

Leiser Construction, LLC and Iron Workers Local Union No. 10, a/w International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO. Case 17-CA-23177

February 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On May 3, 2006, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a limited exception, a supporting brief, and an answering brief to the Respondent's exceptions. The Charging Party filed a limited cross-exception and a brief in support of the cross-exception and in opposition to the Respondent's exceptions.

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 in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.²

The judge found that the Respondent, a nonunion company that performs ironwork in the construction of commercial buildings, violated Section 8(a)(3) and (1) by discharging and otherwise discriminating against employees David Coleman and Travis Williams because of their union activity, by refusing to hire or consider for hire union applicants Michael Bright and Richard Christopherson, and by engaging in other coercive conduct. As explained below, we affirm most of the judge's unfair labor practice findings. However, we reverse the judge's findings that the Respondent violated the Act by discharging Williams and by prohibiting him from displaying a union sticker on his hardhat, and we find it unnecessary to pass on the refusal to consider Bright and Christopherson for hire.

I. DISCHARGE OF DAVID COLEMAN

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging employee

¹ The Respondent has implicitly 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 conclusions of law, remedy, and recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

David Coleman because of his union activity.³ We agree with the judge that the General Counsel established under *Wright Line*⁴ that Coleman's union activity was a motivating factor in the Respondent's decision to discharge him. We also agree with the judge that the Respondent failed to show that it would have discharged Coleman even in the absence of his union activity.

In doing so, we reject the Respondent's contention that it discharged Coleman because he falsified his employment application by listing employers for whom he had never worked. The record shows that this asserted justification was a pretext for discrimination. Coleman began working for the Respondent in late December 2004, without disclosing that he was a union organizer. It is undisputed that the Respondent was pleased with Coleman's work. On January 20, 2005, during lunch at a local restaurant with Lloyd Leiser (the Respondent's owner and general manager) and other employees, Coleman began handing out union cards. Coleman said, "This is where the, this is where our relationship goes south, Lloyd. . . . I'm an organizer man." Leiser responded, "See ya." Coleman then asked, "I'm fired?" Leiser stated, "Yep, enjoy, good while it lasted."

Thus, as soon as Coleman told Leiser that he was a union organizer, Leiser terminated him. Furthermore, Leiser told Coleman just a few minutes later that he would *not* have hired Coleman if Coleman had revealed that he was a union ironworker. Under these circumstances, we find that the Respondent's discharge of Coleman was not motivated by Coleman's falsification of his employment history.⁵ See *Solvay Iron Works*, 341 NLRB 208 (2004) (rejecting as pretextual the respondent's defense that it lawfully refused to hire an applicant because he misrepresented his name). Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Coleman.⁶

³ We also agree with the judge, for the reasons stated in his decision, that the Respondent violated Sec. 8(a)(1) by indicating to employees that Coleman was discharged because of his union activity and by telling Coleman that he would not have been hired if he had revealed his union affiliation.

⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

⁵ Because we reject the Respondent's asserted justification as pretextual, we need not address whether Coleman's discharge would have been lawful if the falsified employment history had been the real reason for the discharge.

⁶ The Respondent contends that even if Coleman's discharge was unlawful, the Board should cut off backpay as of April 12, 2005, when the Respondent contends that it offered to reinstate Coleman. We reject that argument. Coleman denied that he was offered reinstatement, and the judge credited his denial.

II. ALLEGATIONS REGARDING TRAVIS WILLIAMS

We agree with the judge,⁷ for the reasons stated below, that the Respondent violated Section 8(a)(1) by threatening employee Travis Williams with physical violence because of his union activity.⁸

The judge also found that the Respondent violated Section 8(a)(1) by prohibiting Williams from wearing a union-related sticker on his hardhat and Section 8(a)(3) and (1) by discharging Williams because of his union activity. We reverse the judge and dismiss those allegations.⁹

A. Facts

Williams, a union member who intended to organize the Respondent's employees, applied and interviewed for a job with the Respondent on March 31, 2005. Lloyd Leiser hired Williams, who began work on April 7, 2005. Williams did not reveal his union affiliation during the hiring process.

Leiser assigned Williams to a jobsite in Scott City, Kansas, about 6 hours from Kansas City. On April 11, 2005, during his lunchbreak at the Scott City jobsite, Williams put on a union T-shirt and a hardhat containing union stickers and began distributing authorization cards. Lloyd Leiser was not at the jobsite. When the Respondent's superintendent, Brian Muting, saw Williams' union activity, Muting called Lloyd Leiser on the phone and told him that Williams was a union member. Leiser spoke to Williams on the phone and ordered Williams to leave the Scott City jobsite within 15 minutes and to report to another jobsite in Kansas City at 7 a.m. the next morning.

On April 12, Williams reported to the Kansas City jobsite at about 6:30 a.m. Williams brought union organizer and former Leiser employee David Coleman with him. Williams wore his own hardhat, on which he displayed several union stickers, including a sticker that depicted someone or something urinating on a rat that was apparently designated "non-union."

Around 7 a.m., Lloyd Leiser and other employees drove up to the jobsite. Williams began handing out union cards. Leiser told Williams that he wanted "to have a little chat" with him. Williams asked Leiser why he had

not allowed Williams to finish his workday in Scott City the day before. According to Williams, Leiser replied that he "didn't want me talking about any of that union bullshit to those guys and that there was a guy on that job that could—that probably would have killed me." Williams told Leiser that Williams was ready to go to work, but Leiser said that "he wasn't going to work me with . . . that sticker on my hardhat."¹⁰ Williams did not remove the rat sticker. Another employee suggested to Leiser that "we work the union guy . . . and see what the hell union guys can do." Williams testified that "Lloyd [Leiser] said, no, he don't work with liars. He don't run his business that way." Leiser then jumped on the back of a truck along with another man. Williams walked over to the two men and declared that he was "going on strike." Leiser said nothing. Williams started walking toward his car, but then turned around and started walking back toward the jobsite, at which point, Coleman told Williams to "go ahead and go home." Williams left.

B. Threat of Physical Violence

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by threatening Williams with physical violence because of his union activity. When Williams asked Leiser why Leiser had suspended him from the Scott City jobsite, Leiser said that "there was a guy on that job that could—that probably would have killed" Williams for talking about the Union. Leiser made this statement only a day after telling Williams, upon learning of his union activity, that Leiser "[knew] how to take care of people like [Williams]."

At the hearing, Leiser testified that the "guy" who "would have killed" Williams was an employee who was adamantly antiunion because he had been assaulted years earlier by union members in Pennsylvania.¹¹ However, Leiser did not explain these circumstances to Williams. Instead, Leiser simply told Williams that Williams would be subject to physical harm at the Scott City jobsite for exercising his Section 7 rights. Contrary to our colleague, we find that a reasonable employee would not interpret Leiser's statement as merely explaining a benevolent attempt to remove Williams from harm's way. Rather, to a reasonable employee in Williams' situation, Leiser's words would convey that Williams' union activity could lead to physical harm. Accordingly, we adopt the judge's finding that Leiser's statement would reasonably tend to interfere with, restrain, or coerce Wil-

⁷ For the reasons set forth in his partial dissent, Chairman Battista finds that the Respondent did not unlawfully threaten Williams.

⁸ We also agree with the judge, for the reasons stated in his decision, that the Respondent violated Sec. 8(a)(3) and (1) by suspending Williams because of his union activity and Sec. 8(a)(1) by interrogating Williams during his job interview, by telling Williams that he was suspended or prohibited from working because of his union activity, and by threatening to retaliate against Williams for his union activity.

⁹ For the reasons stated in his separate dissent, Member Walsh would affirm the judge and find both violations.

