

Hi-Tech Interiors, Inc. and United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City & Vicinity, AFL-CIO.
Case 17-CA-22916

September 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND KIRSANOW

On June 20, 2005, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed separate answering briefs.

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,¹ and conclusions as modified and to adopt his recommended Order as modified below.²

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire, and to consider hiring, William Rogers and Bruce Hildebrandt because it knew from their applications that they intended to organize employees on behalf of the Union. We find no merit in the Respondent's argument that the General Counsel failed to prove that union animus motivated its hiring decisions because it hired several employees who it knew or suspected were affiliated with the Union. As fully described in the judge's decision, Field Superintendent Martin Baumgard's unlawful coercive statements to job applicant Woody Hall provide direct evidence of Respondent's animus against union organizers. In particular, Baumgard told Hall, "So, that's my only issue with anybody that's hired on, is that I don't want somebody coming on and then a couple of months down the road trying to organize the company."³

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.

² We shall modify the judge's recommended Order to conform more closely to the 8(a)(3) violations found, and in accordance with the amended remedy (below) and *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also substitute a new notice to conform to the Order as modified.

³ Based on the specific facts of this case, we affirm the judge's finding that Baumgard violated Sec. 8(a)(1) by coercively interrogating Hall during this same conversation. We find no need to pass on whether Baumgard also unlawfully interrogated job applicant Joe Hal-

That the Respondent hired several known or suspected union applicants does not negate the strong evidence that it discriminated against Rogers and Hildebrandt because of their declared union organizer status.⁴ Unlike Rogers and Hildebrandt, none of the individuals hired indicated an intent to engage in organizational activities.⁵ Consequently, we agree with the judge that the General Counsel met his initial burden of showing that union animus motivated the Respondent's hiring decisions.⁶ Inasmuch as the Respondent failed to prove any legitimate reasons for refusing to hire or consider hiring Rogers and Hildebrandt, it has not met its rebuttal burden of showing that it would have taken the same actions even if the discriminatees had not declared their intent to engage in union organizing activities. The Respondent therefore violated Section 8(a)(3) of the Act.

AMENDED REMEDY

The Respondent contends in exceptions that it is inappropriate to order reinstatement and backpay for Rogers and Hildebrandt without making those remedies conditional on their first passing the mandatory drug screening and physical capacity tests that all new employees must pass before beginning work. In the circumstances of this case, passing the tests is a condition of reinstatement. We therefore find that the Respondent should be permitted to administer these tests, and that it is not required to hire a discriminatee who fails either test.⁷

stead because the finding of an additional violation would not affect the remedy for the Respondent's misconduct.

In finding that Baumgard's interrogation of Hall violated Sec. 8(a)(1), we agree that the questioning was coercive considering all relevant circumstances. See *Rossmore House*, 269 NLRB 1176 (1984), *enfd.* sub nom. *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). We find it unnecessary to pass on the judge's finding that the questioning was inherently coercive.

⁴ See, e.g., *Zurn/N.E.P.C.O.*, 345 NLRB 12, 19 (2005) (Joe Van Dyke).

⁵ We place little weight on Baumgard's testimony about his alleged attempt to hire Thomas Fischer, who, like Rogers and Hildebrandt, declared his union organizer status on his application. Fischer applied for work on July 7 or 8, 2004, but Baumgard testified that he did not even check Fischer's prior employer reference until October 2004, after the Union filed a charge naming Fischer as a discriminatee. In the interim, the Respondent hired nine carpenters within 3 weeks or less of their respective application dates. Further, while Baumgard initially testified that he offered Fischer a job, he later testified that he could not recall whether he contacted Fischer after learning that he had returned to work with his former employer.

⁶ See *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). The Respondent does not contest the judge's findings that it was hiring at the time of the alleged misconduct or that Rogers and Hildebrandt had the requisite training and experience for the positions for which they applied.

⁷ *Kamtech, Inc.*, 333 NLRB 242 (2001).

