

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

FERGUSON ENTERPRISES, INC.,

Respondent

-and-

Case No. 7-CA-52306

JOSEPH LAPHAM, an Individual,

Charging Party

**REPLY BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent has filed Exceptions to the decision of the Administrative Law Judge and a supporting brief in this matter. The Counsel for the General Counsel has submitted an answering brief in support of the Administrative Law Judges decision. However, the Counsel for the General Counsel still has failed to refute, with substantial evidence, the Exceptions set forth by Respondent. In this Reply Brief, Respondent will point out the Counsel for the General Counsel's failure to satisfactorily address the key issues presented in the Respondent's Exceptions.

I. Counsel For The General Counsel Has Failed To Address The Uncorroborated Nature of Charging Party's Testimony

Exception 1 submitted by Respondent excepted the Administrative Law Judge's credibility determination regarding the May 26, 2009 meeting as it relates to the Counsel for the General Counsel's prima facie case. More pertinently, Respondent submitted that the Administrative Law Judge made credibility determinations that were not supported by substantial evidence. The sole piece of evidence relied upon by the Administrative Law Judge

was a single alleged comment during an alleged conversation that took place at a meeting on May 26, 2009 at the offices of Respondent. The alleged statement at issue was that Reynolds, Senior supposedly stated that the only reason the Reynolds, Junior crew was being suspended was because two members of the crew had filed prevailing wage claims.

The crux of Respondent's argument was that the Administrative Law Judge's credibility determination regarding the statement made at the May 26 meeting was inappropriate because, the alleged critical statement as testified to by Charging Party was uncorroborated, and in fact refuted by three other witnesses. This is one of those instances where a clear preponderance of the evidence does not support the Administrative Law Judge's findings. An Administrative Law Judge's findings that turn on express or implied credibility determinations take on a particular significance on review. *Slusher v NLRB*, 432 F.3d 715, 727 (7th Cir. 2005). Moreover, where witnesses' versions of events are at odds, credibility determinations must be examined with care. *Krispy Kreme Doughnut Corp. v NLRB*, 732 F.2d 1288 (6th Cir. 1984).

Here, the Counsel for the General Counsel wholly fails to address the uncorroborated nature of Charging Party's testimony in her answering brief. At no point in her answering brief addressing Exception 1 does the Counsel for the General Counsel even state the word "uncorroborated," and this highlights the Counsel for the General Counsel's failure to address the primary focus of Respondent's Exception 1.

The Sixth Circuit has made clear that, "The uncorroborated testimony of an interested party does not amount to substantial evidence of an unfair labor practice." *NLRB v Container Corporation of America*, 649 F.2d 1213, 1216 (6th Cir. 1981). Furthermore, the Sixth Circuit has stated:

While recognizing that credibility determinations are generally left to the Board, *this court has declared itself unwilling to uphold*

unfair labor practice findings that rest upon the uncorroborated testimony of persons who stand to receive back pay if the findings are upheld. See, *NLRB v Norbar, Inc.*, 752 F.2d 235, 241 (6th Cir. 1985); *Union Carbide Corp. v NLRB*, 714 F.2d 657, 661-62 (6th Cir. 1983); *Delco Air Conditioning Div. v NLRB*, 649 F.2d 390, 393 (6th Cir. 1981) (Emphasis added).

Counsel for the General Counsel cannot refute that Charging Party is the only witness who testified that Reynolds, Senior actually made this critical statement. In fact, two other discriminatees set forth two completely different versions of the events, both stating that Reynolds, Senior made no such statement, and one version where he was not even present at the meeting. The testimony of fellow discriminatees Lewis and Reynolds, Junior completely contradicts the Charging Party's testimony and therefore renders it uncorroborated. Nowhere in Counsel for the General Counsel's answering brief does she even reference the contradictory testimony of Lewis and Reynolds, Junior. This is because there is no plausible response.

