UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and **Cases 28-CA-22605**
28-CA-22714

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

ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT JACOBSON STAFFING'S ANSWERING BRIEF

Counsel for the Acting General Counsel submits the following Reply to the Answering Brief filed by Respondent Jacobson Staffing (Jacobson or Respondent Jacobson). For the reasons described below, the matters asserted by Respondent Jacobson in its Answering Brief are without merit and that the Board should grant Acting General Counsel's Exceptions.

I. The ALJ Erred by not Finding that Respondents Aim Royal and Jacobson are Joint Employers and by Dismissing the Refusal to Hire and Consider for Hire Allegations Concerning Luis Bolaños, Gustavo Gonzalez, Shawn McMillan, and Angel Aizu.

A. Counsels' Stipulation Does Not Preclude the Finding of a Violation.

At the start of the third day of the hearing, Respondent Jacobson offered the following 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." (Tr. 357) (ALJD at 16)

Because the proposed stipulation was technically accurate, Counsel for the Acting General Counsel entered into the stipulation. Significantly, the stipulation is silent as to Respondents' joint employer status regarding of any of the alleged discriminatees. Trying to turn logic on its head, in its Answering Brief Respondent Jacobson argues that, because the stipulation on joint employer status does not mention the specific discriminatees, the issue has been resolved regarding those unmentioned discriminatees. *Resp't Jacobson Br*. at 3-5. Respondent Jacobson cannot sustain its factual proposition by relying solely upon a negative inference: that because the discriminatees were not mentioned in the stipulation, Jacobson and Aim Royal are not joint-employers with respect to the unmentioned discriminatees.[1]

Respondent Jacobson has to rely on an inadequate negative inference because the affirmative evidence presented by the Acting General Counsel shows that Jacobson was, in fact, a joint employer with Aim Royal at all times, including when the named discriminatees applied for employment. To establish a joint employer relationship, there must be evidence that one employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees. *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007). The unrefuted evidence presented by the Acting General Counsel at hearing shows that, although Jacobson pays the employees who work at Aim Royal directly and provides their benefits, such as insurance and workers

[1] Respondent's argument is reminiscent of Alice's experience with the White Knight:

> "I see nobody on the road," said Alice.
>
> "I only wish I had such eyes," the King remarked in a fretful tone. "To be able to see Nobody! And at that distance!"

The Complete Works of Lewis Carroll, Modern Library ed. (New York, n.d.), p. 223, as cited in *Walmsley v. City of Philadelphia*, 872 F.2d 546, 554 (1989) cert. denied 493 US 955 (1989). Respondent's argument is an example of what logicians describe as the "Fallacy of Drawing an Affirmative Conclusion from a Negative Premise." *Walmsley*, 872 F.2d at 554 citing I Copi, *Introduction to Logic* 221 (7th ed. 1986) and D. Fischer, *Historians' Fallacies* 47 (1970) ("The fallacy of negative proof is an attempt to sustain a factual proposition merely by negative evidence.")

compensation, Jacobson does not hire any employees without Aim Royal's explicit commitment and approval. (Tr. 341 – 342; ALJD at 2, 15) Jacobson employees are supervised directly by Aim Royal, and are provided their work tools by Aim Royal. (Tr. 219–225, 341–342) Jacobson has no knowledge of the actual work these employees perform in the field on a day-to-day basis, and Aim Royal sets the employees' work hours, including overtime. (Tr. 220–225, 341) Aim Royal can issue employees sent by Jacobson disciplinary warnings, can cause the Jacobson employees to be fired, and has sent incompetent employees home after only one or two hours of work. (Tr. 220–225) In these circumstances, there is little question that Aim Royal and Jacobson are joint employers at all times, including during the interview and hiring process. Thus, the ALJ erred by ignoring this specific evidence and instead relying solely upon the stipulation, which has no bearing upon the named discriminatees. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1124-25 (3d Cir. 1982) (employee contractor and client employer are joint employers where they share the right to hire and fire, client-employer establishes work hours and supervises workers, and client employer's forms are used for recordkeeping).

B. The ALJ Erred in Failing to Find that Jacobson is Liable for the Refusal to Hire Violation.

Board law is clear, in a joint employer relationship, where one employer supplies employees to the other, both employers will be liable for the unlawful discrimination when: (1) the non-acting joint employer knew or should have known that the other acted against the employee for unlawful reasons; and (2) the former acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist. *Capitol-EMI Music*, 311 NLRB 997, 100 (1993).

Relying upon the stipulation, the ALJ declined to find that Jacobson and Aim Royal were joint employers in relation to the named discriminatees. As demonstrated above, this finding by the ALJ was erroneous. In an attempt to avoid having the Board find a violation under the *Capitol-EMI Music* standard, in its Answering Brief, Respondent Jacobson ignores the specific factual findings by the ALJ and claims that Jacobson had no knowledge or reason to know of Aim Royal's unlawful intent. *Resp't Jacobson Br*. at 6. This assertion is contrary to the ALJ's specific findings.

1. Jacobson knew or should have known that Aim Royal did not hire Bolaños, Gonzalez, McMillan, and Aizu for unlawful reasons, and consented to Aim Royal's conduct.