With respect to backpay, if either discriminatee fails a test, that does not necessarily mean he would have done so at the time of the Respondent's discrimination in 2004. However, a present-day test failure is sufficient to raise an inference that the discriminatee would also have failed the test in 2004 at the time of the discrimination. The discriminatee is in possession of the evidence to show that his physical capacity and/or drug usage was different on that earlier date. Consequently, upon showing of a test failure, the burden should shift to the General Counsel to go forward with evidence that the discriminatee would have passed the test if administered at the time of the Respondent's unlawful conduct. The ultimate burden of persuasion remains with the wrongdoing Respondent. Thus, if the evidence on the record as a whole is in equipoise, then the Respondent will not prevail in its claim that backpay should be limited based on the test results.⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Hi-Tech Interiors, Inc., Manhattan, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 1(c).

“(c) Failing and refusing to consider applicants for hire, or failing and refusing to hire applicants because of their support for the United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, AFL-CIO, or any other labor organization.”

2. Substitute the following for paragraph 2(a), relettering subsequent paragraphs.

“(a) Within 14 days from the date of this Order, offer William Rogers and Bruce Hildebrandt instatement to the positions for which they applied, subject to their passing drug screening and physical capacity tests required for all new employees, or, if those positions no

longer exist, to substantially equivalent positions (subject to the same conditions), without prejudice to their seniority or any other rights or privileges that they would have enjoyed absent the discrimination against them.

“(b) Make William Rogers and Bruce Hildebrandt whole, with interest, for any loss of earnings and other benefits sustained by reason of the discrimination against them, in the manner set forth in the Amended Remedy section of this Decision and Order.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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 a 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 interrogate employees, including applicants for employment, concerning their union membership, activities, or sympathies.

WE WILL NOT inform employees, including applicants for employment, that we will not hire applicants who intend to engage in union organizing activities.

WE WILL NOT fail and refuse to consider applicants for hire, or fail and refuse to hire applicants, because of their support for the United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Rogers and Bruce Hildebrandt instatement to the positions for which they applied, subject to their passing the drug screening and physical capacity tests we require of all new employees before they start work, or if those positions no longer exist, to substantially equivalent positions (subject to the same conditions), without prejudice to their seniority or any other

⁸ Any backpay due shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As stated by the judge, the Board leaves to compliance the determination of how long a discriminatee would have worked for the Respondent if he had not been unlawfully refused hire. *Dean General Contractors*, 285 NLRB 573 (1987). Chairman Battista and Member Schaumber recognize that *Dean General* represents current Board law. They have concerns, however, about whether that case was correctly decided. Inasmuch as evidence adduced at the compliance stage may lessen or eliminate backpay and eliminate the instatement order, they do not pass on the respective burdens of proof as to these matters, except as discussed above with respect to the physical capacity and drug tests. *Progressive Electric*, 344 NLRB No. 52, slip op. at 3 (2005).

rights or privileges that they would have enjoyed absent the discrimination against them.

WE WILL make William Rogers and Bruce Hildebrandt whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, expunge from our files all references to the unlawful failure to hire and to consider for hire William Rogers and Bruce Hildebrandt, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

HI-TECH INTERIORS, INC.

Michael Werner, Esq., for the General Counsel.

David L. Vogel, Esq., for the Respondent.

Martin W. Walter, Esq., for the Charging Party Union.

DECISION¹

ALBERT A. METZ, Administrative Law Judge. The issues are whether the Respondent unlawfully interrogated employees concerning their union activities, implied that it would refuse to hire union-affiliated employees, and refused to hire or consider for hire, William Rogers and Bruce Hildebrandt because of their union affiliation. The Respondent's conduct is alleged to have violated Section 8(a)(1) and (3) of the National Labor Relations Act.² On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact.