¹⁰ It is not clear from the record whether Leiser expressly told Williams that "that sticker" meant the rat sticker. However, Williams did not ask Leiser which sticker he meant, nor has Williams ever claimed not to know that Leiser was referring to the rat sticker.

¹¹ According to Leiser, the employee told Leiser that the employee would "rather kill [Williams] than work with him."

liams in the free exercise of his protected rights in violation of Section 8(a)(1). See, e.g., *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946) (test of an 8(a)(1) violation does not turn on the employer's motive, but on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act").

C. Hardhat Sticker

The judge found that the Respondent violated Section 8(a)(1) by prohibiting Williams from displaying the rat sticker on his hardhat. We disagree.

An employee generally has a protected right under Section 7 to wear union insignia at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). "Section 7 rights, however, may give way when 'special circumstances' override the employees' Section 7 interests and legitimize the regulation" of such insignia. *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Special circumstances may include, inter alia, situations in which the insignia are vulgar or obscene¹² or may "exacerbate employee dissension"¹³ or situations in which restriction of the insignia "is necessary to maintain decorum and discipline among employees."¹⁴ In cases in which the employer argues that special circumstances justify a ban on union insignia, the Board and courts balance the employee's right to engage in union activities against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances. *Albis Plastics*, 335 NLRB 923, 924 (2001).

It is the employer's burden to prove special circumstances. *W San Diego*, 348 NLRB No. 24, slip op. at 2 (2006); *Inland Counties Legal Services*, 317 NLRB 941, 942 (1995). Considering the vulgar and obscene nature of the rat sticker and the narrowness of the Respondent's restriction, we find that the Respondent has met that burden here.

First, the sticker was unquestionably vulgar and obscene. The Board and courts have recognized an employer's right to restrict the display of such insignia. See *Southwestern Bell*, supra at 670 ("[i]n view of the controversial language used and its admitted susceptibility to derisive and profane construction," respondent did not violate Section 8(a)(1) by banning a sweatshirt stating "Ma Bell is a Cheap Mother"); *NLRB v. Mead Corp.*, 73

¹² See *Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972) (respondent lawfully banned sweatshirt stating "Ma Bell is a Cheap Mother").

¹³ *Komatsu*, supra at 650 (respondent lawfully banned a t-shirt that "invoked a highly charged and inflammatory comparison" between the respondent's outsourcing plans and the 1941 Pearl Harbor attack).

¹⁴ *Id.*

F.3d 74, 79 (6th Cir. 1996) (special circumstances arise where, inter alia, "the slogans are patently offensive or vulgar").¹⁵ Contrary to our dissenting colleague's suggestion, the fact that vulgar language was sometimes used in the Respondent's workplace does not preclude the Respondent from restricting vulgar or obscene insignia. See *Southwestern Bell*, supra at 671 (distinguishing the occasional use of obscene language in workplace conversation from "continuously displaying what could admittedly be construed . . . as obscenities directed at management during the entire 7 or 8-hour workday").¹⁶

Second, and significantly, the Respondent's restriction was narrowly tailored to prohibit only the rat sticker, without infringing on Williams' right to display other union-related insignia. The fact that the Respondent did not ask Williams to remove any of the other numerous union-related stickers on his hardhat militates against a finding that the Respondent's limited restriction on one vulgar and obscene sticker was unlawful. See *Sacred Heart Medical Center*, 347 NLRB 531, 534 (2006) (respondent's tolerance of other union buttons militated against a finding that a restriction on one particular button raising patient-care issues was unlawful); *Komatsu*, supra at 650 (noting that the union had displayed other insignia without objection); *Southwestern Bell*, supra at 671 (noting that employees displayed other insignia without company objection).¹⁷

Accordingly, we reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(1) by prohibiting Williams from displaying the rat sticker.

D. Alleged Discharge of Williams

The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging employee Travis Williams on April 12, 2005, because of his union activity. Because the General Counsel failed to prove that Williams was discharged, we reverse the judge and dismiss that allegation.

"Where an unlawful discharge is alleged, it is self-evident that the General Counsel must show, first and foremost, a discharge." *Nations Rent, Inc.*, 342 NLRB

¹⁵ Although our colleague takes issue with our reliance on *Southwestern Bell*, the case is well-established Board precedent dating back over 30 years, and we see no reason to depart from it here.

¹⁶ Contrary to our colleague, we also do not find the lack of evidence of a dress code or customer contact significant. Our finding of special circumstances is not based on the Respondent's concerns about its public image, but on the sticker's vulgar and obscene nature.

¹⁷ Of course, a ban on particular union insignia is not lawful simply because it fails to prohibit *all* union insignia. However, in evaluating a claim of special circumstances, we must balance the employer's legitimate interests against the employees' Sec. 7 rights. See *W San Diego*, supra, slip op. at 4-5; *Albis*, supra at 924. The narrowness of the intrusion on Williams' rights is a relevant factor in balancing those interests.

179 (2004). The standard is whether the employer's words or actions "would logically lead a prudent person to believe his [or her] tenure has been terminated." *Id.* (quoting *North American Dismantling Corp.*, 331 NLRB 1557 (2000), *enfd.* in relevant part 35 Fed. Appx. 132 (6th Cir. 2002)). Formal words of firing are not necessary. *Id.* To determine what a prudent person would logically believe as to his employment status, it is necessary to consider "the entire course of relevant events" from the employee's perspective. *Id.*

Having examined the entire course of relevant events, we find that the General Counsel has not proven, by a preponderance of the evidence, that Williams was discharged. On April 11, even after learning that Williams was a union organizer, Leiser told Williams to report to the Kansas City jobsite at 7 the next morning. On April 12, when Leiser arrived at the jobsite and saw the rat sticker displayed on Williams' hardhat, he told Williams that he could not work with "that sticker" on his hardhat. The clear implication was that Williams would be permitted to work if he removed the sticker. Another employee then suggested that Leiser "work the union guy." Leiser responded—to that individual, not to Williams—that Leiser "[did not] work with liars." Williams then told Leiser that he was "on strike." Leiser said nothing; he did not contradict Williams or otherwise question Williams' characterization of his status as "on strike." Williams started to leave, but then turned around and started walking back toward the jobsite. Former employee Coleman—not Leiser—told Williams to "go ahead and go home," and Williams left.

Relying on Leiser's statement that he "[does not] work with liars," our colleague contends that the Respondent's conduct would have led a prudent employee to believe that he was discharged, or at least would have created "a climate of ambiguity and confusion" that would leave a prudent employee to believe that his job status was questionable. We disagree. Leiser had already stated to Williams that he was not permitted to work with "that sticker," i.e., the rat sticker, on his hardhat, implying that he could work if he removed it. Thus, Williams knew precisely the condition placed on his ability to resume his work with the Respondent. We find that Leiser's subsequent remark to another employee about working with liars was insufficient to cause a reasonable employee to believe that his job status had changed or was in question. After Leiser's remark, as before it, the Respondent's sole requirement was the removal of the sticker. Instead, Williams stated that he was "on strike." Obviously, a strike is an employee's refusal to work, not an employer's refusal to permit the employee to work. Thus, viewing events from the employee's perspective,

even after hearing Leiser's comment, Williams himself did not, and reasonably would not, believe that he was discharged.¹⁸

Moreover, in response to Williams' statement that he was going on strike, Leiser said nothing. He did not contradict Williams or otherwise insist that Williams was terminated. It was Coleman, not Leiser, who eventually told Williams to "go ahead and go home." The Respondent's silence in the face of Williams' declaration that he was "on strike" would, to a reasonable employee, indicate that the employer acquiesced in the employee's position that he was on strike and was not terminated.¹⁹

In support of the contention that Williams was discharged, our colleague lists the unfair labor practices committed against Williams. We agree that Williams' suspension and certain coercive statements made to him were unlawful. If the Respondent had in fact discharged Williams, such conduct would be relevant to the issue of discriminatory motive. However, it does not alter our determination that the facts in this proceeding fail to show that Williams was discharged.²⁰

Based on the above, we cannot conclude that the General Counsel has proven a discharge. Accordingly, we dismiss the allegation that the Respondent discharged Williams in violation of Section 8(a)(3) and (1).

