

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AIM ROYAL INSULATION, INC.
and JACOBSON STAFFING, L.C.
Joint Employers

Respondent,

and

Case Nos. 28-CA-22605
 28-CA-22714

INTERNATIONAL ASSOCIATION OF
HEAT & FROST INSULATORS & ALLIED
WORKERS, AFL-CIO, LOCAL NO. 73

Charging Party.

**BRIEF IN RESPONSE TO GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dated: July 2, 2010

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Jacobson Staffing, L.C. (“Respondent” or “Jacobson”) by its attorneys Krukowski & Costello, S.C., by Kevin J. Kinney and Timothy C. Kamin, submits this Brief in Response to General Counsel’s Exceptions to the Decision of the Administrative Law Judge.

I. INTRODUCTION

Administrative Law Judge Kocol did not err when he made reasonable findings and conclusions based upon the evidence in the record regarding Jacobson’s status as a joint employer with regard to specific employees and regarding the events of July 1 involving a conversation between Jacobson and alleged discriminatee Mr. McMillan. These Exceptions of General Counsel should be overruled and the Decision of the ALJ with regard to these matters should be affirmed.¹

II. RELEVANT FACTUAL BACKGROUND

Jacobson is a third party staffing agency. (TR at 339.) It provides employees to other companies in need of temporary workers, including the Respondent Aim Royal Insulation, Inc. (“Aim Royal”). (TR at 339.) The individuals referred by Jacobson to work at its clients locations are employees of Jacobson. (TR at 339-340.) They receive their paycheck directly from Jacobson and Jacobson provides the employees with workers compensation and unemployment compensation coverage. (TR at 339-340.) Jacobson invoices its customer based upon the number of hours worked by the employee at the employee’s hourly rate plus a mark-up. (TR at 340.) Sandy Chavez (“Chavez”) is the account manager for Jacobson at its Phoenix office. (TR page 337.) Chavez was the only Jacobson witness to testify at the hearing.

¹ Respondent Jacobson has not taken exceptions to the Decision and Order but would note that paragraph 2(a) of the Jacobson Order contains a typographical error. (ALJD at 20, lines 10, 11, 13, 15 and 16.) The name “AIM” should be deleted and the name “Jacobson” should be substituted.

The parties entered into a stipulation on the record that is relevant to the Exceptions taken by General Counsel. Specifically with regard to the “joint employer” allegation of Paragraph 2 (i) of the Complaint, the General Counsel and Jacobson stipulated that:

...Respondent Jacobson is a joint employer with Respondent AIM Royal with respect to those individuals that were Jacobson employees assigned to the AIM Royal workplace.

(TR at 357.)

In Jacobson’s relationship with Aim Royal, Jacobson would take no action until it received a “job order” for employees from Aim Royal. (TR at 341.) Once a job order was received from Aim Royal, hiring was handled in two specific ways. (TR at 340-341.) In some cases, Jacobson would attempt to locate candidates to fill the order and then send those candidates to be interviewed by Aim Royal, and Aim Royal would inform Jacobson whether it had selected a candidate for hire. (TR at 341.) In other cases, Aim Royal would send a candidate whom it had already selected to Jacobson with instructions that the individual be placed on the Jacobson payroll and assigned to Aim Royal. (TR at 340-341.)

Once an individual is assigned to a customer, including Aim Royal, the day-to-day supervision of the employee is the exclusive responsibility of the customer. (TR at 340.) Jacobson has no onsite supervisory role and no onsite personnel. (TR at 340.) If a customer is dissatisfied with a Jacobson employee or if the need for the employee ends, the customer sends the Jacobson employee back to Jacobson. (TR at 340.)