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Manhattan, Kansas, is a contractor engaged in the business of interior finish and specialized exterior construction including metal stud framing, installation of drywall, plaster, acoustical ceilings, and applying exterior insulation finish system (EIFS). The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ROGERS AND HILDEBRANDT APPLY FOR EMPLOYMENT

The Respondent's relevant hierarchy consists of President Fred Willich and Martin Baumgard, who serves as field superintendent. Baumgard reports directly to Willich and is responsible for all of Respondent's hiring decisions.

On about July 4, the Respondent placed advertisements in the Topeka Capital Journal and Manhattan Mercury newspapers seeking employees to work as metal stud framers and sheet rockers. Union member William Rogers applied for employment with Respondent on July 9. Rogers was acting pursuant to instructions from his union business agent in seeking em-

ployment from the Respondent. His application stated that he had in excess of 40 years of framing and sheetrock experience. Rogers wrote the words "Union Organizer" on the top of his application.

On July 12, union carpenter Bruce Hildebrandt completed an application for employment with the Respondent. Hildebrandt wrote on his application that he had 18 years of metal stud and sheetrock experience. Hildebrandt also wrote the words "Union Organizer" on the top of his application.

The Respondent hired the following carpenter employees during the relevant period:

HIRE DATE	EMPLOYEE	EXPERIENCE
July 19	Greg Green	15 years of framing & sheetrock experience which was similar to Hildebrandt's experience, but far less than Rogers' 40 years of carpentry experience.
July 21	Darrell Frye	7 years of framing & sheetrock experience.
July 27	Tim Sheen	2 & 3 years of framing experience & 1 year of sheetrock experience.
July 29	Joe Halstead	6 years experience framing & hanging sheetrock.
Aug. 5	Edgar Damron	A carpenter whose background was comparable to Hildebrandt's.
Aug. 10	Chris Flowers	6 years of framing experience & 5 years of sheetrock experience.
Sept. 7	Jason Haslouer	10 years of framing experience & no experience hanging sheetrock.
Sept. 14	Woody Hall	5 years of framing & sheetrock experience.
Sept. 24	Charlie Strauss	Strauss did not list how many years he had been hanging sheetrock or framing.

Hildebrandt did not receive a response to his application and on September 9 he telephoned the Respondent to inquire about the matter. He testified without contradiction that the Respondent's receptionist told him that the Respondent was hiring and she promised to pass his name along to Martin Baumgard. Hildebrandt did not hear from the Respondent and thus he telephoned the Respondent on September 22. Again he was told that the Respondent was still hiring. Hildebrandt never heard from the Respondent. Rogers telephoned the Respondent on September 22 to check on the status of his application but never heard back from the Respondent.

Between July and September 2004, the Respondent hired nine carpenters. In July and October, the Respondent placed advertisements in local newspapers seeking carpenters with framing, sheetrock, and acoustical ceiling experience. The Respondent admittedly had numerous ongoing projects, including seven projects on which its estimated manpower requirements exceeded 700 days.

¹ This matter was heard at Manhattan, Kansas, on April 12, 2005. All dates in this decision refer to 2004, unless otherwise stated.

² 29 U.S.C. § 158(a)(1) and (3).

In October, the Respondent continued its need for employees but was having difficulty meeting these demands. The Respondent publishes an in-house newsletter, the “Hi-Tech Insider,” and in the October edition Baumgard wrote:

Work wise things are looking up and it has been an extremely busy year. We had a fairly busy summer, with a great deal of overtime on Panera Bread, Council Grove High School, Wamego High School, Discovery Furniture and Seaton Hall just to name a few. . . . We have a great deal of work running now and plenty more work in the books to keep everyone busy all winter long and throughout most of the spring. . . . I could also use some help finding new employees, if you have someone in mind let me know. [GC Exh. 7.]