¹⁸ Our colleague contends that Williams' claim to be "on strike" is not inconsistent with a belief that he was discharged, because Williams could have meant that he intended to protest his discharge. This is pure speculation. The General Counsel, who had the burden to prove a discharge, failed to elicit any testimony from Williams explaining his "on strike" comment.

Our colleague also observes that Williams testified that he was "fired" by Leiser. We find this conclusory after-the-fact testimony, in response to a leading question, less meaningful than Williams' statements and actions at the time of the alleged discharge.

¹⁹ *Flat Dog Productions, Inc.*, 331 NLRB 1571 (2000), *enfd.* 34 Fed. Appx. 548 (9th Cir. 2002), cited by our colleague, is distinguishable. The Board in that case found a discharge on the basis that the Respondent's acts created "a climate of ambiguity and confusion which reasonably caused strikers to believe that they were discharged or, at the very least, that their employment status was questionable because of their strike activity." *Id.* at 1571. In *Flat Dog*, the Respondent continually flip-flopped between telling the strikers that they were terminated and telling them that they could return to work. Here, Leiser's conduct did not change back and forth. Moreover, based on Williams' declaration that he was on strike, Williams did not harbor confusion or uncertainty as to his job status.

²⁰ The General Counsel is not contending that there was a constructive discharge, i.e., that unlawful conduct caused Williams to quit. Nor does the General Counsel allege that Williams quit rather than remove the sticker. To the contrary, the General Counsel alleges that Williams was discharged by the Respondent.

Similarly, the General Counsel does not allege that Williams quit rather than comply with the directive to remove the union sticker. Again, the allegation is that Williams was discharged.

III. REFUSAL TO HIRE BRIGHT AND CHRISTOPHERSON

As explained in the judge's decision, union organizers Michael Bright and Richard Christopherson submitted applications to the Respondent in late February 2005 in response to the Respondent's advertisement for ironworkers and structural steel erectors. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Bright and Christopherson.²¹

In a refusal-to-hire case, the General Counsel must prove:

- (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that 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) that antiunion animus contributed to the decision not to hire the applicants.

Dynasteel Corp., 346 NLRB 86, 89 (2005); *FES*, 331 NLRB 9, 12 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). Once the General Counsel makes this initial showing, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity. *FES*, *supra* at 12.

We agree with the judge that the General Counsel carried his initial burden.

First, as explained in the judge's decision, Bright and Christopherson had ample relevant training and experience.

Second, the Respondent was hiring when it refused to hire Bright and Christopherson. Bright's and Christopherson's applications were dated February 24, 2005. The Respondent had advertised for employees in late January and early February.²² In a February 21 telephone conversation, the Respondent's secretary, Tracy Thompson, told Christopherson that the Respondent was still hiring. Sandra Leiser does not recall exactly when she received Bright's and Christopherson's applications, except that it was sometime after February 24 or 25. The

²¹ We also agree with the judge, for the reasons stated in his decision, that the Respondent violated Sec. 8(a)(1) by telling Christopherson during a February 1, 2005 telephone call that his union affiliation would affect his chances to be hired.

We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to consider Bright and Christopherson for hire. The remedy for that violation would be subsumed within the broader remedy for the refusal-to-hire violation. See *American Residential Services of Indiana*, 345 NLRB 995, 996 fn. 2 (2005); *Sommer Avning Co.*, 332 NLRB 1318, 1319 fn. 4 (2000).

²² All further dates are in 2005 unless otherwise specified.

Respondent contends that by this time, it had filled the available openings by hiring three applicants: David Byrd (application dated February 5), Todd Skinner (application dated February 11), and Doug Foster (application date unknown). Although it does appear that these three employees were hired before the Respondent received Bright's and Christopherson's applications, the record also shows that the Respondent began hiring again shortly after Bright and Christopherson applied. New hire Doug Foster was supposed to report for work around March 1, but did not show up. Sandra Leiser then began looking for a certified welder to take his place. She ultimately hired Jeff Barnum, whose application was dated March 1. Furthermore, the Respondent hired additional employees throughout the rest of 2005. Travis Williams was interviewed and hired around March 31. Lloyd Leiser testified that the Respondent was looking for a certified welder and a laborer around that time. The Respondent also advertised for employees in June, September, and November, and hired about nine employees between June and December.²³

Third, we agree with the judge that antiunion animus was a factor in the refusal to hire.²⁴ The Respondent contends that antiunion animus was not a factor, because the Respondent had filled all of its openings before it received Bright's and Christopherson's applications, and therefore simply filed their applications away with others received during the same time period. The Respondent argues that when an opening arose in early March due to Foster's failure to show up, Sandra Leiser hired Barnum, to whom she had spoken by phone on February 25, before receiving Bright's and Christopherson's applications.

We reject the Respondent's argument. First, although Sandra Leiser may have spoken to Barnum on February 25, her only testimony about that conversation is that she returned Barnum's telephone message asking for an application. There is no evidence of any commitment to hire him. Sandra Leiser had also talked to Christopherson on the phone when he called on February 1 to request an application. Second, Sandra Leiser admitted

²³ Bright and Christopherson submitted their applications in late February. Although Sandra Leiser testified that she did not consider applications more than 30–60 days old, the judge discredited that testimony, and there are no exceptions to that credibility determination.

²⁴ As the judge found, the Respondent's other violations of Sec. 8(a)(3) and (1) during the same time period as the refusal to hire demonstrate animus. However, in finding animus, Chairman Battista and Member Schaumber do not rely, as the judge did, on the discharge of Travis Williams, because they dismiss the allegation that Williams was unlawfully discharged. Member Walsh would not dismiss that allegation. He therefore agrees with the judge that it is additional evidence of animus.

that she may have looked through her file of existing applications before hiring Barnum, which file, according to Sandra Leiser, would have contained Bright's and Christopherson's applications. Third, as noted above, the Respondent advertised additional job openings in June, September, and November and hired additional employees during that time period.

Accordingly, for the foregoing reasons, we find that the General Counsel carried his initial burden to prove an unlawful refusal to hire.

We also agree with the judge that the Respondent failed to show that it would not have hired Bright and Christopherson even in the absence of their union activity. In addition to Barnum, the Respondent hired about 10 employees, including discriminatee Travis Williams, after Bright and Christopherson applied.²⁵ Although some of the new hires were former employees or referrals, for whom the Respondent claimed it had a legitimate hiring preference, several others were not. Of those who were not, the Respondent has not explained why they would have been hired over Bright and Christopherson.²⁶

In sum, we agree with the judge that the General Counsel carried his initial burden under *FES*, and that the Respondent failed to prove that it would have not have hired Bright and Christopherson even in the absence of their union activity. We therefore affirm the judge's findings that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Bright and Christopherson.

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's conclusion of law 3(g) and reletter the subsequent paragraph.

2. Substitute the following for the judge's conclusion of law 4.

"The Respondent violated Section 8(a)(3) and (1) of the Act by its suspension of employee Travis Williams, by its discharge of employee David Coleman, and by its refusal to hire applicants Richard Christopherson and Michael Bright because of their union membership and their engagement in union and other protected concerted activities."

²⁵ The judge found that the Respondent hired 13 employees after Bright and Christopherson applied. However, the judge appears to be including Byrd, Skinner, and Foster, who were hired before Bright and Christopherson applied.