The only cursory attempt to defend the uncorroborated nature of Charging Party's testimony was to attempt to call into question the testimony of Gwendolyn Young. It should be noted that Young testified that Reynolds, Senior was not at the meeting of May 26. When referencing the meeting of May 26 regarding who was present, she testified as follows:

Q. Who was present at the meeting with you when you administered these disciplines?

A. Fred Erdman. (Tr. Pgs 640-641).

When asked who from management was present at the meeting to administer discipline to the discriminatees, Ms. Young testified that Fred Erdman was the only person there, and that Reynolds, Senior was not. Counsel for the General Counsel questions why the Respondent did not inquire regarding this on direct examination. It was, and still is, Respondent's position that Reynolds, Senior was not at the meeting of May 26. Therefore, it does not make sense that

Respondent would have to inquire on direct examination as to something that never happened. If Respondent did not assert Reynolds, Senior was at the meeting, then it stands to reason, there would be no reason to inquire of Young what statements Reynolds, Senior allegedly made.

Again, this is simply the Counsel for the General Counsel attempting to escape the fact that the sole piece of evidence set forth in support of her prima facie case, and relied upon by the Administrative Law Judge, is the uncorroborated testimony of Charging Party. Pursuant to the explicit law set forth in the Sixth Circuit, the uncorroborated testimony of a Charging Party is not substantial evidence and should not support the finding of an unfair labor practice.

II. Counsel For The General Counsel Has Failed To Prove That Respondent Was Aware Of The Alleged Protected Concerted Activity

The Respondent enumerated in Exception 2 that the Administrative Law Judge inappropriately relied solely upon uncorroborated testimony to determine that Counsel for the General Counsel set forth a prima facie case. In order for Counsel for the General Counsel to meet her burden in establishing a prima facie case, she must prove (1) that the employee engaged in protected concerted activity; (2) *that the employer knew of the concerted nature of the activity*; (3) that the concerted activity was protected by the Act; and (4) that the adverse action taken by the Respondent was motivated by the employee's protected activity. *Cibao Meat Prods.*, 338 NLRB 934 (2003)(Emphasis added). Counsel for the General Counsel has not proven that Respondent *knew of* the concerted nature of the alleged activity.

In its Exceptions brief, Respondent systematically outlines the fact that the Administrative Law Judge relied upon evidence which does not support his conclusion that Respondent knew of the alleged "concerted" nature of the alleged protected activity. In her answering brief, Counsel for the General Counsel simply reiterates the same facts that were outlined by Respondent in support of its argument. In fact, Respondent inserted the

Administrative Law Judge's entire recitation of his reasoning in a separate block quote, which for expediency is again noted below:

When these facts are viewed collectively, I conclude that the Respondent knew of the concerted nature of the prevailing wage claims of Lapham and Hall before the suspension notices were prepared on May 22. Lapham informed Reynolds, Sr. but he was going to file prevailing wage claims. Thereafter, he filed such a complaint with Hall. Thus, when Respondent was notified by letter that both Hall and Lapham had filed prevailing wage claims it was clear that the filing of Hall's claims arose from Lapham's announced efforts to initiate such conduct. To find otherwise would strain credulity in my view. I would have to find that Hall and Lapham, even though similarly situated as the only non-union employees working daily on the same crew, independently filed prevailing wage claims at the same time. In reaching my conclusion, I note that there is no evidence whatsoever to controvert the testimony of Lapham regarding what he stated to Reynolds Senior. regarding his intention to file prevailing wage claims and Reynolds Senior's admissions that the suspensions were motivated because 'you guys' filed prevailing wage claims.... (ALJ Decision, pg. 17, Lines 34-46).

At no time in the Administrative Law Judge's reasoning does he indicate one scintilla of evidence that Charging Party ever specifically informed Reynolds, Senior of Hall's involvement in the decision to file prevailing wage claims, or even mention Hall's name at all in their alleged conversation. Again, the Administrative Law Judge has made a finding with no facts in the record to support it. In response, Counsel for the General Counsel has simply restated the Administrative Law Judge's reasoning, but fails to indentify any specific piece of evidence or testimony that specifically states that Charging Party informed Reynolds, Senior that both he and Hall were going to file prevailing wage claims.

Moreover, Counsel for the General Counsel also states that Reynolds, Senior's alleged comment on May 26 supports the Administrative Law Judges decision, but this again fails to address Respondent's Exception. In his opinion, the Administrative Law Judge states that there

is no evidence whatsoever to controvert the testimony of the Charging Party regarding what he said to Reynolds, Senior regarding his intent to file a claim, or that Reynolds, Senior stated that the reason for the suspension was because “you guys” filed prevailing wage claims (ALJ Decision, pg. 17, lines 42-46). Again, Respondent does not refute that Charging Party informed Reynolds, Senior of his intent to file a prevailing wage claim, but there is no evidence in the record to support a finding that he also informed Reynolds, Senior that Hall was also filing.

