

**Air Flow Equipment, Inc. and Sheet Metal Workers
International Association, Local No. 7, AFL-
CIO. Case 7-CA-44131-1**

September 29, 2003

DECISION AND ORDER

**BY MEMBERS LIEBMAN, SCHAUMBER, AND
WALSH**

On February 22, 2002, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Air Flow Equipment, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Steven Carlson, Esq., for the General Counsel.

David M. Buday, Esq. and *Nathan D. Plantinga, Esq.*, for the Respondent.

Dennis Crane, Union Representative, for the Charging Party.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Contrary to his colleagues, Member Schaumber, based on his review of the testimony of employee Case, finds that the General Counsel did not prove by a preponderance of the evidence that the comment made by Dick DeYoung at an employee meeting concerning the Respondent's continued ability to make personal loans if the Union came in was a threat to withdraw an existing benefit in violation of Sec. 8(a)(1).

² The judge found that the Respondent was "obligated to investigate" allegations of misconduct involving discriminatee Eric Furtaw. These allegations formed the basis of the Respondent's explanation of Furtaw's discharge. As a general rule, an employer is under no such obligation. However, given the General Counsel's initial showing that the discharge was unlawful, the Respondent's failure to investigate contributes to the finding that the Respondent's rationale for Furtaw's discharge was a pretext for unlawful discrimination.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on November 8 and 9, 2001, in Kalamazoo, Michigan. The complaint alleges Respondent violated Section 8(a)(1) of the Act by making a number of coercive statements.¹ The complaint also alleges Respondent violated Section 8(a)(3) of the Act by discharging employee Eric Furtaw. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation with an office and place of business in Kalamazoo, Michigan, where it is engaged in the manufacture of custom air-handling units. During a representative 1-year period, Respondent purchased and received at its Kalamazoo facility goods valued in excess of \$50,000 directly from points outside Michigan. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent, during the time period involved in this proceeding, employed approximately 7 to 10 employees. The large air-handling units Respondent builds are custom manufactured for particular customers, and may contain fans, filters, coolers, heaters, dehumidifiers, dampers, and air blenders, as required for the particular application. Dick² is the president and owner of Respondent, his wife Brenda and his two sons, Steve and Matt, also work in the business. In the absence of Dick for vacation, Steve has acted as the supervisor of the facility.

¹ It is alleged that Respondent threatened employees with unspecified reprisals if they selected the Union to represent them, informed employees that selecting the Union to represent them would be futile, interrogated employees about the union activities of other employees, urged employees to rescind their signed union authorization designations, and informed employees that Respondent would no longer be able to make personal loans to employees if they selected the Union to represent them.

² Mr. Dick's name appears in the transcript in several places as "Demmen James," which is his full legal name. He is normally called Dick, and was referred to in most places in the transcript, especially by witnesses, as Dick. He will be referred to as Dick in this decision.

2. The organizing campaign

In late April 2001,³ an employee of Respondent, Eric Furtaw, contacted the Union in order to seek representation of Respondent's employees. Union Organizer Dennis Crane testified without contradiction that he met with the employees several times in late April and early May, and secured from a majority of the employees signed cards authorizing the Union to represent them.⁴ On about May 4, Crane distributed T-shirts to the employees which bore the name of the Union, which several of them wore in the plant thereafter. On May 10, Crane visited Respondent's facility, where he introduced himself and informed Dick that a majority of his employees had designated the Union as their representative. According to his testimony, Crane handed Dick a letter naming the Union's in-plant organizing committee. The three employees named in the letter were Tim Price, Dennis Eymer, and Eric Furtaw. Dick denied receiving any letter, and Brenda, who was present for a portion of the encounter, did not recall a letter. Crane also testified that Dick showed surprise at Crane's appearance, and stated that he didn't like the way Crane did business. Dick denied that he was angry or hostile. It is undisputed that Crane made an appointment to return to Respondent to discuss the matter of representation with Dick. For the reasons stated below, I credit Crane's testimony over that of Dick regarding Crane's delivery of the letter naming Eric Furtaw and two other employees as the in-plant organizing committee.

Crane returned to Respondent's plant on May 17, at which time he and Dick discussed the possibility of voluntary recognition and the negotiation of a collective-bargaining agreement for about 2 hours, but neither recognition nor anything else was agreed upon. Dick called the meeting "informational." Crane testified that after the discharge of Eric Furtaw at the end of May and subsequent loss of support among the employees in early June, he ceased to pursue voluntary recognition, and the parties did not meet again.