During the time period relevant to the Complaint, Jacobson received two (2) job orders from Aim Royal. The first order was placed on June 29 or 30, 2009, and was for two (2) employees. (TR at 342.) The second order was placed on July 14, 2009, also for two (2) employees. (TR at 361.) With regard to the second order, Aim Royal had already interviewed

and selected for hire one individual and Aim Royal sent that individual to Jacobson to be placed on the payroll and assigned to Aim Royal. (TR at 362.)²

III. ARGUMENT

A. **The ALJ Properly Found That Jacobson Was Not A Joint Employer Subject To Vicarious Liability For The Alleged 8(a)(1) And (3) Violations.**

In its exceptions, General Counsel conflates two distinct issues. The first issue is whether Aim Royal and Jacobson are joint employers and for what purposes. The second issue is whether the nature of the particular joint employer status should result in Jacobson's vicarious liability for the alleged unlawful acts attributed to Aim Royal. Contrary to General Counsel's assertions, universal joint employer status for all purposes does not automatically flow from the relationship between a staffing company and the employer with whom it contracts. Further, liability for alleged unfair labor practices does not automatically flow from a joint employer relationship, even where such a relationship exists.

1. **The Parties Stipulated To The Nature Of The Joint Employer Relationship, And The Stipulation Clearly Excluded The Individuals General Counsel Now Alleges To Be Jointly Employed.**

Contrary to the generalized, blanket assertions in General Counsel's brief, the mere fact that two employers are "joint employers" in some sense does not mean they are joint employers to all employees of both employers. For example, while employees who receive paychecks from Jacobson for contract work performed under the supervision of and direction of Aim Royal are jointly employed by Jacobson and Aim Royal, it does not follow that all Aim Royal employees or applicants are jointly employed by Jacobson, or vice versa. Jacobson has many employees that have never worked for Aim Royal. Aim Royal has many employees that have never worked for Jacobson.

² That individual happened to be a family friend of Aim Royal's Superintendent. (TR. at 230.)

Thus, General Counsel's broad allegations in its Brief that Aim Royal and Jacobson are "joint employers" in the broadest sense of the term actually ignores the critical question in this case, which is whether Aim Royal and Jacobson are joint employers for the purposes of the alleged discriminatees in this case.

General Counsel seeks to avoid that question in its Brief, because that is a question that the parties resolved through a specific stipulation on the record at hearing. Rather than extend the hearing in this matter with tedious testimony and other evidence defining the nature of any joint employer relationships in this case, the parties (Jacobson and Aim Royal and General Counsel) entered into a very specific stipulation to resolve the disputed allegation of "joint employer" status in Paragraph 2 (i) of the Complaint. The parties stipulated that:

MR. KINNEY [counsel for Jacobson]: Thank you, Your Honor. Yes. Respondent Jacobson would offer as a stipulation that **Respondent Jacobson is a joint employer with Respondent AIM Royal with respect to those individuals that were Jacobson employees assigned to the AIM Royal workplace. And specifically, that would be individuals previously identified as Marcellino Trujillo, Imuris Garcia, Isidro Ortega, and Gilbert Cervantez.**

JUDGE KOCOL: There was an Isidro Garcia?

MS. MACKIN [counsel for Aim Royal]: Yes, Isidro.

MR. KINNEY: Isidro. **And Claudio Rendon.**

JUDGE KOCOL: All right. Do you join in that Mr. Rogers?

MR. ROGERS [counsel for Aim Royal]: I do, Your Honor.

JUDGE KOCOL: Mr. Giannopolous?

MR. GIANNOPOULUS [counsel for General Counsel]: **Yes, I do.**

JUDGE KOCOL: Okay. Very good. **That stipulation is received. That removes an issue.** Thank you. Mr. Kinney?

(TR at 357.) (Emphasis added.) As a result, the parties' stipulation could not have been any clearer regarding which individuals were jointly employed, and the stipulation clearly excluded the alleged discriminatees now advanced by General Counsel, specifically Messrs. Gonzalez, McMillan, Bolanos and Aizu. (TR at 357.) The Board generally encourages parties to reach

appropriate stipulation of facts and does not permit parties to renege on stipulations absent unusual circumstances. *See, e.g., Lott's Electric Co.*, 293 NLRB 297, fn. 1 (1989).