The evidence, as found by the ALJ shows that Jacobson knew, or should have known, that Aim Royal's decision to not hire, or consider for hire, the alleged discriminatees was for unlawful reasons, and that Jacobson acquiesced in Aim Royal's unlawful actions. As to the efforts by Luis Bolaños and Gustavo Gonzalez to secure employment at Aim Royal through Jacobson, the ALJ specifically found that, on July 14, when Bolaños and Gonzalez appeared at Jacobson's office, Chavez told them that Aim Royal was looking to hire workers through Jacobson, that Aim Royal had already hired two workers that day, and that they were going to hire two more. Chavez also told Bolaños that she wanted to send him for an interview at Aim Royal for an insulator position. While both Bolaños and Gonzalez were in the office with Chavez, three telephone conversations then ensued between Chavez and Lazaro Campos, Aim Royal's Field Superintendent. During one call, Chavez arranged for an interview with Gonzalez at 1:30 p.m., and marked "1:30" on his application. In a subsequent call with Campos, Chavez asked Gonzalez who sent him for the job; Gonzalez replied "Angel," and gave Chavez the business card of Angel Aizu, which indicated that Aizu was an organizer for

the Union. Chavez wrote the word "Union" on Gonzalez' application, and told Campos that Angel Aizu from the Union had sent Gonzalez. At the conclusion of the call between Chavez and Campos, Chavez told Bolaños and Gonzalez that Aim Royal was no longer interested, and that Gonzalez' interview was cancelled.[2] Neither Jacobson nor Aim Royal has filed exceptions to these specific factual findings. Moreover, neither party filed exceptions to the ALJ's finding that Chavez violated Section 8(a)(1) by telling Bolaños and Gonzalez that they lost employment opportunities because of their Union support.

Similarly, McMillan also arrived at Jacobson's offices on July 14, gave Chavez his application, and was scheduled for an interview with Aim Royal. Chavez then interrogated McMillan, in violation of Section 8(a)(1), by asking him how his application would affect his Union status. Later that day, after the telephone calls with Campos discussed above, Chavez called McMillan and told him that Aim Royal had backed out of the interview. Again, no party filed exceptions to these findings of fact or to the ALJ's legal conclusion that Chavez illegally interrogated McMillan. Likewise, when Aizu turned in his completed application to Chavez on July 15, Chavez asked Aizu if he was in the Union or part of a union.[3] Aizu was also never hired or referred for work.

Under these facts, as found by the ALJ, there can be little argument about the fact that Chavez clearly knew, or should have known, of Aim Royal's unlawful motivation relating to these discriminatees. Aim Royal and Jacobson were hiring; interviews were scheduled for Bolaños, Gonzalez, and McMillan; Campos used Chavez to interrogate the applicants and uncover their Union status; and then their interviews were cancelled. Moreover, it is undisputed that Chavez never protested, or otherwise exercised any contractual right to resist,

[2] Facts involving Gonzalez, Bolaños, McMillan, and Aizu are taken from pages 13 through 16 of the ALJD.
[3] The Acting General Counsel has filed exceptions to the ALJ's failure to find that Chavez' questioning of Aizu violated Section 8(a)(1).

Aim Royal's unlawful conduct. Accordingly, contrary to Jacobson's contention, the ALJ erred in not finding a violation.

C. Jacobson was hiring or had concrete plans to hire at the time the discriminatees applied for work.

In trying to avoid a violation, Jacobson again ignores the ALJ's specific findings, and attempts to argue that the open positions at Aim Royal had been filed before the discriminatees applied for work with Jacobson. *Resp't Jacobson's Br*. at 6. However, the undisputed facts as found by the ALJ show that, on the morning of July 14, when Bolaños and Gonzalez arrived at Jacobson's office, Chavez told them that Aim Royal was looking to hire workers through Jacobson, that Aim Royal had already hired two workers that day, and were going to hire two more. (ALJD at 13-14) The ALJ specifically discredited the testimony by Campos and Chavez that the discriminatees were not hired because of Campos' claim that he had already hired another two employees that day. (ALJD at 14-15) No exceptions have been taken to these specific, and correct, factual finding by the ALJ.

Accordingly, the credited record evidence establishes that, when the discriminatees applied for employment at Jacobson, Aim Royal and Jacobson were hiring, or had concrete plans to hire, at least two more workers. See, *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000) (to establish a refusal to hire violation the General Counsel must show, in part, that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct). Therefore, Respondent Jacobson's claim to the contrary is without merit.

II. CONCLUSION

Based on the foregoing, the Board should reverse the ALJ's erroneous rulings and find that Respondents committed the additional violations as set forth in the Acting General Counsel's Exceptions.

Dated at Phoenix, Arizona, this 16th day of July, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT JACOBSON STAFFING'S ANSWERING BRIEF in AIM ROYAL INSULATION, INC. and JACOBSON STAFFING, L.C., JOINT EMPLOYERS, Case 28-CA-22605 et al., was served by E-Gov, E-Filing, E-Mail and overnight delivery via United Parcel Service on this 16th day of July 2010, on the following:

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