The Respondent was unable to hire all of the carpenters that it needed. Thus, on October 5, the Respondent signed a labor supply agreement with MSI, Inc. Pursuant to this agreement MSI contracted to provide the Respondent with employees at a billing rate of \$22.96 per hour, per man straight time. Baumgard testified that since October 2004, MSI supplied the Respondent with 15–20 carpenters, finishers, EIFS, and acoustical ceiling mechanics. The Respondent also advertised in the Topeka Capital Journal on October 20 seeking additional employees with experience in metal studs, drywall, EIFS, acoustical ceilings, and other related activities.

III. CONVERSATION BETWEEN BAUMGARD AND JOE HALSTEAD

Union Organizer Paul Garrett asked union member Joe Halstead to submit an application to the Respondent and on July 16 Halstead telephoned the Respondent’s office. Halstead used a tape recorder to record his conversation. The evidence shows that Halstead requested an application and was advised that Respondent was hiring. His call was then transferred to Baumgard who also told Halstead that the Respondent was hiring. The conversation continued to the point where Baumgard asked Halstead:

MB: . . . are you, Union, non-union?

JH: Uh, I have been Union in the past.

MB: Okay, well that’s fine, we are a non-Union shop.

JH: Yeah, that’s fine.

MB: Okay.

JH: I realize that.

MB: Well I’ve had a lot of Union guys thinking we were Union.

JH: Okay.

MB: And, then, you know, it wastes everybody’s time because they don’t want to work for me. [GC Exhs. 13 and 14.]

Baumgard’s representation to Halstead that he had “a lot of Union guys” thinking that the Respondent was a union company and it was a waste of time because they did not want to work for him was contradicted by Baumgard’s testimony. Baumgard testified that he could not recall any employees who had applied for work and who had been offered a job ever telling him they could not work for the Respondent because it was a nonunion company. Likewise, Baumgard testified that he could not recall any of the applicants who had a union back-

ground ever thinking that the Respondent was a union company. I conclude that Baumgard’s inquiry of Halstead was motivated by Baumgard’s desire to gain knowledge of the applicant’s union sympathies.

IV. CONVERSATION BETWEEN WOODY HALL AND BAUMGARD

Union member Woody Hall went to the Respondent’s jobsite at Discovery Furniture in Topeka on August 25. Hall spoke with Respondent’s Foreman Casey Willich about employment. Willich gave him an application and instructed him to speak with Baumgard about getting hired. Hall subsequently telephoned Baumgard and made arrangements to fax his application to Respondent’s office. On September 8, Hall went to the Respondent’s office for a scheduled interview with Baumgard. Hall carried a hidden tape recorder with him during the interview. Baumgard inspected Hall’s application and noticed that he had previously worked for KBS, a union contractor. The recorded conversation then continued:

MB: What, you going to try and stick with the Union? Cause we are nonunion.

WH: Yeah, I know, there’s just no work in Topeka.

MB: I know, but see the thing is with them, the Discovery Furniture store here in Topeka, they put a banner, they’re out there picketing us. And we’ve got Heritage Bank in Topeka and they’re starting to put another picket sign up there. And we’ve got another job that they’re threatening to throw another picket sign up there. So, I mean, just making sure that, I mean I’ve had a couple of guys come in and say ‘I’m sitting on the bench too much, I just can’t do it no more’ and then when I tell them I’m (unintelligible.) for nonunion it’s all “oh I can’t work for you.” So, that’s the only thing I’m getting at. So I mean, with your qualifications and your skills I see no reason not to hire you. The thing is we don’t want somebody coming in here and six months down the road trying to send the Union back in here, cause they want this company bad. They want the company name, they want the company, they want the people. And they’re, they’re saying we’re doing all kinds of nasty things that we’re not. That’s just them. So, there is no feelings with me and the Union. I could take them or leave them. But I just don’t want them here.

WH: Okay.

MB: So, that’s my only issue with anybody that’s hired on, is that I don’t want somebody coming on and then a couple of months down the road trying to organize the company. [GC Exhs. 11 and 12, pp. 1–2.]