Thus, not only did General Counsel stipulate that these individuals did not fall under the joint employer relationship of Jacobson and Aim Royal, but there was no evidence presented that these employees were jointly employed by Jacobson and Aim Royal, as the ALJ correctly found. (ALJD at 16, lines 2-10.) In fact, all of the record evidence demonstrated that in the pre-hire stage, it was Aim Royal that solely made the decisions with regard to whether to hire to Messrs. Gonzalez, McMillan, Bolanos and Aizu, as fully discussed below.

General Counsel not only failed to prove such a joint employer relationship, but also stipulated to the definition of the existing joint employer relationship in such a manner that clearly excluded these individuals from jointly employed status. Therefore, the ALJ did not err in finding no joint employer status with regard to these individuals.

2. Even If The Joint Employer Relationship Alleged By General Counsel Were Proven And Had Not Been Subject To The Stipulation, There Still Would Be No Grounds For Liability Against Jacobson.

While it is Jacobson's position that the express stipulation and the lack of evidence in the record preclude any finding of joint employer status with regard to Messrs. Gonzalez, McMillan, Bolanos and Aizu, Jacobson further submits that there is no basis for liability against Jacobson even if joint employer status had been established. In fact, in the lone case cited by General Counsel, *Capitol EMI Music, Inc.*, 311 NLRB 997 (1993), the Board held that the staffing company (Graham & Associates) and the primary employer (Capitol EMI Music) were, in fact, joint employers, but that the staffing company could NOT be held liable for the primary employer's actions. *See id.*

In *Capitol EMI Music*, even though the Board found that Capitol had for unlawful reasons instructed the staffing agency to remove an employee from employment, the Board also held that the staffing agency would bear no liability for that violation because the staffing agency did not supervise the employee, did not make the decision to remove the employee and had no reason to believe that Capitol's motivation in requesting the removal of the employee was unlawfully motivated. *See id.* at 1000. In so finding, the Board noted that all of the evidence indicated that the staffing agency did not know of any unlawful motive on the part of Capitol, and there was no evidence that the staffing company was placed "on notice" of Capitol's unlawful motivation. *See id.* at 1000-1001.

The *Capitol EMI Music* decision expressly stated that:

Consequently, in joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for [unlawful discrimination] **only when the record permits an inference that (1) the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons** and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.

Id. at 1000 (emphasis added). This is precisely such a case. If, in fact, Aim Royal did have any alleged unlawful intent with regard to Messrs. Gonzalez, McMillan, Bolanos and Aizu, Jacobson certainly had no knowledge of any unlawful intent, nor any reason to doubt the lawful reasons provided by Aim Royal. Additionally, and as the record establishes, at the time Aim Royal declined to interview these individuals the open positions had not only been filled, but the positions had been filled even before the individuals appeared at Jacobson to seek employment.

The evidence is undisputed that Mr. Campos of Aim Royal told Ms. Chavez of Jacobson that the reason Aim Royal was declining to interview and extend employment to McMillan, Bolanos, Gonzalez and Aizu was that Aim Royal had already filled the positions it was seeking

to fill at those times, and no other reason. (TR at 404-405, 408-409.) There is absolutely no evidence that Jacobson had any reason to believe that this assertion was untrue, or that there was any unlawful motivation on Aim Royal's part for its statement that it did not require these individuals. In fact, Jacobson had every reason to believe Aim Royal's assertion. Jacobson had already sent candidates to Aim Royal before any of these alleged discriminatees applied, and Aim Royal reported that it had accepted and hired those candidates.