3. Tim Price's employment interview

On about March 27, employee Tim Price met with Dick for an employment interview. Price's application showed that some of his previous jobs had been working for union-signatory employers. Price testified that Dick told him that Respondent is "not a union company and never will be," and added, "don't push it." Dick admitted that he told Price that Respondent is nonunion, but denied the remainder of the remarks attributed to him. Tim Price was hired by Respondent.

A few months later, Tim Price quit his employment with Respondent voluntarily. He testified in a straightforward manner, and attempted to be accurate in his responses to questions on cross-examination as well as on direct examination. Respondent argued that Price was a biased witness, as he supported the Union, and quit his job at Respondent due to an action by Respondent which he apparently regarded as petty. These facts

³ All dates hereafter will be in 2001, unless otherwise specified.

⁴ The Union's asserted majority status is of interest only for its bearing on the allegations already recited. The Union never filed a representation petition, and this proceeding does not involve any allegation of an 8(a)(5) violation nor does the General Counsel seek a bargaining order.

are at most minimal indications of bias, and are counterbalanced by other facts. His employment at Respondent encompassed only a few months of 2001, and he left voluntarily. His demeanor was good, and I find him to be essentially a neutral witness. I credit his testimony over that of Dick, whose testimony tended to be conclusionary and emotionally charged. I have not credited the testimony of Dick where his testimony contradicts that of Crane, Price, Case, and several other witnesses. Dick demonstrated an impatient demeanor, gave exaggerated or imprecise answers on a number of occasions, and testified inconsistently concerning several important facts, including his knowledge of Eric Furtaw's union activities and his conduct concerning the union organizing campaign.

4. Employees' testimony regarding May 10

Price also testified that on about May 10, Dick approached him in the shop and asked him what was the point of organizing. Price did not respond. This incident was not alleged as a violation. May 10 was the day on which Dennis Crane visited Respondent and informed Dick that a majority of his employees had designated the Union as their representative.

Eric Furtaw testified that on the same day, May 10, while he was working in the shop, he observed Dick approach employee Kevin Shannon and heard him ask Shannon "who was in my shop while I was on vacation? Who was trying to organize a union?" Shannon replied that he didn't know. Furtaw was about ten feet away from Dick and Shannon during this exchange. Kevin Shannon denied the incident. Dick did not address it in his testimony. With regard to these remarks, I credit Eric Furtaw over Shannon. Shannon was an unconvincing witness who displayed some difficulty with his memory on essential points, a tendency to speculate, and by his demeanor appeared not to be taking seriously his role as a witness. While Furtaw admitted on cross-examination that he had made a false statement during the unemployment compensation hearing after his discharge, his testimony in this proceeding was consistent and largely corroborated by other witnesses. On balance, I find him the more reliable witness of the two.

5. Allegations involving the June 7 meeting

Dan Case, an employee who worked at Respondent during May and part of June, testified that at an employee meeting on June 7, Dick, who had called the meeting, told the assembled employees that they could get their signed union authorization cards back if they wanted to, by writing a letter to the address he would post at the timeclock. Dick also said that he had a supply of green return receipt cards, and would leave them at the timeclock also. He added that if they had trouble composing a letter, Brenda would help them, and they could leave work early in order to get to the post office before it closed. Dick prefaced his remarks by saying that "a number of" employees had asked him how to retrieve their authorization cards, but there was no evidence that anyone except employee William Hires had actually done so.

Dick also told employees that in the past, he had advanced employees their pay, but if the Union came in, he would not be able to do that. Hires testified that Dick added that there would be "no more open door policy," but this statement was not alleged in the complaint, and no other witness testified to it. As I

have not credited Hires for the reasons set forth below, I find that this statement did not occur. It is undisputed that several employees did take worktime, at least 1/2 hour, in order to go to the post office to mail their requests for the return of their authorization cards.

I find that Dan Case was a credible witness. He worked for Respondent for only about 6 weeks, leaving Respondent's employment voluntarily for a better job. His demeanor was good, and he displayed a better memory than other witnesses who testified about this incident.

6. Discharge of Eric Furtaw

Eric Furtaw worked for Respondent from June 2000 until his discharge on May 31, 2001. It is undisputed that he was the employee who first contacted the Union, and who informed the other employees about the beginning of the organizing drive and union meetings. It is also undisputed that Furtaw wore a union T-shirt in the workplace during May. In addition, Crane informed Respondent on May 10 that Furtaw was one of the three in-plant organizers for the Union.

