

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE**

COPPER CRAFT PLUMBING, INC., AND
KANSAS CITY PLUMBING, INC., a Single Employer
and Their Alter Egos KC COMMERCIAL
PLUMBING, INC. AND STUDIO 36 LLC

and

Case 17-CA-24227

DONOVAN SHAFER, an Individual

and

Case 17-CA-24291

STEVEN R. COX, an Individual

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENTS' EXCEPTION TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

On April 30, 2009, Administrative Law Judge Margaret G. Brakebusch issued her decision in the above-captioned case finding in relevant part that Respondents Copper Craft Plumbing and Kansas City Plumbing, Inc., as a single employer, (herein called Respondent Copper Craft/Kansas City Plumbing) wrongfully terminated employee Donovan Shafer in violation of Sections 8(a)(1) and 8(a)(3), and later laid off its other employees in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4). In making these findings, Judge Brakebusch further found that KC Commercial Plumbing, Inc. and Studio 36 LLC (herein called Respondent KC Commercial and Respondent Studio 36 respectively) had continued liability for the actions of Respondent Copper Craft/Kansas City Plumbing

because such entities were established with the direct intent to avoid their predecessor's - Respondent Copper Craft/Kansas City Plumbing's - liabilities under the Act.

Respondents have taken very limited exception to the decision of the Administrative Law Judge. Respondents except solely to Judge Brakebusch's decision that Respondent Studio 36 is liable for the unfair labor practices of Respondents Copper Craft/Kansas City Plumbing. The decision of Judge Brakebusch on this issue is substantiated in fact and in law, and justice dictates that her determination should be sustained.

FACTS SUPPORTING THE JUDGE'S DECISION:

Based on all of the evidence, there is no other conclusion to draw other than that Respondent Studio 36 was created with the sole motivation to hide assets from reach of the General Counsel for those blatant violations of Respondents Copper Craft/Kansas City Plumbing. Respondents contend that the Judge had no evidence to support a finding that Respondent Studio 36 was created to avoid unfair labor practice liability. Nothing could be further from the truth. The Judge used ample record evidence to make the appropriate finding regarding Respondent Studio 36 and its continued liability. First, as set out in her decision, as of August 22, 2008, the date of incorporation of Respondent Studio 36, Tim and Cami Nettekoven were aware that the Board had found merit to the charge filed by Donovan Shafer and intended to seek a remedy for Shafer. (ALJD p. 16, lines 2-10, and p. 17, lines 24-25). Thus, the evidence supports that within a week of being apprised of their potential unfair labor practice liability, Respondent KC Commercial and Respondent Studio 36 were created by the Nettekovens. The Respondent's did not except to the Judge's factual findings as to the timing of

notification of the unfair labor practice findings and the timing of the establishment of Respondent Studio 36.

Additionally, the Judge relied on the credited testimony of Javier Mendoza and Respondent's own agent Bryan Lee to support her finding that the establishment of Respondent KC Commercial and Respondent Studio 36 was unlawfully motivated. (ALJD, p. 20, lines 34-47, and p. 21, lines 1-14). Respondents did not accept to the Judge's factual findings related to the testimony of Javier Mendoza or Bryan Lee. As such, the evidence relied on by the Judge, which was not excepted to by Respondents, clearly supports her conclusion that Respondent Studio 36 and Respondent KC Commercial were created as instrumentalities to avoid unfair labor practice liability engendered by Respondent Copper Craft/Kansas City Plumbing.

As to Respondent's attempts to paint the evidence to make it seem that Respondent Studio 36 was intended to be chiefly the residence of the Nettekovens, with an area in the "basement" to store or otherwise warehouse some plumbing supplies for the Nettekoven's businesses, such a contention is not supported by the record. Both Tim Nettekoven and Javier Garcia's testimony support that Respondent Studio 36's purchase of the building at 3600 Troost was with the primary intent to operate a plumbing business from the first floor of the building and to live on the second floor. (T. 40, 130). Respondents attempt to claim that Tim Nettekoven never intended to operate Respondent Copper Craft/Kansas City Plumbing from the building, is also belied by the evidence, not the least of which was Respondents stipulations contained in General Counsel's Exhibit 2, wherein Counsel for Respondents admitted that in around October 2008, Respondents Copper Craft/Kansas City Plumbing moved their business operations to the downstairs of

the building owned by Respondent Studio 36 at 3600 Troost and that the downstairs space was used by Respondent Copper Craft/Kansas City Plumbing and Respondent KC Commercial as their “shared facility.” (GC Ex. 2, Paragraph 1(f), Paragraph 3 (b), Paragraph 2(c)).