The undisputed evidence is that Aim Royal placed a job order with Jacobson for two (2) individuals on June 29 or 30, 2009, and that those two positions were filled with Trujillo and Garcia on July 1, and those two individuals began work on July 2. (TR at 398; Resp. Jacobson Exh. 1 – timecards of Trujillo and Garcia.) The ALJ found that McMillan did not seek work with Jacobson until July 2, 2009. (ALJD at 12-13.) Once McMillan did apply, Jacobson contacted Aim Royal to send McMillan over for an interview, but Jacobson was told by Aim Royal that the two (2) positions had already been filled by Trujillo and Garcia and they no longer required any further positions. (TR at 405.) This finding was made by the ALJ (ALJD at 13.) There is simply no evidence in the record that Jacobson had any reason to doubt this representation.

Likewise, on July 14, 2009, Aim Royal placed an order with Jacobson for two (2) more individuals. (TR at 361.) At that time, Aim Royal informed Jacobson that it had already selected an individual (Ortega) to fill one of the positions. (TR at 362.) Ortega was a family friend of Aim Royal's Superintendent. (TR at 230). At the time that order was placed by Aim Royal with Ms. Chavez of Jacobson by phone, Jacobson employee Claudio Rendon was sitting at Chavez's desk seeking a new job assignment. (TR at 364.) Ms. Chavez immediately sent Rendon over to Aim Royal for an interview at Aim Royal's request. (TR at 364.) After Aim

Royal had already selected Ortega and after Jacobson had referred Rendon to Aim Royal to fill the two (2) positions, only then did Gonzalez, Bolanos and Aizu apply for positions. (TR at 408-409.) Ms. Chavez also contacted Mr. McMillan and asked him to come in to fill out paperwork, and this was confirmed by telephone records. (ALJD at 13.) He too did not even arrive at the Jacobson office until after the positions had been filled. (ALJD at 13.) When Bolanos and Gonzalez applied later in the day on July 14, Ms. Chavez attempted to refer them to Aim Royal, but Aim Royal rejected the referrals stating that the positions already had been filled by Ortega and Rendon. (TR at 409.) Likewise, when Aizu submitted his application on July 15, those positions had already been filled and Ortega and Rendon had already completed their first day of work with Aim Royal. (TR at 408.) Clearly, Jacobson had no reason to believe that Aim Royal's representation was false or a pretext for a discriminatory motive. In fact, Jacobson had every reason to believe that both positions had been filled because two (2) Jacobson employees were actually in those jobs.

Even if Aim Royal had secretly rejected Gonzalez, McMillan, Bolanos and Aizu out of unlawful anti-union animus, Jacobson was not aware of any such motivation and certainly had no reason to suspect such motivation. Under these circumstances and under the precedent of *Capitol EMI Music*, cited by General Counsel, there is no evidence to support General Counsel's claim that joint liability can be imposed upon Jacobson for any alleged unfair labor practices attributed to Aim Royal's rejection of Gonzalez, McMillan, Bolanos and Aizu. *See Capitol EMI Music*, supra.

Therefore, the ALJ did not err when he found that there was no joint employer status with regard to Gonzalez, McMillan, Bolanos and Aizu and, more importantly, that Jacobson is not jointly liable for any alleged unfair labor practices attributed to Aim Royal with respect to these

individuals. General Counsel's Exception should be overruled and the ALJ's decision adopted by the Board.

B. The ALJ Did Not Err In Finding That Mr. McMillan Did Not Apply For Work On July 1, 2009, But Rather Did Not Apply Until July 2, 2009.

General Counsel takes Exception to the ALJ's finding that Mr. McMillan first applied for work with Aim Royal through Jacobson on July 2, 2009, and that McMillan did not apply for work on July 1, 2009. (ALJD, p. 12). This is significant because, as discussed above, the active job order that Jacobson had from Aim Royal was filled by the time McMillan applied on July 2. The ALJ's conclusion is reasonable and is based upon credible evidence in the record.