Baumgard did not contest the accuracy of the taped conversations with Hall and Halstead. Baumgard did testify that he could not recall anything about these conversations. I credit the accuracy of the taped conversations and the testimony of Hall and Halstead and find that Baumgard did speak the words attributed to him.

V. ANALYSIS

A. *The 8(a)(1) Allegations*

The Government alleges that Baumgard’s interrogation of

Halstead about his union affiliation is a violation of Section 8(a)(1) of the Act. The Respondent defends Baumgard's questions about applicants' union membership and statements about union organizing as merely an effort to inform applicants of the Respondent's nonunion status.

The Board holds that an employer's inquiries about an applicant's union membership during a job interview are inherently coercive and violate the Act. *Quality Drywall Co.*, 254 NLRB 617, 621 (1981) (questions concerning former union membership in the context of job application interviews, are inherently coercive, without accompanying threats, even when the interviewee is subsequently hired); *Service Master*, 267 NLRB 875, 875 (1983); *Triple H. Electric Co.*, 323 NLRB 549, 552 (1997). Baumgard's interrogation of Halstead's union membership was made during the critical job interview stage and, under case law, was inherently coercive. I find that Baumgard's questioning of Halstead was indeed an unlawful inquiry into the applicant's union membership and sympathies. I conclude, therefore, that the Respondent did violate Section 8(a)(1) of the Act by this interrogation.

The Government alleges that Baumgard's statement to Hall that the Respondent would remain nonunion implied that the company would refuse to hire union-affiliated applicants. Additionally, it is alleged that Baumgard unlawfully interrogated Hall regarding his union affiliation and preference. Baumgard noted that Hall's application showed he had worked for the union firm KBS which led him to inquire if Hall was "going to try and stick with the Union." As discussed above, I conclude that such an interrogation of a job applicant is coercive and a violation of Section 8(a)(1) of the Act under well established Board precedent. Baumgard's additional statements are likewise unlawful. Thus, Baumgard followed the interrogation by stating, "The thing is we don't want somebody coming in here and six months down the road trying to send the Union back in here, cause they want this company bad." Baumgard added, ". . . that's my only issue with anybody that's hired on, is that I don't want somebody coming on and then a couple months down the road trying to organize the company." Such statements clearly tend to interfere with, restrain, and coerce employees in their rights under the Act to engage in union and other protected concerted activity. *Quality Control Electric*, 323 NLRB 238 (1997) (employer's statement that it was afraid to hire union members because it did not want to be organized held to be unlawful). Baumgard's statements were coercive and a clear indication that the Respondent would refuse to hire applicants who were affiliated with a labor organization and intended to organize the Respondent. I conclude that these statements also violated Section 8(a)(1) of the Act.

B. The 8(a)(3) Allegations

The Government alleges that the Respondent refused to hire and refused to consider for hire Rogers and Hildebrandt because of their "union organizer" expressions set forth on their applications. The Respondent contends that Rogers was well qualified and, although he was never hired, it was considering him for employment as a foreman. The Respondent asserts that Baumgard had knowledge of Hildebrandt's work habits and decided not to hire him because of an adverse opinion as to

those habits and because his reference check was unfavorable.

The Respondent has no written policies concerning the handling of employment applications or the interviewing of applicants. Baumgard does have a practice, however, of reviewing all applications and assessing whether the applicant is worthy of an interview. If the candidate is promising Baumgard checks his references. The Respondent keeps employment applications on file for 6 months.

William Rogers listed over 40 years of carpentry experience on his application, including a union apprenticeship, training in scaffolding, and first aid instruction. Rogers' application noted that he worked as a foreman on several projects including a HAZMAT facility in Los Alamos, New Mexico, and a powerplant in Council Bluffs, Iowa. Rogers is also certified as a building inspector by the International Conference of Building Officials.

Bruce Hildebrandt's application reflected that he had 15 years experience in framing and installing acoustical ceilings, and 18 years experience in hanging sheetrock. Hildebrandt had worked as a foreman on two projects, supervising approximately seven employees on each project.