²⁶ We do not rely on the judge's finding that the Respondent's claimed hiring preference for prior employees and referrals was "unsupported" because it was not set forth in the employee manual. Nevertheless, even assuming the Respondent had such a policy, it would not justify the failure to hire Bright and Christopherson. As explained above, the Respondent hired other employees after Bright and Christopherson applied who were not prior employees or referrals.

AMENDED REMEDY

The General Counsel and Charging Party except to the judge's failure to provide reinstatement and make-whole relief for Bright and Christopherson in the remedy section of his decision and the judge's failure to provide make-whole relief in the notice.²⁷ We find merit in this exception, and we amend the remedy and notice accordingly. We shall order the Respondent to offer Bright and Christopherson reinstatement to the positions for which they applied. If those positions no longer exist, the Respondent shall offer them employment in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. Furthermore, we shall order that Bright and Christopherson be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁸

ORDER

The National Labor Relations Board orders that the Respondent, Leiser Construction, LLC, Madison, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it has discharged employees because of their union affiliation and other protected concerted activities.

(b) Telling employees that it would not hire employee-applicants who are affiliated with a union or who engage in other protected concerted activities.

(c) Coercively interrogating employees about their union affiliation and union membership, activities, and sympathies.

(d) Telling employees that it had suspended its employees and/or prohibited its employees from working because of their union and other protected concerted activities.

²⁷ The judge properly included both reinstatement and make-whole relief in his recommended Order.

²⁸ The judge recommended a broad cease-and-desist order. Chairman Battista and Member Walsh adopt that recommendation in the absence of exceptions. Member Schaumber dissents from the issuance of a broad cease-and-desist order. As fully set forth in his dissenting opinion in *Postal Service*, 345 NLRB 409 (2005), Member Schaumber notes that the Supreme Court has made clear that broad orders must be reserved for egregious cases in which the violations are so severe or so numerous and varied as to truly manifest a general disregard for employees' fundamental employee rights. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). In his view, this is not such a case.

(e) Threatening employees with reprisals and retaliation because of their union and other protected activities.

(f) Threatening its employees with physical violence because of their union and other protected activities.

(g) Telling employee applicants that their union affiliation and their union and other protected activities would affect their chances to be hired by the Respondent.

(h) Suspending, discharging, or otherwise discriminating against its employees in retaliation for their union or other protected concerted activities.

(i) Failing or refusing to hire applicants because of their union affiliation or its belief or suspicion that they may engage in union activities once they are hired.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the 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 David Coleman 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) Within 14 days from the date of this Order, offer Michael Bright and Richard Christopherson reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(c) Make Michael Bright, Richard Christopherson, David Coleman, and Travis Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension, discharge, and refusals to 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.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Madison, Kansas, copies of the attached

notice marked "Appendix."²⁹ 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 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, or sold the business or the facilities involved herein, 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 January 20, 2005.

(g) 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.

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would not find that the Respondent threatened employee Travis Williams with physical violence in violation of Section 8(a)(1).

Lloyd Leiser, the Respondent's owner and general manager, spoke with Williams at the 87th and Lackman jobsite on April 12, 2005, the day after Williams' suspension from the Scott City, Kansas jobsite.¹ Leiser informed Williams that he had removed him from the Scott City jobsite because he didn't want Williams talking any of that "union bullshit" to the group and that a guy there "probably would have kill(ed) him." At the hearing, Leiser testified that his remark referred to an employee at the Scott City jobsite whom he knew to be vehemently antiunion.

My colleagues find that, by this statement, Leiser threatened physical retaliation against Williams. On the contrary, Leiser was simply saying to Williams that he was concerned that the other employee might take action against Williams, and that the removal of Williams took Williams out of harm's way. Thus, Leiser's statement would be perceived by a reasonable employee as demonstrating an unwillingness to expose Williams to physical harm, not a threat to do so. Accordingly, I would find

²⁹ 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."

¹ I agree with my colleagues that Williams' suspension was unlawful.

that the Respondent made no threat of physical violence and I would dismiss this allegation.

MEMBER WALSH, dissenting in part.

On April 12, 2005, after unlawfully suspending employee Travis Williams and subjecting him to unlawful threats, the Respondent's owner, Lloyd Leiser, refused to put Williams to work. Leiser said that he "[did not] work with liars," an obvious reference to Williams' refusal to disclose his union membership when Leiser unlawfully interrogated Williams just 2 weeks earlier. A reasonable employee in Williams' situation would believe that he was discharged, or at the very least, that his employment status was questionable because of his union activity. Accordingly, the judge correctly found that Williams was discharged in violation of Section 8(a)(3) and (1). I dissent from the majority's dismissal of that allegation.¹

The fact of a discharge does not depend on formal words of firing. *North American Dismantling Corp.*, 331 NLRB 1557 (2000), enfd. in relevant part and remanded 35 Fed. Appx. 132 (6th Cir. 2002). "It is sufficient if the words or action of the employer 'would logically lead a prudent person to believe his tenure has been terminated.'" *North American*, supra at 1557 (quoting *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964)). Furthermore, if the employer's acts "created a climate of ambiguity and confusion which reasonably caused [employees] to believe they were discharged or, at the very least, that their employment status was questionable because of their [protected] activity, the burden of the results of that ambiguity must fall on the employer." *Flat Dog Productions, Inc.*, 331 NLRB 1571 (2000), enfd. 34 Fed. Appx. 548 (9th Cir. 2002). The

¹ I join the majority decision in all other respects, except for the dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by prohibiting Williams from displaying the rat sticker on his hardhat. I would affirm the judge and adopt the violation. Although the sticker was vulgar, the record shows that vulgar language by both management and employees was common in the Respondent's workplace. Therefore, the sticker does not appear to be out of line with the workplace culture. Furthermore, there is no evidence that the Respondent had any rules governing employee apparel or that Williams had any contact with the public. Thus, there is no evidence that the sticker would harm the Respondent's public image.

In finding special circumstances, the majority relies on *Komatsu America Corp.*, 342 NLRB 649 (2004), and *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972). I dissented in *Komatsu*, and I adhere to my dissent. In any event, *Komatsu* is distinguishable. The majority in that case emphasized the Union's "clear appeal to ethnic prejudices," an issue not present here. Regarding *Southwestern Bell*, I view that decision as poorly reasoned and something of an aberration, as stated in my dissent in *Honda of America Mfg.*, 334 NLRB 746, 750 fn. 2 (2001).

Accordingly, I would adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting Williams from displaying the sticker.

Board considers the entire course of relevant events from the employee's perspective. *Nations Rent*, 342 NLRB 179, 180 (2004). Here, Leiser's words and actions logically would have led Williams to conclude that he was terminated on April 12.

The events of April 12 unfolded against a background of hostile and unlawful antiunion activity directed at Williams. During Williams' job interview on March 31, Leiser coercively interrogated him about whether he was "affiliated with any unions." On April 11, Leiser learned for the first time that Williams was a union organizer and immediately suspended him and threatened him with retaliation. Leiser told Williams to be on the Kansas City job the next morning and not to "worry about what you'll be doing. You'll do what I tell you." On April 12, shortly before the alleged discharge, the Respondent also threatened Williams with physical violence, telling him that another employee "probably would have killed" Williams for talking about the Union. As stated in the majority decision, the Board has found that the interrogation, suspension, and threats were unlawful. This conduct clearly conveyed to Williams that the Respondent was willing to threaten and retaliate against him for engaging in union activity.²

When Leiser arrived at the jobsite on the morning of April 12, he saw that Williams was there with David Coleman, a union organizer whom the Respondent had unlawfully discharged a few months earlier. Leiser announced to the other employees: "These guys here are union organizers. They're real fond of what they do, and they'll lie to you." Leiser told Williams that the reason he wanted Williams there was "to have a little chat." Williams then asked why he had been suspended the day before, and Leiser made the statement that a Scott City employee "probably would have killed" Williams. Williams stated that he was ready to work, but Leiser said that Williams could not work with "that sticker" on his hardhat. In Williams' presence, another employee asked Leiser to "work the union guy and see what . . . union guys can do." Leiser's response was unequivocal. He stated: "No, [I] don't work with liars. [I] don't run [my] business that way." Leiser then walked away. Williams followed him and stated that he was "going on strike." Leiser never retracted his statement about not "work[ing] with liars" or his refusal to put Williams to work.