On May 31, Dick called Furtaw into his office and told him that he was discharged on the grounds that an unnamed person had accused him of having threatened to kill the management and employees of Respondent. Furtaw, Dick, and another employee, Terry Wiggins, were the only ones present. The testimony of all three of these witnesses agrees that Furtaw protested that this was false, and asked to know who had accused him. In addition, Furtaw asked to be heard concerning the accusation. Dick refused to tell him anything further, and refused to hear any explanations or other comments. Instead, he ordered Wiggins to escort Furtaw from the premises, after giving him his final paycheck, which he had had prepared in advance. According to Furtaw, Dick said at parting, "get the hell out of my shop."

Respondent introduced evidence concerning Furtaw's nearly 1 year of employment. During the fall of 2000, according to the testimony of several employees, Furtaw on several occasions expressed frustration by throwing down a tool that he was working with, or at least handling a tool roughly. On at least one of these occasions a supervisor or manager was aware of the conduct, but Furtaw was not warned or disciplined for this conduct. According to Dick, he was aware that Furtaw was involved in marital difficulties during this period, and that in this connection, he had pled guilty to an assault charge. During February, Dick was aware that Furtaw, in his upset over this situation, had taken a radio belonging to himself and thrown it purposely onto the floor of the shop. Dick admitted that he was aware of Furtaw's periodic upsets, but did nothing about this conduct other than telling employees generally to "cut it out" and sending Furtaw home for the rest of the day after he had broken his radio.

With regard to the accusations of threats of harm to employees, Bill Hires testified that in December 2000, Furtaw got angry over something that had occurred at work and said "fuck this place and these people." Hires then stated that Furtaw said "something about" killing these people, starting with the front office or "something to that effect." Hires testified that, on the same day, he informed Steven DeYoung about Furtaw's re-

marks. Dick was out of town at the time, and his son Steven was in charge of the plant. Dick claimed in testimony that he was not told about Hires' allegations until May 30. Steven DeYoung was not called as a witness by Respondent, and no explanation of his absence was offered.⁵ Nothing was said to Furtaw about this incident until May 31, and he was not disciplined for it until that date. With regard to Steven DeYoung, I find that he was a supervisor within the meaning of the Act, based on the entire record evidence, including the undisputed evidence that he was in charge of the plant in his father's absences and exercised supervisory authority by, for example, reinstating Furtaw to his job in April as described below.

The General Counsel has argued that because Steven DeYoung was not called to testify by Respondent, and no reason for this failure was offered, that adverse inferences should be drawn, to the effect that he would not have corroborated Dick.

During March and April, there were several instances of Furtaw walking off the job. Matt DeYoung, an engineer and project manager for Respondent, testified that in March, upset about not having had the opportunity to volunteer for some overtime, Furtaw walked out of the plant, saying "fuck this place, I'm tired of this," and did not work the rest of the day. Dick was informed of this incident, but Furtaw received no discipline for it.

According to Dick's testimony, he had a conversation with Eric Furtaw in March, during which Furtaw requested a raise. Dick told Furtaw that he would not give him a raise because he lacked certain skills in the shop. No mention was made of Furtaw's conduct, apparently. Furtaw said that if he didn't get a raise, he would look for another job. Dick claimed that he then placed an advertisement for another employee, apparently motivated by the fact that Furtaw intended to quit as soon as he found another job. When testifying about placing the want ad, Dick made no mention of Furtaw's conduct as a motivating factor.

During April, Dick was on vacation, and Steven was in charge of the plant. On one day during April, according to employee Hires and Dick's recitation of what his son Steven told him over the telephone, Furtaw became upset when Steven DeYoung told him that he had taken too long for his lunch-break, and must return to work. On that occasion, Furtaw assertedly told Steven DeYoung to "go fuck himself" and left the plant, saying that he quit. Some time later, Furtaw returned to the plant, apparently asked for his job back and Steven DeYoung returned him to work. Furtaw received no discipline for this incident. Dick testified that when Steven informed him about this incident over the telephone, he determined to discharge Furtaw as soon as he returned from vacation at the beginning of May, but in fact, no discipline was ever given to Furtaw for this incident, and neither was he discharged. There is no evidence that Dick even mentioned the incident to Furtaw.

⁵ The General Counsel has argued that because Steven DeYoung was not called to testify by Respondent, and no reason for this failure was offered, adverse inferences should be drawn, to the effect that he would not have corroborated Dick on the issue of when Dick was first informed of the December 2000 allegations against Eric Furtaw made by Hires. I find that such an inference is warranted, and that had Steven testified, he would not have corroborated Dick on this point.