1. Refusal-to-consider standard

In *FES*, 331 NLRB 9 (2000), the Board set forth the standards for judging discriminatory refusals-to-consider individuals for hire and for assessing illegal refusals to hire. To establish a discriminatory refusal-to-consider case, it is necessary to show:

- 1.) the respondent excluded applicants from a hiring process; and
- 2.) antiunion animus contributed to the decision not to consider the applicants for employment.

If these elements are established, the Employer then bears the burden of demonstrating that it would not have considered the applicants even in the absence of their union activity or affiliation.

2. Refusal-to-hire standard

The Board in *FES*, supra at 12, stated the following elements are necessary to establish a discriminatory refusal-to-hire:

- (1) The respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
- (2) The applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
- (3) antiunion animus contributed to the decision not to hire the applicants. Once these elements are established the burden will shift to respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The record shows that in the summer and fall of 2004, the Respondent had a large amount of work and a great need for carpenters. To fill this need the Respondent did directly hire nine carpenter employees, continued to advertise for additional applicants, and urged its employees to recommend potential applicants. Ultimately the Respondent had to hire contract

carpenters through MSI in order to meet its needs.

The Respondent does not contest the technical qualifications of Hildebrandt or Rogers whose backgrounds included many years of experience as carpenters. I find that both men had the experience and training relevant to requirements of the positions for which they applied.

3. Bruce Hildebrandt

Hildebrandt applied for employment with the Respondent on July 12. Baumgard testified that he had worked for a contractor that also employed Hildebrandt approximately 7 years before Hildebrandt's application. Baumgard testified that Hildebrandt was not hired because he had occasion to observe Hildebrandt at work during that employment and found him to be a slow worker. On October 6, the Union filed a charge against the Respondent alleging that the failure to hire Hildebrandt was an unfair labor practice. Baumgard testified that on October 12, he checked Hildebrandt's references after being instructed by the Respondent's president to check all references regardless of intent to hire because "people change." Baumgard testified that when he asked Louie Gasprich of Dry Wall Construction Company about Hildebrandt, Gasprich said that he would not hire him back. Thus, based on these two reasons, Baumgard's historic observation of Hildebrandt's work and his reference check, Baumgard decided not to hire him. Gasprich did not testify at the hearing.

This explanation varies from the Respondent's position statement provided to the Government during the investigation of the charges in this case. That statement gave the following explanation for not hiring Hildebrandt:

Hi-Tech received Bruce Hildebrandt's application for employment on July 12th, 2004. During the hiring process mentioned above, the previous employers of Mr. Hildebrandt informed Hi-Tech that they would not hire him back for several factors, including lack of production while at his previous jobs and the fact the Mr. Hildebrandt did not take a leadership role during his prior employment. Hi-Tech's policies are for applicants to have a good track record with their former employers and to have a progressive leadership roll within their previous jobs. Based on the information received from Mr. Hildebrandt's former employers, he did not meet Hi-Tech's criteria for employment. [GC Exh. 8.]

The position statement makes no reference to Baumgard's personal trepidation about Hildebrandt's work resulting from having previously worked with him. The sole reason for not hiring Hildebrandt is stated to be the poor references he received. In fact, the evidence shows that only one reference check was completed on Hildebrandt and this was done some 3 months after he applied for work and after charges were filed regarding his not being hired. I find that the Respondent has offered shifting reasons for not hiring Hildebrandt. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (shifting reasons constitute evidence of discriminatory motivation); *Black Entertainment Television*, 324 NLRB 1161 (1997) (Board noted Respondent's shifting explanations given in its position statement and its assertions at the hearing for reducing hours and laying off of employees. "The Board has long expressed the

view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Sound One Corp.*, 317 NLRB 854, 858 (1995.); *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), *enfd.* 881 F.2d 542 (8th Cir. 1989). I infer that the reasons offered for not hiring Hildebrandt are not the true reasons he was not hired.