Besides that stipulations voluntarily entered into by Respondents, Respondents claim that only Respondent KC Commercial ever operated out of Respondent Studio 36’s building is not supported by testimonial evidence. First the evidence shows that Respondent Studio 36 purchased the building at 3600 Troost by the time of the layoff on September 17, 2008, given Mendoza’s testimony that Tim Nettekoven asked him to help move the shop equipment to the new building on the date of the layoff. (T. 130). It is further undisputed and not excepted to by Respondents that at the time of the layoff, there was ongoing work to be completed by Respondent Copper Craft/Kansas City Plumbing (T. 79-81, 359-360). In fact, General Counsel Exhibit 4 shows that as of October 10, 2008, there was still ongoing work to be completed by Respondent Copper Craft/Kansas City Plumbing, work which would have been done from Respondent Studio 36’s new facility. Thus, given the stipulation, and the other evidence cited above, the evidence does support that Respondent Copper Craft/Kansas City Plumbing performed work from Respondent Studio 36’s building.

Moreover, Respondents argument about whether Respondent Copper Craft/Kansas City Plumbing ever performed work from Respondent Studio 36’s building is circular and disingenuous. Whether Respondent Copper Craft/Kansas City Plumbing ever performed work from Respondent Studio 36’s building is of no import where the only reason they may not have performed much work from the building is because

Respondent Copper Craft/Kansas City Plumbing fraudulently stopped doing business by laying off all of its employees, only to reopen as a disguised continuance, Respondent KC Commercial. Thus, but for the unlawful establishment of Respondent KC Commercial as an unabashed alter ego of Respondent Copper Craft/Kansas City Plumbing, Respondents Copper Craft/Kansas City Plumbing would have been the plumbing entity performing work from the first floor of Respondent Studio 36's building, rather than Respondent KC Commercial.

LAW SUPPORTING THE JUDGE'S DECISION:

The legal analysis of Judge Brakebusch to hold Respondent Studio 36 liable is correct and should be upheld. As the Judge concluded, under the reasoning of *White Oak Coal*, 318 NLRB 732 (1995), Respondent Studio 36 was established with the sole intent to evade its and Respondent KC Commercial's responsibilities under the Act, and based on the lack of corporate formalities, Respondent Studio 36 was merely a shell, instrumentality, or conduit, seeking to conceal the Nettekoven's plan to continue in the plumbing business as Respondent KC Commercial without the legal obligations occasioned by the acts of Respondent Copper Craft/Kansas City Plumbing. (ALJD , p. 25, lines 21-35). Citing both *Midwest Precision Heating and Cooling, Inc.*, 341 NLRB 435 (2004), and *Diverse Steele*, 349 NLRB 946 (2007), the Judge found that Respondent Studio 36 was created with the sole motivation to avoid potential unfair practice liabilities. As is set out above, this legal finding is abundantly supported by record evidence.

While the Respondents are right that *White Oak* involved the imposition of personal liability, and the instant case does not involve a finding of personal liability, the

reasoning of *White Oak* is appropriate in this situation where the General Counsel is seeking liability where one of the business entities for whom liability is sought is not engaged in the same type of business as its predecessor alter ego. The Judge correctly applied the reasoning of *White Oak* to hold two the two entities liable to remedy unfair labor practices where such entities were established with the express intent to evade the Act, and where corporate formalities were of no significance.