Thus, over a period of less than 24 hours, Williams was unlawfully suspended and threatened with violence

² Moreover, it is reasonable to infer that Williams knew that employee David Coleman had been discharged after revealing his union affiliation. Williams was organizing under Coleman's direction, and Coleman accompanied Williams to the jobsite on the date of Williams' alleged discharge.

and retaliation for his union activity. The Respondent then unequivocally refused to allow him to work, on the basis that the Respondent “[did not] work with liars.” Under these circumstances, a prudent employee would conclude that he had been discharged.³

The majority makes too much of Williams’ statement that he was “going on strike.” First, Williams had already been effectively discharged when he made that statement. Second, Williams testified that he was “fired” by Leiser, which contradicts the majority’s conclusion that Williams did not believe that he had been discharged. Third, declaring himself to be “on strike” could simply have meant that Williams intended to protest a discharge he felt was wrong.⁴ In short, the statement does not preclude a finding that a reasonable employee would believe that he was discharged.

Nor does Leiser’s silence after the strike comment undermine a finding that Williams was discharged. Leiser had already announced that he “[did not] work with liars” and walked away. His failure to say anything else to Williams does not erase the effect of his earlier words.

At the very least, Leiser’s conduct “created a climate of ambiguity and confusion” that reasonably caused Williams to believe that his employment status was questionable because of his union activity. *Flat Dog*, supra at 1571. Relying on Leiser’s statement that Williams could not work with “that sticker” on his hardhat, the majority erroneously finds that Williams “knew precisely the condition placed on his ability to resume his work.” Assuming arguendo, as the majority contends, that Leiser’s

³ The majority notes that Leiser ordered Williams to report to the Kansas City jobsite even after learning that Williams was a union member. However, based on Leiser’s statement to Williams on April 11 not to “worry about what [he’ll] be doing” and Leiser’s statement on April 12 that the reason he wanted Williams there was “to have a little chat,” it would not have been clear to Williams whether Leiser intended to put him to work at the Kansas City site.

The majority also contends that the Respondent’s unlawful suspension and 8(a)(1) violations with respect to Williams are relevant only to discriminatory motive, not to whether Williams was discharged. In determining whether a discharge occurred, however, the Board must view the events from the employee’s perspective. That perspective includes the series of unlawful antiunion acts directed at Williams that preceded his alleged discharge. A reasonable employee in Williams’ situation would naturally consider his recent treatment by the Respondent in forming the belief that he had been discharged.

⁴ The majority also observes that after Williams said he was going on strike and walked away, he turned around and began walking back to the jobsite, until Coleman told him to go home. To the extent the majority suggests that Williams was coming back to work and therefore must not have believed that he had been discharged, the evidence does not support such a finding. Leiser testified that Williams was not wearing a hardhat at this time and had “dropped his stuff off at the car.” Coleman’s statement to Williams to “go ahead and go home” is consistent with a belief by Coleman—who witnessed the events—that Williams had been discharged.

statement implied that Williams could work if he removed the sticker, Leiser then indicated just the opposite by stating “No, [I] don’t work with liars.” Those were the Respondent’s last words on the matter. Therefore, it would not be at all clear to a reasonable employee that he could resume work if he removed the sticker. Instead, the Respondent’s contradictory messages would lead a reasonable employee to believe that his job status was questionable. The Respondent had the burden to remove that uncertainty and clarify Williams’ status. *Flat Dog*, supra. It plainly failed to do so. Accordingly, the judge correctly found that the Respondent discharged Williams in violation of Section 8(a)(3) and (1).

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 tell employees that we have discharged employees because of their union affiliation and other protected concerted activities.

WE WILL NOT tell employees that we will not hire employee-applicants who are affiliated with a union or who engage in other protected concerted activities.

WE WILL NOT coercively interrogate employees about their union affiliation and union membership, activities, and sympathies.

WE WILL NOT tell employees that they are suspended and/or prohibited from working because of their union and other protected concerted activities.

WE WILL NOT threaten employees with reprisals and retaliation because of their union and other protected activities.

WE WILL NOT threaten employees with physical violence because of their union and other protected activities.

WE WILL NOT tell employee applicants that their union affiliation and their union and other protected activities would affect their chances to be hired by us.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees in retaliation for their union or other protected concerted activities.

WE WILL NOT fail or refuse to hire applicants because of their union affiliation or our belief or suspicion that they may engage in union activities once they are hired.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer David Coleman 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.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Bright and Richard Christopherson instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make Michael Bright, Richard Christopherson, David Coleman, and Travis Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension, discharge, and refusals to 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.

LEISER CONSTRUCTION, LLC

Anne Peressin, Esq., for the General Counsel.

Thomas M. Moore, Esq., for the Respondent.

Michael J. Stapp, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Overland Park, Kansas, on January 31, and February 1, 2006. The complaint is based on an amended charge filed by Iron Workers Local Union No. 10, affiliated with International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO (the Union or the Charging Party) with the National Labor Relations Board (the Board) and alleges that Leiser Construction, LLC (the Respondent or Leiser Construction) has committed violations of Section 8(a)(1) and (3) of the National Labor Relations Act

(the Act). The complaint is joined by the answer filed by the Respondent wherein it denies the commission of any violations of the Act.

After due consideration of the testimony and evidence received at the hearing and the briefs filed by the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits and I find that at all times material herein the Respondent is and has been a corporation, with an office and place of business in Madison, Kansas, and it has been engaged in the construction industry providing construction services including steel erection services to commercial enterprises, that during the 12-month period ending December 31, 2004, Respondent in conducting its business operations, purchased and received at its Madison facility goods valued in excess of \$50,000 directly from points located outside the State of Kansas, and performed services valued in excess of \$50,000 in states other than the State of Kansas and that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves the Union's efforts to organize Respondent's ironworker employees and the Respondent's response to these activities. Lloyd Leiser and his wife Sandra Leiser are management employees of Respondent and the owners of Respondent. Lloyd Leiser is the general manager of Respondent and Sandra Leiser is the office manager of Respondent. Both Lloyd and Sandra Leiser are Section 2(11) supervisors and Section 2(13) agents of Respondent under the Act. Respondent has been in business approximately 10 years and performs ironwork for the construction of commercial buildings. It is a nonunion company and performs ironwork primarily in the western portion of Missouri and in Kansas. Typically Respondent employs approximately 10 individuals in the field performing ironwork in two or more crews under the direction of leadmen and working foremen, all of whom report to Lloyd Leiser. Respondent's office in Madison, Kansas, is staffed by Sandra Leiser and her receptionist and secretary Tracy Thompson and her assistant Sheena Scheck. Lloyd Leiser spends virtually all of his time in the field overseeing the crews and obtaining material and keeping the crews supplied with necessary equipment and material. Lloyd and Sandra Leiser keep in contact by phone during the workday. Lloyd checks into projects to be bid and forwards this information to Sandra Leiser who prepares bids for new contracts. Respondent receives applications for employment at the office and applicants are often interviewed initially by Sandra Leiser who sorts through these applications to cull down the applicants to those that appear to have the most experience for the work. On a typical month when Respondent has not advertised for employees, it may

receive about 10 applications at the office. During periods when Respondent has advertised in local newspapers for candidates, it may receive 30 applications in a week. Sandra Leiser apprises Lloyd of the promising candidates for hire and they make decisions together. On occasion Sandra may make the hiring decision herself. Respondent maintains an employee manual which encompasses various rules and employment policies. Both Lloyd and Sandra Leiser testified they do not generally follow the manual but rather handle matters on a case-by-case basis.