Weighing against the Respondent's defense for not hiring Hildebrandt is Baumgard's statements of antiunion animus and the Respondent's intent not to hire union supporters because, "... we don't want somebody coming in here and six months down the road trying to send the Union back in here," and "... I just don't want them here." See *C. P. Associates, Inc.*, 336 NLRB 167, 168 (2001) (animus established by evidence of unlawful threats and interrogating applicants/employees about their union sympathies.) I found Baumgard's demeanor while testifying to be guarded and evasive in explaining his hiring practices and procedures. This assessment of Baumgard's testimony also includes his clouded memory as to what he said to Hall and Halstead regarding being union carpenters and the Respondent not wanting to be organized by the Union. He could not "recall" anything about such discussions. As noted, Hildebrandt had prominently advised the Respondent of his prounion sympathies by stating on his application that he was a "Union Organizer." Based on the record as a whole I do not credit Baumgard as to the reasons he gave for not hiring Hildebrandt.

The Respondent was in urgent need of carpenter employees at the time of Hildebrandt's application for employment, he was a qualified carpenter, and I find that antiunion animus contributed to the decision not to consider him for employment and that this was, at least in part, the reason he was excluded from the hiring process. The Respondent offered shifting reasons as to why it did not consider him for employment. I find, therefore, that the Respondent has not met its burden of establishing that it would not have hired Hildebrandt even in the absence of his union membership and "union organizer" status. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See *Zengel Bros.*, 298 NLRB 203, 206 (1990) (an employer's failure to offer a consistent account of its actions warrants an inference that the real reason for its conduct is not among those asserted); *Gaetano & Associates, Inc.*, 344 NLRB 531, 533-534 (2005). I conclude that the preponderance of the evidence establishes that the Respondent unlawfully refused to consider Hildebrandt for employment in violation of Section 8(a)(1) and (3) of the Act.

Regarding the allegation that Hildebrandt was unlawfully refused employment the evidence shows that the Respondent (1) was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) Hildebrandt had the experience or training relevant to the requirements of the positions for hire and (3) antiunion animus contributed to the decision not to hire him. I further find that the credited evidence demonstrates that the Respondent failed to show that it would not have hired Hildebrandt even in the absence of his union activity or affiliation. *Wright Line*, *supra*. I conclude that the Respondent also unlawfully refused to hire Hildebrandt in violation of Section 8(a)(1) and (3) of the Act.

4. William Rogers

The Respondent asserts that Rogers was not hired because he was over qualified for the openings it had for carpenters. Baumgard testified that he would consider Rogers for a foreman's position but the hiring done for those jobs had been from present or former employees.

The evidence shows that Rogers was a highly qualified and experienced carpenter. He did not seek a foreman position on his July 9 application and listed as "negotiable" his expected pay. The Respondent never contacted him about employment despite its pressing need for carpenters. Rogers' application, unlike others, shows no evidence that the Respondent ever checked his references. The Respondent never returned his telephone call inquiring about the status of his application. The Respondent never discussed with Rogers that it was considering him for a foreman position or ask whether he was willing to work as a journeyman carpenter. The Respondent hired several less experienced carpenters in the meantime and, when it ran out of acceptable applicants, it resorted to contracting with MSI to provide additional carpenters.

