UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ACTION CARTING ENVIRONMENTAL SERVICES, INC. And LOCAL 813, INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 621, UNITED WORKERS OF AMERICA And SHAFI GADSON, An Individual	**Case No.** 22-CA-28197 22-CA-28211 22-CA-28337 22-CB-10530

GENERAL COUNSEL'S EXCEPTION TO THE DECISION OF THE ALJ, BRIEF IN SUPPORT OF EXCEPTION AND CERTIFICATE OF SERVICE.

EXCEPTION:
THE ALJ INCORRECTLY APPLIED THE LAW IN FINDING THAT THE EMPLOYER CONSTRUCTIVELY DISCHARGED FRANK MADDEN.[1]

The ALJ incorrectly applied longstanding Board law defining the requisites for a "traditional" constructive discharge.[2] The pertinent facts here are that Action Carting, the employer, unlawfully transferred its employee, Frank Madden, from Newark, New Jersey to Brooklyn, New York, and then again to The Bronx, New York to punish him for his union activity. The ALJ found that by transferring Madden the Employer had deliberately made working conditions unbearable for him because of his union activity.[3]

However, the judge found that Madden was not constructively discharged because he quit his job in response to an altercation with a coworker after the multiple transfers. It is undisputed that the altercation occurred after the unlawful conditions had been imposed by Action Carting. Accordingly, the fact that Madden quit in the wake of an altercation neither negates the constructive discharge nor eliminates the need for a remedy.

The ALJ's unorthodox application of the law defining constructive discharge is incorrect for several reasons. He has effectively added an additional unprecedented

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[1] See Action Carting, slip opinion by ALJ ("Slip op."), page 29, line 35 through page 30, line 15.

[2] There are two theories of constructive discharge, the "traditional" theory in which the employer deliberately makes working conditions unbearable, and the Hobson's choice theory in which the employer conditions continued employment on the employee's abandonment of Section 7 rights. See *Intercon I (Zercom)*, 333 NLRB 223 (2001). Here, the judge incorrectly applied the traditional theory. The Hobson's choice theory is not implicated by the facts here. .

[3] Slip op. at page 29, lines 25-26.

requirement to the definition of a "traditional" constructive discharge. There are only two required proofs to make out a "traditional" constructive discharge: (1) here, that Action Carting intended to cause the Madden to quit; and (2) that the reason for Action's actions was Madden's union activity.[4] As the judge found, the Employer unlawfully transferred Madden from Newark, New Jersey to work in a facility in Brooklyn, New York, intolerably increasing the distance he traveled to work and his commuting costs.[5] The judge further found that the Employer transferred him again to the Bronx, adding further to his commute.[6] The judge found that the second requirement, Action's anti-union motivation, was also proved.[7]

But there is no additional requirement that a victim of conditions which amount to constructive discharge quit with the unlawfully-imposed working conditions in mind, as required by the judge.[8] Or that the victim harbor that intention prior to the shift during which he quit, as also required by the judge.[9]

The foul was committed when Action imposed the unlawful conditions. The test for the employer's intent is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, it

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[4]. See e.g., *Cadillac Asphalt Paving Co.*, 349 NLRB No. 5 (2007).
[4] Slip op. at page 29, lines 25-26
[5] *Id.* at page 17, lines 7-14. The judge omitted from his discussion of the facts supporting constructive discharge the fact that Action had further increased the distance Madden had to travel to his job from his home in central Jersey to the Bronx in New York. Consequently, Madden' commuting costs, including the price of gasoline, increased. These facts are obvious, in the record and were found in significant part by the judge. See *id.* at page 17, line 27.
[6] *Id.* at page 17, line 27.
[7] *Id.* at page 29, lines 25-26.
[8] See id. on page 30, line 6.
[9] See id. on page 30, line 6.

reasonably should have foreseen that its action would cause an employee to quit. *American Licorice Co.*, 299 NLRB 145, 148 (1990) citing *Keller Mfg. Co.*, 237 NLRB 712, 723 (1978). Once the violation has attached, it does not matter that Madden left his job for another, personal reason.

Constructive discharge does not depend on the employee's subjective state. See, e.g., *Aero Industries*, 314 NLRB 741, 742 (1994). Constructive discharge depends on the intent and actions of an employer, not the intent of the victim. Thus the basis for Madden's decision to quit is irrelevant.

The Act operates "in the public interest in order to enforce a public right." *NLRB v. Threads, Inc.*, 308 F.2d 1, 8 (4th Cir. 1962). See also *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). In consequence, public policy must be taken into account in evaluating application of doctrines, such as anticipated and constructive discharges, developed and applied under the Act. An additional flaw in the ALJ's decision is that it undermines the Act's purpose to vindicate public wrongs. Once an employer has committed a violation, the wrong must be remedied. Action Carting is a wrongdoer, and should not be let off the hook because Madden left his job for a personal reason other than the unlawful conditions.

In addition, the ALJ has, contrary to another public policy, effectively punished Madden for mitigating his damages and trying to stick out his onerous working conditions. "It seems ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer *any* unlawful condition, at least if they have avenues for remedying that condition." *Lively Electric*, 316 NLRB 471, 473 (1995). The ALJ effectively declared that the moment the burdensome condition was imposed, Madden

was required to quit. Madden's discharge is not lawful because he elected to worked under unlawful terms and conditions of employment. This choice can depend on obvious economic or other personal factors apart from the legality of the Employer's conduct.

Thus, while the General Counsel does not concede that Madden caused his co-worker to be late, it matters not. Madden did not defeat the constructive discharge by failing to pick up his coworker and then being unreasonably angry if he was late, if these implausible, inconsistent and erroneously found facts are assumed. No *Wright Line* defense has been asserted or factually supported here. The record was replete with employees at this trash company getting into altercations without discipline. The responsibility for the altercation is irrelevant to the violation and the need for a Board remedy.

Action has violated established Board law by constructively discharging Madden. The violation merits a Board remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that I have e-filed and served today the foregoing General Counsel's Exception and Brief in Support of Exception by email to counsel for the parties today, and by next-day delivery to Shafi Gadson, an individual party, whom I have called today to notify of the filing and service of this document.

June 25, 2009

Tara Levy