Dick testified that the reason he discharged Furtaw was for the December 2000 alleged threats to kill managers and employees of Respondent. He asserted that he learned of this incident for the first time on May 30, in the course of a meeting with his attorneys concerning the employees' union organizing efforts. According to Dick, Steven was present at this meeting and mentioned the December 2000 incident. According to Dick, he approached employee William Hires on the following day, May 31, and secured a written statement in support of Hires' contentions, then immediately decided to discharge Furtaw on this basis, without further investigation.⁶ He had Furtaw's last check prepared and discharged him in the manner described by Furtaw.

Hires was not a believable witness. His demeanor was poor. He contradicted himself on numerous occasions, he spoke in vague and uncertain phrases, and his recollection was faulty as to many matters. He tended to exaggerate his testimony and then to modify his statement, making it impossible to credit either version. I do not credit Hires.⁷

B. Discussion and Analysis

1. The 8(a)(1) allegations

The Board has found in numerous cases that an employer's statement to employees that it will never be union is essentially a threat that employees' organizing efforts will be futile, and is therefore coercive and violative of Section 8(a)(1) of the Act. In this instance, Dick's statement to Tim Price that Respondent was not going to be union was joined with an instruction not to "push it," which would lead one to believe that he was referring to organizing. Therefore, it falls within the same category of cases as those where employees are given to understand that their organizing efforts will be futile. Dick's statement was a warning that organizing attempts would be futile, and violated Section 8(a)(1) of the Act. *EPI Construction*, 336 NLRB 234, 237 fn. 17 (2001); *Yuker Construction*, 335 NLRB 1072, 1077–1079 (2001). In addition, his further instruction, "don't push it," could reasonably be understood to imply that there would be bad consequences if an employee "pushed" the union. It could also be understood as a complete prohibition on organizing or "pushing" a union. Under either interpretation, Dick's second remark to Price was definitely coercive and violated Section 8(a)(1) of the Act. *ITT Federal Services Corp.*, 335 NLRB 998, 1002–1003 (2001).

Dick's questions to employee Shannon, overheard by Eric Furtaw, are also clearly coercive. While there are circum-

⁶ Hires' testimony as to when he gave Dick a written statement was vacillating and equivocal. He stated that he gave Dick the statement on the morning of May 31, but also admitted that he had sworn in his affidavit that it was a few days before Eric Furtaw's discharge that he was asked for and wrote the statement. Hires testified that he did not recall Furtaw's precise words in December 2000, and that he was not asked by Dick for Furtaw's words. In his testimony, he continually equivocated, using phrases such as "something to that effect" and "something like" and in his testimony at first did not use the words, "go postal," as he did in his written statement for Dick.

⁷ On cross-examination, Hires admitted that, upon learning of Furtaw's discharge, he assumed that Dick had discharged Furtaw because of his union activities. I do credit this admission.

stances in which it may be noncoercive to inquire of an employee as to *his own* sentiments regarding a union (See *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985)), it is *decidedly* a strong indication of coercion to inquire into the union activities of *other* employees. *Sundance Construction Management*, 325 NLRB 1013 (1998); *Williamhouse of California, Inc.*, 317 NLRB 699, 716 (1995).

Dick's June 7 statement to the assembled employees to the effect that he would no longer be able to offer them personal loans (in the form of advances against their pay), if the Union represented them is, without doubt, a threat to withdraw an existing benefit if employees decide to select the Union to represent them. As such it violates Section 8(a)(1) of the Act. *Meyer Waste Systems*, 322 NLRB 244 (1996); *Standard Products Co.*, 281 NLRB 141 (1986).

Board law holds that employers may inform employees as to how to request the return of authorization cards in only limited circumstances. There must be no assistance provided other than passive or ministerial aid, such as providing an address to which to write. In addition, there must be no possible monitoring of which employees make such requests, and a context free of other unfair labor practices. If an employer goes beyond mere "ministerial" or "passive aid," and does so in the context of other unfair labor practices, it has acted unlawfully. *Mohawk Industries*, 334 NLRB 1170, 1170–1171 (2001). With respect to Respondent's announcement regarding how to request employees' authorization cards back from the Union, Dick did more than simply provide an address and supply green cards at the timeclock for employees' use. He offered the assistance of his wife, Brenda DeYoung, a management official, in composing such requests, and authorized employees to leave work early. It would have been possible, and employees could have realized that it was possible, to monitor which employees availed themselves of the opportunity to leave work early that day. Their timecards would have provided the necessary information. Finally, in this instance, there is a context of other unfair labor practices. In the same meeting, Respondent unlawfully threatened withdrawal of a benefit. In addition, less than a week earlier, Respondent had discharged the leading union activist. Even William Hires, anxious as he was to please Dick, assumed that Furtaw had been fired because of his union activities. As recounted below, I find that Hires' assumption was correct. Viewed as a whole, therefore, Respondent's solicitation of employees to request return of their authorization cards was coercive and occurred in a coercive context. I find that it violated Section 8(a)(1) of the Act.