Rogers had conspicuously advised the Respondent of his prouion sympathies by stating on his application that he was a "Union Organizer." As noted above, the Respondent's hiring agent exhibited clear antiunion animus against hiring anyone who was going to attempt to organize its employees. Baumgard's bias against the Union organizing the Respondent was also evident in his demeanor when testifying. In this regard Baumgard's lack of conviction and hesitating manner when testifying were not persuasive that he was candidly stating the real reasons for failing to hire Rogers. Thus, Baumgard is not credited as to the reasons he gave for not hiring Rogers. I have also considered the weight of the evidence and find that the admitted facts show the Respondent's urgent need for carpenters make it inherently improbable that it would totally ignore a highly experienced applicant to its own business detriment. This conduct shows that the Respondent fabricated the reasons it did not hire Rogers and I infer from such action that the Respondent had an unlawful motive in fabricating such reasons. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966) ("If [a trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where

the surrounding facts tend to reinforce that inference."); *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004) ("By definition, an employer's proffer of a lawful, but false, reason for an alleged act of Section 8(a)(3) discrimination constitutes evidence that the proffered lawful reason was pretextual, i.e., it either did not exist or was not, in fact, relied upon, thereby permitting the *Shattuck Denn* inference that the employer was shielding an illicit motive.") *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). I find that the Respondent has not shown that it would have refused to hire or consider for hire Rogers regardless of his union membership or activities. *Wright Line*, supra. I conclude that the Government has shown by a preponderance of the evidence that the Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to hire and refusing to consider for hire William Rogers. *FES*,

331 NLRB 9 (2000).

As set forth above the Government has shown the Respondent had a number of openings that were available for hiring at the relevant time. That evidence demonstrates that the Respondent was advertising for help when Hildebrandt and Rogers applied for employment and that the company hired nine carpenter employees within a short period thereafter. *C. P. Associates, Inc.*, 336 NLRB 167, 168 (2001) (newspaper ads and contemporaneous hirings at the time of the alleged unlawful conduct prove element 1 of *FES* standards for refusal to hire violation). I find, therefore that such proof of job openings justifies an affirmative remedy of reinstatement and backpay for both Hildebrandt and Rogers. *Choctaw Builders, Inc.*, 338 NLRB 799 (2003); *Jet Electric Co.*, 334 NLRB 1059, 1159–1160 (2001). See also *Jobsite Staffing*, 340 NLRB 332 (2003) (when both a refusal-to-hire and a refusal-to-consider for hire violation are found the remedy for the refusal to consider violation is subsumed by the broader refusal to hire remedy.)

CONCLUSIONS OF LAW

1. The Respondent, Hi-Tech Interiors, Inc., Manhattan, Kansas, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³

ORDER

The Respondent, Hi-Tech Interiors, Inc., Manhattan, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees, including applicants for employment, concerning their union membership, activities, or sympathies.

(b) Informing employees, including job applicants, that it is futile for applicants who intend to engage in union organizing activity to apply for work.

(c) Failing and refusing to consider applicants for hire, or failing or refusing to hire applicants, because of their membership in, or support for, the United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, AFL-CIO, or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

³ 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.

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

(a) Make William Rogers and Bruce Hildebrandt whole, with interest, for any economic loss suffered as a result of the failure and refusal to hire them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As determined in a subsequent compliance proceeding, instate William Rogers and Bruce Hildebrandt to the available positions for which they applied or, if those positions no longer exist, to substantially equivalent positions. Instatement shall be without prejudice to seniority or any other rights or privileges to which these discriminatees would have been entitled if the Respondent had not discriminated against them. Because Respondent is engaged in the construction industry, I shall further recommend, in accord with *Dean General Contractors*, 285 NLRB 573 (1987), that the Board leave to the compliance stage of this proceeding the determination of whether the discriminatees would have continued in the Respondent's employment after completion of the projects for which they would have been hired. *Network Dynamics Cables*, 341 NLRB 735, 735 fn. 2 (2004). See also *Cheney Construction*, 344 NLRB 238 (2005), and *Progressive Electric, Inc.*, 344 NLRB 426 (2005) (at the compliance stage, the parties may introduce evidence as to how long a discriminatee would have worked for the Respondent if he had not been unlawfully refused hire).

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal-to-hire and consider-for-hire the above-named discriminatees and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(c) 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 payments records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Manhattan, Kansas copies of the attached notice marked "Appendix"⁴ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 July 9, 2004.

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

⁴ 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."