In December 2004, union organizer David Coleman learned of a steel erection job at the Oak Grove Middle School in Kansas City, Missouri, which was being constructed by the Respondent. He went to the jobsite and spoke to Lloyd Leiser about employment. He filled out a job application using false references of nonunion contractors so as not to be identified as a union supporter or member. He was hired by Leiser and worked there approximately a month prior to his discharge by Lloyd Leiser on January 20, 2005, when he identified himself as a union organizer and attempted to hand out union cards to other employees following their lunch at a restaurant. His discharge by Lloyd Leiser was immediate.

Prior to this, Union President, Organizer, and Assistant Business Agent Richard Christopherson went to Respondent's jobsite which was off of 7 Highway, Perimeter Park on January 11, 2005, and spoke to Lloyd Leiser who had been previously described to him by Coleman. He saw Coleman on the job but neither he nor Coleman acknowledged each other. Christopherson gave Lloyd Leiser one of his union business cards and spoke to him about Respondent becoming a signatory to the Union's contract with companies performing steel erection work in the Union's territory and told him that he could send him some ironworkers. Leiser told him he had tried this in Detroit and had received nothing but bad help out of that hiring hall. Christopherson told him the Union had a lot of good help he could send him. Leiser said he was not interested.

On February 1, 2005, Christopherson telephoned Respondent's office in Madison, Kansas, and spoke to Sandra Leiser and asked if Respondent was taking applications for ironworkers. She told him they were and that they had plenty of work. He asked her if she could send him two applications as he had a "buddy" who might also want to apply. She asked him why they had not gone through the Iron Workers Union that represented the iron workers in the Kansas City area as he had given her a Kansas City address as to where to send the applications. He asked her if it would make a difference if they were union members and she said sure it would. He told her that he and his buddy Michael Bright were union organizers and intended to organize Respondent. He asked her if they could receive applications and she agreed to send them applications. However by February 21, 2005, they had not received the applications.

Christopherson telephoned Respondent's office again and this time spoke to Respondent's secretary Tracy Thompson and told her he had spoken to Sandra who had told him she would send them applications but that they had not received them. Tracy agreed to send them two more applications which were received a few days thereafter. Both Christopherson and Bright partially filled out the applications which were sent to the Re-

spondent. There were several places on the applications for them to list the most recent employers with their job title and rate of pay. Christopherson put down that he had been an ironworker for 24 years and listed his ironworker apprenticeship and various certifications and his current union position as organizer of the Union and business agent but he did not list the names of any employers. Bright did the same thing on his application, claiming 28 years of iron working experience his ironworker apprenticeship and various certifications and his current position as the Union's business agent and organizer but not listing any employers. The applications were sent in on about February 24 and received by the Respondent about that date. This was during a period when Respondent was hiring. However Christopherson and Bright were never contacted by the Respondent.

The complaint alleges Respondent violated Section 8(a)(1) of the Act as follows:

(a) On January 20, 2005, at the Shorthorn Restaurant by telling its employees that it had discharged employees because of their union affiliation and other protected concerted activities.

(b) On January 20, 2005, at the West Star jobsite telling employees that it would not hire employee-applicants who were affiliated with a union or who engaged in union or other protected concerted activities.

(c) On March 31, 2005, at the 87th and Lackman jobsite interrogating its employees about their union affiliation and union membership, activities and sympathies.

(d) On April 11, 2005, in a telephone conversation and on April 12, 2005, at 87th and Lackman jobsite telling employees that it had suspended its employees and/or prohibiting its employees from working because of their union and other protected concerted activities.

(e) In a telephone conversation on April 11, 2005, and on April 12, 2005, at its 87th and Lackman jobsite threatening its employees with reprisal and retaliation because of their union and other protected concerted activities.

(f) On April 12, 2005, at its 87th and Lackman jobsite threatening employees with physical violence because of their union and other protected concerted activities.

(g) On April 12, 2005, at its 87th and Lackman jobsite prohibiting employees from wearing union emblems or logos at work.

(h) During a telephone conversation wherein Sandra Leiser on February 1, 2005, told employee-applicants that their union affiliation and their union and other protected concerted activities would adversely affect their chances to be hired by Respondent.

I find the Respondent violated Section 8(a)(1) of the Act as follows:

(a) and (b) On January 20, 2005, at the Shorthorn Restaurant, Lloyd Leiser discharged employee David Coleman after Coleman disclosed that he was a union organizer, Leiser told Coleman he was fired because he was an organizer, Lloyd said, "see you." When Coleman asked if he was fired, Lloyd said, "Yep. Good while it lasted." After this Coleman returned to the job site to return Lloyd's hard hat to him. At that point Coleman asked Leiser if he would have hired him if he had informed him he was a union ironworker and Leiser said, "No."

In the above instances Leiser's comments to Coleman that he was discharged and would not be hired because of his union affiliation were made in the presence of Leiser's employees and were inherently coercive and violative of Section 8(a)(1) of the Act.

(c) Travis Williams testified that on March 31, 2005, he met with Lloyd Leiser in an interview for a job and that during the interview Leiser asked him if he was affiliated with any unions in the area.

I find that the inquiry about Williams' affiliation with any unions in the area during a job interview was inherently coercive and violative of Section 8(a)(1) of the Act.

(d) through (g) On April 11, 2005, Travis Williams disclosed he was a voluntary union organizer and attempted to organize the other employees at the Scott City, Kansas jobsite where he was working. Respondent's superintendent, Brian Muting, to whom he had disclosed his intentions said that "Lloyd is probably going to do to you what he did to the last person." Muting called Lloyd and said, "They did it again. He's a member of the Local." Muting then told Williams that he needed to drive back to Kansas City and be on Lloyd's job at 7 o'clock in the morning. Williams did not know which job was Lloyds. Muting then called Lloyd again and Lloyd said to be at the 87th and Lackman job. Muting then gave the phone to Williams and Lloyd said, "you weaseled your way in didn't you." He said, "That's all right. I know how to take care of people like you. You just be on my job at 7 o'clock in the morning and don't worry about what you'll be doing. You'll do what I tell you. You've got 15 minutes to get off that job." Lloyd was yelling when he made the above comments. Williams then left the jobsite.

On the next day Williams went to the 87th and Lackman job site accompanied by Coleman as Williams was apprehensive of what Lloyd might do. Leiser showed up about 7 o'clock. There were other employees on the jobsite. Williams told them he was a member of the Union and that he was there to organize the Respondent and offered them union cards. He told Leiser he was there to work. Leiser said, "Well, the reason I want you here is to have a little chat." Leiser also said he did not want Williams talking about any of "that Union bullshit" to those guys and that there was a guy on that job that "probably would have killed me." Williams told Leiser he was there to work. Leiser said he was not going to work him with the union sticker on his hard hat. Another employee suggested that they work Williams to see what he can do and "Lloyd said, no, he don't work with liars." Williams then left and told another person standing there that he was going on strike.

I find the foregoing evidence supports a finding that Respondent violated Section 8(a)(1) of the Act on April 11 and 12, 2005, by telling Williams in the presence of other employees that he was suspended or to leave the jobsite on April 11 and was refused the right to work on April 12. On both occasions Leiser's comments were threats of reprisal and retaliation because of their union and other protected concerted activities. On April 12, Leiser's comments to Williams that someone on that job would have probably killed him was a threat of physical violence. The prohibition to Williams by Leiser on April 12,

that he could not work while wearing a union sticker on his hardhat was also violative of Section 8(a)(1) of the Act.