The Judge appropriately held that in determining whether the assets of Respondent Copper Craft/Kansas City Plumbing, Respondent KC Commercial and Respondent Studio 36 have become indistinct, it is first necessary to look at the degree to which corporate formalities have been maintained and the extent to which corporate funds, assets, and affairs have been commingled. The Judge then looked at *White Oak*'s second prong that there must be some nexus to the first prong of the test. In other words, the fraud, injustice, or evasion of legal obligations must flow from the misuse of the corporate form. *Id* at 735.

The evidence clearly supports that the establishment of Respondent Studio 36 involved the misuse of the corporate form in order to create a shield against legal liability by segregating assets that would otherwise be subject to the remedies called for by the unfair labor practices. Judge Brakebusch pointed to several of the *White Oak Coal* factors in making this conclusion, including evidence of corporate misuse through the testimony of Javier Garcia and Bryan Lee concerning the establishment of the corporate identities. The establishment of the entities under Cami Nettekoven's was correctly found to be an effort to hide Tim Nettekoven's involvement in the businesses, warranting the Judge's conclusion that under the *White Oak Coal* rubric, the Nettekoven's used both

Respondent KC Commercial and Respondent Studio 36 as shells of Respondent Copper Craft/Kansas City Plumbing so that they could continue in the plumbing business without the worries of unfair labor practice liability.

In looking at the maintenance of corporate formalities, the Judge correctly held that the record fully supported that the personalities and assets of the four corporations are indistinct. (ALJD, p. 25, lines 10-19). The Judge reviewed the testimony of Tim Nettekoven himself to support that Respondent Studio 36 failed to maintain arm's-length relationships between the three corporations. (ALJD, p. 24, lines 9-13). In that vein, Nettekoven's testimony established that both Respondent Copper Craft and Respondent KC Commercial utilized the assets of Respondent Studio 36 without compensation, (T. 40-41). Tim Nettekoven's testimony on this matter supports the Judge's finding that the Nettekovens' misused the corporations such that the personalities and assets of the corporations are indistinct, as does his testimony concerning the nature of the corporate ownership of the entities, with Tim and Cami Nettekoven owning and controlling all entities.

The Judge also applied the second prong of the *White Oak Coal* analysis, to appropriately find that adherence to Respondent Studio 36's corporate form would sanction a fraud, promote injustice, and lead to evasion of legal obligations in this case. The Judge's conclusion is warranted based on her finding that the fundamental purpose of the Nettekoven's establishment of Respondent KC Commercial and Respondent Studio 36 was to evade Respondents obligations under the Act.

In conclusion, Counsel for the General Counsel urges the Board to uphold the decision of Administrative Law Judge Brakebusch, and deny Respondent's exception to

the Judge's decision. Failure to uphold Judge Brakebusch's decision on this issue, will thwart appropriate imposition of liability for Respondent Studio 36, and sanction the Nettekoven's fraudulent conduct.

Dated: June 15, 2009

Respectfully submitted,

/s/ Mary G. Taves

Mary G. Taves

Counsel for the General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing General Counsel's Answering Brief to Respondents' Exception to the Decision of the Administrative Law Judge on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Division of Judges and by electronic email to Counsel for Respondents and Charging Party Donovan Shafer. Charging Party Steve Cox was served by overnight delivery service.

Dated: June 15, 2009

/s/ Mary G. Taves

Mary G. Taves
Counsel for the General Counsel

PARTIES RECEIVING EMAIL

Mr. Tim Nettekoven and
Ms. Cami Nettekoven
Copper Craft Plumbing, Inc. and
Kansas City Plumbing, Inc., A Single
Employer, and their Alter Egos KC
Commercial Plumbing, Inc. and Studio 36 LLC
3600 Troost
Kansas City, MO 64109
cami@kansascityplumbing.com

Mr. Walter R. Roher, Attorney
200 NW Missouri, Suite 200
Lee's Summit, MO 64086
roherlaw@earthlink.net

Donovan Shafer
18611 Wilmoth Road
Pleasant Hill, MO 64080
shafersbar@aol.com

PARTIES RECEIVING OVERNIGHT DELIVERY:

Steven R. Cox
1908 Northwest 600th Road
Kingsville, MO 64061

Fed Ex. 8659 3143 8008