The evidence was undisputed that Mr. McMillan did not contact Jacobson looking to apply for work, but rather that Ms. Chavez, on behalf of Jacobson, contacted Mr. McMillan after Imuris Garcia, a walk-in applicant, had offered McMillan's name as somebody who might be looking for work. (TR at 398.) Chavez's testimony was clear that she called McMillan and asked if he was looking for a position. (TR at 399.) According to Chavez's testimony, McMillan said that he was out of work, but that he was with the union so he was not able to work with anybody other than the union. (TR at 399.) Chavez testified that she told McMillan to call back if he changed his mind. (TR at 299.) McMillan himself testified, as quoted and expressly relied upon by the ALJ, as follows:

“She [Chavez] told me that she would look for work and she'll call me back **because I told her at the time that I wasn't really sure if I can join Jacobson Staffing Company or go through Aim Royal because of my union status,** and she, oh, you're part of the union, and then she kind of said I can't really help you then, and hung up on me.”

(TR at 432; ALJD at 12, lines 19-22.)

Regardless of whether Chavez made the statement McMillan alleged – and Chavez disputed that allegation in her testimony - the ALJ's finding that McMillan did not apply for

work with Jacobson or Aim Royal on that date is fully supported by this evidence in the record.³ Both McMillan and Chavez testified that it was McMillan who told Jacobson that he did not think he could accept employment with Jacobson because of his union status. Based upon this clear and undisputed evidence, the ALJ was correct in determining that McMillan did not seek work with Jacobson or Aim Royal on that date. It was not Chavez or Jacobson that excluded McMillan from consideration for employment on July 1, it was McMillan himself. Nothing in the Act requires Jacobson or any employer to actively pursue an individual who has stated a lack of interest in employment.

Further, the indisputable evidence from the telephone records demonstrate that McMillan called Jacobson the very next day, July 2, 2009. (GC Exh. 27, p. 22.) Because McMillan was clearly mistaken when he testified that he never made that phone call and that it was Chavez who reestablished contact several days later, the ALJ was fully justified in making a credibility determination that, in reality, McMillan called Jacobson the next day, July 2, and that McMillan sought work at that time. (ALJD at 13, lines 1-10.) Because McMillan's testimony could not possibly be correct in light of the evidence, the ALJ determined that McMillan had not applied for work on July 1, but changed his mind and called back on July 2 to seek work, as the phone records demonstrate. (ALJD at 13.) Additionally, the ALJ reasonably questioned McMillan's credibility regarding these conversations, noting that McMillan's testimony changed significantly between direct examination and subsequent questioning by the ALJ. (ALJD at 12.) The Board's longstanding policy is that an ALJ's credibility determinations are not to be overruled absent clear evidence of error. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362) (3d Cir. 1951). Given the telephone records that directly and

³ Mr. McMillan actually offered three (3) versions of this conversation. One on direct, one on cross and, finally, one under questioning by the ALJ. (TR at 432.) The ALJ credited the final version quoted above. (ALJD at 13.)

unequivocally demonstrate that McMillan's testimony was mistaken at best, and McMillan's shifting recollections of what had occurred, the ALJ's determination was fully supported by the evidence in the record.

The ALJ did not err in finding that McMillan did not seek work with Jacobson on July 1, 2009. The credible evidence clearly supports the ALJ's finding and General Counsel's Exception should be overruled.

IV. CONCLUSION

Administrative Law Judge Kocol did not err when he made reasonable findings and conclusions, based upon the evidence in the record and the stipulation between the parties. The stipulation and the evidence strongly support the ALJ's finding that Jacobson was not a joint employer with regard to the specific individuals alleged in General Counsel's Exceptions and that Jacobson cannot be held vicariously liable for alleged unfair labor practices of Aim Royal regarding any such individuals. Likewise, the evidence and the ALJ's reasonable credibility determinations regarding the events of July 1 and July 2 involving conversations between Jacobson and alleged discriminatee Mr. McMillan strongly support the finding that Mr. McMillan applied for work on July 2, not July 1.

Therefore, the Exceptions of General Counsel should be overruled and the ALJ's decision should be affirmed in those regards.

Respectfully submitted this 2nd day of July, 2010.

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