(h) The comments made by Sandra Leiser during a telephone conversation with Union Business Agent Richard Christopherson that his union affiliation and that of Business Agent Michael Bright would affect their chances for employment violated Section 8(a)(1) of the Act.

The Discharge of David Coleman

David Coleman is a full-time organizer for the Union. In early December 2004, he learned from another union member that the Respondent was engaged in a job at the Oak Grove Middle School in Kansas City, Missouri. He discussed this with Richard Christopherson who is the Union's assistant business agent, president and organizer and with Michael Bright who is Respondent's business agent and organizer. It was decided that Coleman would apply for a position with Respondent as an ironworker. Coleman approached Owner Lloyd Leiser on the jobsite seeking employment as an ironworker. Leiser gave him an application and he filled it out and returned it to Leiser. Although Coleman had considerable experience as an ironworker through work at various contractors through referrals by the Union, he did not list any union employers. During his initial discussion with Leiser, he was told by Leiser that Respondent was a nonunion company and he indicated this was not a problem. Coleman was hired and worked at the Oak Grove jobsite from December 30, 2004, until January 20, 2005. By the accounts of both Lloyd Leiser and Coleman, Coleman did good work and this was acknowledged by Leiser. On January 20, 2005, Coleman went to lunch with Lloyd Leiser and several other crew members at the "Shorthorn" restaurant. Immediately after lunch, Coleman told Lloyd Leiser, "this is where our relationship goes south" and proceeded to hand out union cards. He also told Leiser, "I'm an organizer, man." Leiser said, "See you." Coleman asked, "I'm fired?" "Leiser said, "Yep. Good while it lasted." Coleman then returned separately to the jobsite to retrieve his tools and to return Lloyd Leiser's hardhat which had been left in Coleman's vehicle as Leiser had rode with Coleman to the restaurant. On his return to the jobsite he spoke with Leiser and asked him if he would have hired him if he had disclosed his union membership to him and Lloyd said, "No!" At the hearing Leiser did not dispute the foregoing testimony of Coleman but testified he offered to return Coleman to work. Coleman denied this. I credit Coleman. Leiser contended that he had discharged Coleman for falsifying his application. It is undisputed that Leiser had not checked Coleman's references. It also appears from the record that Respondent does not usually check the references of applicants it hires.

The Suspension and Discharge of Travis Williams

Employee Travis Williams testified that in December of 2004, he observed a Leiser construction jobsite off of 7 Highway and 83rd Streets. In February 2005, he went to this jobsite and asked an employee named Jim Wills if Respondent was hiring. Wills told him he thought they were hiring and gave him the office telephone number. He called the telephone number and talked to a lady named Tracy and asked her if Respondent was hiring. She told him they were hiring and said she would mail him an application. He received an application a couple of

days later. He had worked for union companies prior to this and wrote down these employers' names as references on the application. After he received the application he went to the union hall and spoke to Coleman who told him Respondent would probably not hire him with the union references on the application. He had already called Tracy and asked her to send him another application which he received a couple days later. He filled out the second application without the union references on it and sent this to Respondent. He wrote "ironworker" on the top of the application where it asks the position being applied for. Williams listed three nonunion employers where he had worked including himself as self-employed. Under the category of skills on the application he listed welding, metal side barns, tie bar, torch work, woodwork, metal roofs and electrical work all of which he has done. He also has several skills which he did not list which involve the ironworking trade such as he has batted up, worked with cranes and I-levels and completed the 3-year ironworker apprenticeship program. He omitted these skills so as not to reveal his union affiliation. He mailed the application to Respondent and did not initially hear from Respondent. He telephoned and again talked to Tracy who said they were still hiring. She found his application and called him back and asked him to come in for an interview with Lloyd Leiser. He met with Lloyd Leiser at the Sunrise Assisted Living facility at 87th and Lackman jobsite wearing a recording device and tape recorded the conversation he had with Lloyd Leiser. The tape and transcript thereof were introduced into evidence and reflect Williams' recollection of the conversation. He did not reveal any of his union work history to Leiser. During the conversation Leiser asked him if he was affiliated with any union in the area. Leiser told him that he had no experience at the type of work involved but he thought he would give Williams a "shot." Leiser told Williams he needed to talk to his wife Sandra and they would probably get hold of him in a day or two with wages. Tracy telephoned him the next day. She offered him \$11 per hour and he accepted this. He went to the Respondent's office in Madison, Kansas, and was given a drug test and he went through a safety oriented class on April 4, 2005. He commenced work with Respondent on April 7, 2005, a Thursday, and was assigned to the Scott City, Kansas jobsite. He also worked on April 8, a Friday. He did not work Saturday or Sunday. He worked on Monday, April 11th at the Scott City job. He worked with two other employees known to him as Brian Muting and Dan. After lunch on that date he called Coleman to apprise him he was going to hand out union authorization cards. He put on his regular hardhat which had a number of union stickers on it and a long-sleeved T-shirt which had "ironworkers" on it and went over to Brian's truck and told Brian he was a member of Iron Workers Local 10 and was there to organize Leiser Construction and offered him an authorization card. Brian declined to take the card. He then went to Dan's truck and told him the same thing and offered him a card and Dan declined to take it. He then went back to his vehicle, put on Leiser's hardhat, and safety glasses and his other shirt and tried to return to work. Brian stopped him and said he needed to call Lloyd first and see what Lloyd wanted to do. Brian said, "Lloyd is probably going to do to you what he did to the last person." Brian called Lloyd and said, "They did it

again. He's a member of the Local." Brian got off the phone and told him that he should be on Lloyd's job at 7 a.m. in the morning. He (Williams) did not know which job, Lloyd wanted him at, so Brian called Lloyd again and Lloyd said he wanted him at the 87th and Lackman job. Brian then told him that Lloyd wanted to talk to him and handed him the phone. Lloyd said, "You weaseled your way in, didn't you?" and "That's all right. I know how to take care of people like you. You just be on my job at 7 o'clock in the morning and don't worry about what you'll be doing. You'll do what I tell you. You've got 15 minutes to get off that job." Williams then left.

Williams testified that he asked Coleman to meet him at the 87th and Lackman jobsite on the next morning as he feared there might be a fight and he was scared. Williams and Coleman met at the jobsite at 6:30 a.m. the next morning, and both parked across the street. Williams had his tools and his hardhat on. Coleman placed some literature regarding the Union's wages and benefits on Respondent's equipment. Leiser arrived around 7 a.m. with a passenger in his truck and three or four more cars pulled up at the same time. Leiser parked his truck about six feet from Williams and a passenger got out of Leiser's truck and the other employees began to gather there. Williams told them he was a member of Local 10 and was there to help organize the Respondent and offered them authorization cards. He told Leiser he was there ready to go to work. Leiser said, "Well, the reason I want you here is to have a little chat." Leiser told Williams he had told him to leave the jobsite yesterday because he didn't want him talking any of that "Union bullshit" to the group and there was a guy on that job that "probably would have kill(ed)" him. Williams told Lloyd he was there to work. Lloyd told him that he would not permit him to return to work with the sticker on the hardhat which Williams was wearing. Lloyd testified that the hardhat had a cartoon on it that depicted someone urinating on a rat identified as a nonunion construction firm. Lloyd said he did not work with liars and did not run his business that way. Williams began to leave but turned back and told Lloyd he was going on strike and then left.