2. Discharge of Eric Furtaw—prima facie case

In order to establish a prima facie case that a respondent has discharged an employee in violation of Section 8(a)(3) of the Act, the General Counsel must show that the employee was engaged in union activities, that the respondent was aware of those activities, that the respondent harbored animus or hostility towards those activities, and discharged the employee because of those activities. If the General Counsel successfully proves these elements, a respondent may defend by proving that it would have discharged the employee in any event, even in the absence of any protected activities. *Wright Line*, 251 NLRB

1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

In this case, it is not disputed that Eric Furtaw was active in the union organizing effort at Respondent. Respondent contends that while it was aware of Furtaw's support for the Union, it was unaware that he was one of the leaders of the organizing effort. On the contrary, I have found that Respondent was aware, at least from May 10 when Crane delivered the letter naming the in-plant organizing committee, that Furtaw was one of the three leading union organizers among its 10 employees.

Respondent's animus against the Union and employees' organizing efforts is amply demonstrated by Dick's statements to Tim Price some weeks before the organizing effort began, and further by his remarks to Price and Shannon on May 10, the day he learned that a majority of the employees had decided to support the Union. In addition, Respondent's animus against the Union did not fade with its discharge of Furtaw, but continued. Within a week of Furtaw's discharge, Respondent violated employees' rights in two additional ways on June 7. Respondent argues that Dick's conduct in meeting politely with the Union representative on May 17, and the fact that his father formerly belonged to the Union militate against a finding of animus. While it may be that Dick had no animus against the Union in the abstract, when faced with the reality of the employees of his own small company being represented by the Union, he apparently found that theory and practice sometimes part company. Respondent amply demonstrated its antiunion animus by the numerous unfair labor practices Dick personally engaged in.

Whether there is a connection between this hostility and the discharge of Eric Furtaw is the final prong of the prima facie case. The timing of Furtaw's discharge, coming within a few weeks of Respondent's learning that he was a leading union organizer, is one element which the General Counsel urges, and which I find, indicates that there is such a connection. In addition, Respondent's asserted reason for the discharge is an alleged incident of bad conduct which had occurred between 5 and 6 months before the discharge. The record is clear that Respondent had knowledge of this conduct in December 2000, when it had allegedly occurred. It is undisputed that employee Hires informed the substitute supervisor and owner's son, Steven DeYoung, of his allegations regarding Furtaw's conduct. Even if I were to credit Dick's denial of knowledge of this particular allegation before May 30, Respondent is charged with knowledge of it through Steven DeYoung. Had Respondent actually found the Hires' allegations sufficiently believable, it would have conducted an investigation or taken action of some kind at that time, not waited 5 or 6 months. In addition, the summary nature of the discharge, undertaken without any investigation, and without permitting any defense by Furtaw, is another indicator that the action was taken because of Furtaw's union activities, and not because of his prior misconduct. I find that there is considerable evidence of the requisite connection between Respondent's animus and its discharge of Furtaw. In summary, I find that the General Counsel has sustained his burden of proving a prima facie case that Respondent violated Section 8(a)(1) of the Act by discharging Eric Furtaw.

3. Respondent's defense

In defense, Respondent has introduced evidence not only of the allegations which were made by William Hires about Furtaw, but also of numerous other instances of misconduct allegedly engaged in by Furtaw. These latter incidents include Furtaw's supposedly throwing down tools on a number of occasions and his own radio on one occasion. With respect to these instances, there was no clear showing that supervisors were aware of Furtaw's roughness with tools. If they were, as is probable from the smallness of the plant, there is no evidence that they were particularly concerned about it. There is absolutely no evidence in the record that Furtaw received so much as a verbal admonition to take it easy on the tools. In addition, the incidents described occurred primarily in the fall of 2000, more than 6 months before the discharge. Dick testified summarily that he was generally aware of Furtaw's "other conduct" and that it was a part of the reason he decided to discharge Furtaw on May 31.⁸ To the extent that he did so rely, I find that Respondent has used stale incidents to bolster its defense, as well as relying on conduct it had previously tolerated and accorded no discipline for. Its reliance on this other conduct also constitutes a shifting defense. These factors are indicators of pretext, rather than of a bona fide defense.

