use one office in that building.

According to Dr. Simons, Price initially paid no rent for this office space but was supposed to pay three hundred dollars a month for it after Aiken Underground got underway.

To the extent that Ms. Sanders' testimony conflicts with that of Dr. Simons, I credit that of Ms. Sanders. Dr. Simons did not specifically deny attending this meeting but only said that he could not recall. On the other hand, Ms. Sanders gave very specific testimony about who was present. I find that her testimony on this point is more reliable. Moreover, another witness, Mr. Davis, corroborated Ms. Sanders' testimony on this point.

Therefore, I find that on October 6, 1994, Dr. Simons attended both the meeting at Snazzy's Barber Shop and the later meeting at the real estate offices owned by his wife. Further, I find that he spoke at the second meeting, as described by Ms. Sanders.

According to Dr. Simons, he did not invest any money in Aiken Underground until October 21, 1994, when he invested \$15,000 by placing it in a bank account. Clifton Key also invested \$15,000 but did so a little later, writing a check for that amount on November 8, 1994. At the time Dr. Simons and Mr. Key wrote the \$15,000 checks, the discrimination against Ms. Sanders and Ms. Cave already had taken place. They had been denied employment on October 14 or 15, 1994.

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Dr. Simons and Mr. Key argued that they were not involved in the hiring decisions and were unaware that Darnell Price, who made these decisions, had discriminated unlawfully.

However, I find that Dr. Simons was already a member of the partnership at the time of the meeting at Snazzy's Barber Shop on October 6, 1994, when Ms. Sanders and Ms. Cave received offers of employment.

It is true that Dr. Simons did not make what could be termed a monetary contribution to capital until October 21, 1994, when he wrote the check for \$15,000 dollars. However, he invested other resources in the venture much earlier.

A written partnership agreement might pinpoint exactly when Dr. Simons and Mr. Key became partners but there was no written partnership agreement. Therefore, I must infer their status as partners from their participation in the enterprise.

Dr. Simons testified that he did not own Simons Real Estate but that his wife owned that company. However, she gave Dr. Simons the use of its premises. The record establishes that the principals in Aiken Underground Utilities Services met at Simons Real Estate after the meeting at Snazzy's Barber Shop.

I find that Dr. Simons, who had access to the real estate office, allowed Price, Key and Davis, as well as the person Price was hiring, namely Ms. Sanders, to use their facility for a business meeting concerning the organization of Aiken

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Underground Utilities Services. This was the meeting on October 6, 1994.

Further, based on Ms. Sanders' testimony, which I credit, I find that Dr. Simons took an active part in this business meeting. Dr. Simons had substantial experience as a residential building contractor, and I find that he contributed the benefit of this experience when he spoke at the October 6, 1994 meeting. Thus Dr. Simons contributed both his access to the Simons real estate building and his two decades of experience as a contractor on October 6, 1994. Clearly he did so as part of an effort to make Aiken Underground Utilities Services a going concern. I find that Dr. Simons' participation in this partnership began at least as early as October 6, 1994.

This finding also accords with the portion of Judge Batson's decision which I previously quoted and which I will quote briefly again, in which he said:

"Mr. Simons, my notes indicate, agreed with that and told her to return the next day."

(In saying "agreed with that," Judge Batson was referring to Mr. Price's offer of employment to Ms. Sanders.)

Therefore I find, in accordance with Judge Batson's decision, that Dr. Simons was a partner as of October 6, 1994, and that he participated in, or at least agreed to, the decision to hire Ms. Sanders.

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In making my findings, I do not credit Dr. Simons' testimony that on October 6, 1994 he was only interested in finding out more about the venture before deciding whether or not to invest in it. Such mere curiosity might have led him to attend the meeting at Snazzy's Barber Shop, but it seems less likely that it would have led him to grant the partners access to his wife's real estate offices and then participate in the meetings there.

Dr. Simons did not deny attending the meeting but stated he simply could not remember. On the other hand, Ms. Sanders did recall this meeting and credibly testified about it. Dr. Simons' participation in this meeting, and in its discussions, suggests an active role in the partnership as of October 6, 1994, and I so find.

The case regarding when Clifton Key became a partner is less clear. There is some conflict in the record regarding whether or not Mr. Key attended the meeting on October 6, 1994 at the Simons Real Estate offices. The record suggests that Mr. Key may have been recruited as a partner after another potential investor, Mr. Hart, dropped out. If so, his becoming a member of the partnership could well have taken place after the unlawful discrimination against Ms. Sanders and Ms. Cave.

Although Ms. Sanders testified that Mr. Key was present at the meeting at the Simons Real Estate Office on October 6,

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1994, another witness, Mr. Davis, does not corroborate that testimony.

Additionally, Judge Batson's decision, referring to the time when Ms. Sanders received an offer of employment states, in part, as follows:

"At that time the testimony of Ms. Sanders is that the partners in the operation were Darnell Price, Joe Davis a Mr. Hart and a Mr. Simons. Now this was in October.

Notably, Judge Batson's decision does not mention Mr. Key.

In these circumstances I have some doubts about the recollection of Ms. Sanders that Mr. Key was present on about October 6 at the meeting in the Simons real estate offices. But even if Mr. Key did attend that meeting, his presence alone would not establish that he was a partner in the venture.

In the case of Dr. Simons, I concluded that he was a partner on October 6th not only because he attended the meeting but also because he provided access to his wife's real estate office where the meeting was held, participated in the meeting, and because, as found by Judge Batson, concurred in the decision to hire Ms. Sanders.

The burden of proof rests on the General Counsel to establish that Mr. Key was a partner at this time. I find that a preponderance of the evidence does not establish that

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Mr. Key became a partner until November 2, 1994, the date his name appears on the bank signature card. At that time the unlawful discrimination already had taken place.

The General Counsel agrees that South Carolina partnership law is applicable. Section 32-41-390 of the South Carolina Code state:

"A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."

I find that this section applies to Mr. Key. Although I find that he is liable, his liability shall be satisfied only out of the partnership property.

That concludes my bench decision.

When the transcript of this matter is prepared and served on the parties and upon me, I will review the bench decision and attach that portion of the transcript to a Certification of Bench Decision which I will then issue.

Upon service of the Certification of Bench Decision, the time for appeal to the Board will begin to run.

The parties have been extremely cordial and professional and I thank everyone for their civility.

The Hearing is closed.

(Off the record.)

(Whereupon the hearing in the above entitled matter was closed at 3:00 p.m.)