ANALYSIS

I find that General Counsel has established a prima facie case that both Coleman and Williams were unlawfully discharged because of their union affiliation and engagement in protected concerted activity. In both cases these two employees were hired by Respondent upon the submission of job applications to Respondent and after having been interviewed by Respondent. In the case of Coleman it is undisputed that he was praised for doing good work by Lloyd Leiser. In the case of Williams it is undisputed that no work performance issues were involved in his discharge. However, once Lloyd Leiser learned of their union membership and their attempt to organize Respondent's employees, Coleman was immediately discharged and Williams was immediately suspended and discharged on the next morning.

In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995) the United States Supreme Court recognized that the rights of union organizers to apply for jobs and to hold those jobs are protected by Section 7 of the Act. Their union organizer status

does not diminish their rights to the protection of Section 7 of the Act. In the instant case the evidence clearly establishes that Coleman and Williams did not commit any act which would deprive them of the protection of the Act. Clearly they were discharged because of their engagement in protected concerted activities and their status as union organizers.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that:

1. The employees engaged in protected concerted activities.
2. The employer had knowledge or at least suspicion of the employees' protected activities.
3. The employer took adverse action against the employees.
4. A nexus or link between the protected activities and the adverse action underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence that it took the action for a legitimate non-discriminatory business reason. In *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), the Board said that once the General Counsel makes a prima facie case that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the instant case all of the elements set out in *Wright Line*, above, as also addressed by *Fluor Daniel*, above, have been satisfied. The undisputed testimony establishes that Coleman and Williams were engaged in protected concerted activities in their efforts to organize Respondent's employees. Lloyd Leiser became aware of this and immediately discharged Coleman and immediately suspended Williams and discharged him the next morning for their engagement in their efforts to organize Respondent's employees, thus establishing the nexus between the protected activities and the adverse action underlying motive. I find that the General Counsel has established prima facie cases of violations of Section 8(a)(1) and (3) of the Act and that Respondent has failed to rebut the prima facie cases by the preponderance of the evidence.

The Refusal to Hire/Consider for Hire

The Respondent ran ads in local newspapers advertising for ironworkers between December 20, 2004, and November 2005, it hired 13 ironworkers following the filing of the applications of Christopherson and Bright. The Respondent's records show it accepted applications from several employees who had submitted applications after Christopherson and Bright submitted their applications and who were hired. Both Christopherson's and Bright's applications showed 24 years and 28 years of ironwork experience respectively although they did not list any of their employers but referenced only their status as union officials.

The elements that General Counsel must prove to establish a refusal-to-consider for hire are:

- (1) the employer excluded applicants from the hiring process and

- (2) antiunion animus was a contributing factor for the employer's failure or refusal to consider the applicants for hire. *FES*, 331 NLRB 9, 15 (2000). Once these two elements have been established, the burden shifts to the employer to prove that it would not have considered the applicants in the absence of their union activities. *Wright Line*, above.

The elements of a refusal-to-hire case are:

- (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that 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) that antiunion animus contributed to the decision not to hire the applicants. *FES*, supra; *Wright Line*, supra, *FES*, 331 NLRB 9, 12 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

In the instant case I find that the General Counsel has established a prima facie case of the refusal to consider for hire allegation and the refusal to hire allegation. Christopherson's testimony is un rebutted. He contacted Respondent by telephone on February 1, 2005, spoke to Sandra Leiser and asked for applications for himself and Bright. He disclosed to Sandra Leiser that he and Bright were union organizers and asked whether this would make a difference and Sandra Leiser said well sure it would and laughed and then said at least I can send you an application. When the applications were not received by Christopherson and Bright, Christopherson called Respondent again on February 21, 2005, and spoke to Sandra Leiser's secretary Tracy. She agreed to send them applications which they received in a couple days. Christopherson did not tell Tracy that he and Bright were union organizers prior to this request. Other employees such as Travis Williams on two occasions and applicant Steve Miller asked for applications and received them within a couple days. Although Christopherson and Bright filed their applications on about February 24, 2005, they have never been contacted by Respondent as of the date of the hearing in this case, although they clearly appear more qualified on the basis of their claimed experience than any other applicant whom Respondent hired between December 2004, and the date of the hearing. Both Christopherson and Bright have completed their 3-year apprenticeship and have over 20 years of ironworker experience and have welding and other certifications. Sandra Leiser told Christopherson that Respondent was looking for welding experience and Tracy told him they were still looking to fill the positions for which Respondent had advertised in various local newspapers during the period from December 2004 to February in 2006. Respondent's antiunion animus has been demonstrated by the independent 8(a)(1) violations including interrogation concerning applicant Travis Williams' union affiliation, threats of retaliation and physical violence and statements made by Lloyd Leiser that he would not hire union members and Sandra Leiser's statement to Christopherson that his and Bright's status as union organizers would make a difference (presumably a negative one) in their chances for hire. Additionally the Respondent's animus is demonstrated by the

two Section 8(a)(1) and (3) cases wherein Coleman was discharged immediately upon his disclosure that he was a union organizer and Travis Williams was immediately suspended and discharged the next morning after he disclosed he was a union organizer. The evidence clearly demonstrates that Respondent had plans to hire and was in the process of hiring when Christopherson and Bright applied. Respondent hired at least 13 employees after Christopherson and Bright filed their applications.

Respondent's defense to the exclusion of Christopherson and Bright from its hiring process and the refusal to hire them is without merit. I find that Respondent's arguments such as its assertions that it has hired other union members or union affiliated applicants is unconvincing as these instances all involved other unions or tenuous or dated relationships. In no case did Respondent cite an instance wherein it hired a member or affiliate of the Union in this case wherein the Union was attempting to organize its employees. I do not credit Sandra Leiser's assertion at the hearing that Respondent does not consider applications more than 30 to 60 days old, and her contention that Christopherson's and Bright's applications would not accordingly have been considered more than 30 to 60 days after February 24, 2005, which was the date on their applications. This assertion is refuted by the hire of applicant Joe Taylor whose application was more than 9 months old at the time of his hire and applicant Steve Kozubek's application which was more than 60 days old when Respondent hired him. Respondent's contention that it gives preference to prior employees or referrals is unsupported by the record evidence. There is no reference to such a policy in Respondent's policy manual.

Accordingly, I find that Respondent has failed to rebut the prima facie cases of the unlawful refusal to consider for hire and to hire.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by:
 - (a) Telling employees that it had discharged employees because of their union affiliation and other protected concerted activities.
 - (b) Telling employees it would not hire employee-applicants who were affiliated with a union or who engaged in union or other protected concerted activities.
 - (c) Interrogating an employee about his union affiliation.
 - (d) Telling employees that it had suspended its employees and/or prohibited its employees from working because of their

union and other protected concerted activities.

(e) Threatening its employee with reprisals and retaliation because of his union and other protected concerted activities.

(f) Threatening its employee with physical violence because of his union and other protected concerted activities.

(g) Prohibiting its employee from wearing union emblems or logos at work.

(h) Telling an employee applicant that his union affiliation status as an organizer and union official would adversely affect his chances to be hired.

4. Respondent violated Section 8(a)(1) and (3) of the Act by its suspension and discharge of employee Travis Williams, its discharge of employee David Coleman and by its refusal to consider for hire and to hire employee-applicants Richard Christopherson and Michael Bright because of their union membership and their engagement in union and other protected concerted activities.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act and post the appropriate notice. It is recommended that Respondent cease the unlawful threats, interrogations, prohibitions, suspension and discharges, and refusals to consider for hire and to hire found above and offer immediate reinstatement to employees Travis Williams and David Coleman. It is recommended that Respondent rescind the unlawful suspension and discharges. The employees shall be reinstated to their prior positions or to substantially equivalent ones if their prior positions no longer exist. The employees shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices. It is recommended that employees Christopherson and Bright be considered for future employment in accordance with nondiscriminatory criteria and if it is shown that they would have been hired for any job openings, they shall be hired and made whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. All of the backpay amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

[Recommended Order omitted from publication.]