To the extent the "other conduct" allegedly relied upon by Respondent consisted of the several instances in 2001 that Furtaw became upset and walked off the job, this asserted defense is subject to the same deficiencies. Respondent tolerated Furtaw's tantrums month after month, with absolutely no discipline for this conduct. In fact, in April when Furtaw voluntarily quit, Steven DeYoung gave Furtaw his job back immediately upon being asked, the same afternoon Furtaw had quit. Although Dick claims to have been unhappy about Steven's action, and determined to discharge Furtaw, he in fact took *no action at all* against Furtaw when he returned from vacation on May 1, which belies his testimony that he had decided to discharge Furtaw in April. Respondent's reliance upon Furtaw's previously condoned conduct is a clear indication that its defense is pretextual.

Finally, the major prong of Respondent's defense is Dick's "discovery" of and reliance on nearly 6-month old allegations made by employee William Hires. I have found that William Hires was not a reliable witness. Even if Respondent believed him to be more reliable than I have found him, it was still obligated to investigate his allegations and to permit Furtaw to give his version of events. It did neither. Respondent completely failed to investigate the allegations, and admittedly refused to permit Furtaw to defend against what Dick heard him say were unfounded accusations. Precisely this type of summary proceeding has repeatedly been found by the Board to indicate pretext rather than a valid defense. See, e.g., *Soltech, Inc.*, 306 NLRB 269, 278-279 (1992); *Kunja Knitting Mills U.S.A.*, 302 NLRB 545, 560-561 (1991); *Superior Coal Co.*, 295 NLRB

⁸ Notably, Respondent does not rely upon Furtaw's frequent use of intemperate language as part of the alleged misconduct. Indeed, it could not convincingly do so, since the entire record reveals that many employees and supervisors, including Dick, habitually used intemperate language in the plant as a matter of course.

439, 450, 453 (1989); *NKC of America*, 291 NLRB 683, 684 (1988). Respondent's conduct in discharging Furtaw in this manner is indicative of pretext, as is its reliance upon a nearly 6-month old incident which I have found it was well aware of prior to May 30. I find that Respondent has not succeeded in carrying its burden of proving that it would have discharged Furtaw in the absence of his union activities. I find, therefore, that Respondent has violated Section 8(a)(3) of the Act by discharging Eric Furtaw.

CONCLUSIONS OF LAW

1. By implying to employees that selecting a union to represent them would be futile, threatening them with unspecified consequences if they tried to organize a union, interrogating employees about the union activities of other employees, encouraging and assisting employees to withdraw their signed authorization cards, and by informing employees that it would no longer make personal loans to them if the Union were selected, Respondent has violated Section 8(a)(1) of the Act.

2. By discharging its employee Eric Furtaw, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to remove from the employment records of Eric Furtaw any notations relating to the unlawful action taken against him and to make him whole for any loss of earnings or benefits he may have suffered due to the unlawful action taken against him, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Air Flow Equipment, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implying to employees that selecting a union to represent them would be futile, threatening them with unspecified consequences if they tried to organize a union, interrogating employees about the union activities of other employees, encouraging and assisting employees to withdraw their signed authorization cards, and by informing employees that it would no longer make personal loans to them if the Union were selected.

(b) Discharging employees because they support a union or are active in organizing efforts.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Eric Furtaw full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Eric Furtaw whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Kalamazoo, Michigan location copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

⁹ 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.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT imply to you that selecting a Union to represent you would be futile.

WE WILL NOT threaten you with unspecified consequences if you try to organize a union.

WE WILL NOT interrogate you about the union activities of other employees.

WE WILL NOT encourage and assist you to withdraw your signed authorization cards.

WE WILL NOT inform you that we will no longer make personal loans to you if you select the Union to represent you.

WE WILL NOT discharge employees because they support the Union or try to organize a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reinstate Eric Furtaw to his former job, and **WE WILL** make him whole for any loss of pay or other benefits he may have suffered because of our unlawful discharge of him.

WE WILL remove from our files any reference to the unlawful discharge of Eric Furtaw, and notify him in writing that this has been done and that the discharge will not be used against him in any way.

AIR FLOW EQUIPMENT, INC.