Respondent has filed an Exception to the Administrative Law Judge’s statement that there is no evidence to controvert Charging Party’s statement regarding the alleged comment by Reynolds, Senior on May 26. As stated above, Charging Party’s testimony is completely uncorroborated, when two other discriminatees set forth versions of the event that are substantially different than Charging Party’s. Instead of addressing this Exception, Counsel for the General Counsel has just reiterated the Administrative Law Judges argument and fails to address the Respondent’s argument.

There is simply no substantial evidence in the record to establish that Respondent knew of any protected concerted activity at the time of the alleged incident. The only evidence that exists is the uncorroborated testimony of Charging Party, which on its own, cannot support the finding of an unfair labor practice pursuant to the law of the Sixth Circuit.

III. The Administrative Law Judge Failed To Follow The Board’s Rules, Section 102.45(a) In Addressing The Suspension And Layoff of Cook, Lewis, and Reynolds, Junior

In Exception 3, Respondent asserts that the Administrative Law Judge failed to comply with the Board’s Rules, Section 102.45(a), when he failed to include any findings of fact or evidentiary basis for his decision on the issue of the other discriminatees entitlement to relief. The Administrative Law Judge only restated the law on this issue and enumerated a conclusion. This does not comply with the Board’s Rules.

The Board's Rules, Section 102.45(a), requires that decisions "contain *findings of fact*, conclusions, and *the reasons or basis [for them]*, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations [on] what disposition of the case should be made." *See also*, Statements of Procedure, Section 101.11(a). (Emphasis added). Decisions which fail to make *specific factual findings* regarding issues raised by complaints, and which fail to include *analysis of contentions*, do not satisfy the obligations imposed on judges and may be remanded. *See, Webb Furniture Enterprises*, 272 NLRB 312, 312 (1984); *See also, Aramark Corp.*, 353 NLRB No. 98 (2009) (Emphasis added).

In his decision, the Administrative Law Judge spends only one paragraph of his decision in making a conclusory statement that Cook, Lewis and Reynolds, Junior are entitled to relief as discriminatees. However, at no time in the limited paragraph spent on this issue, does the Administrative Law Judge set forth one piece of evidence, documentary or otherwise to support this finding.

In response, Counsel for the General Counsel implicitly admits that the Administrative Law Judge did only spend one paragraph of his opinion on this issue. In an attempt to assist the Administrative Law Judge, where his opinion failed to comply with the Board's Rules, Counsel for the General Counsel states that the Board should look throughout the remainder of Administrative Law Judges decision regarding "Respondent's failed *Wright Line* defenses" to find or grasp for support for this conclusion. This concept should fail.

Counsel for the General Counsel cannot rearrange the pieces of the puzzle once they have already been assembled. The Administrative Law Judge assembled his decision in a deliberate manner. It cannot be denied that the Administrative Law Judge made a short conclusory statement when addressing this issue and failed to incorporate any factual support for his

decision. By informing us to “search” through the rest of the opinion to potentially tell us what the Administrative Law Judge did not, at the point he should have, does not comport with the Board’s Rules. Counsel for the General Counsel can attempt to rearrange the puzzle of the Administrative Law Judge’s decision, but this does not excuse the Administrative Law Judge from failing to follow the Board’s Rules.

CONCLUSION

Respondent filed Exceptions to the Administrative Law Judge’s decision regarding certain credibility determinations he made and the impact of those decisions on whether Counsel for the General Counsel proved her prima facie case. In support of her prima facie case, Counsel for the General Counsel relied upon the uncorroborated testimony of Charging Party to establish that Respondent knew of any protected concerted activity at the time of the alleged unfair labor practice. Moreover, the Administrative Law Judge made an inappropriate credibility determination regarding Charging Party’s testimony on this issue, when it was uncorroborated, and in fact refuted by three other witnesses. The Sixth Circuit has stated that the uncorroborated testimony of a Charging Party cannot equate to substantial evidence to support an unfair labor practice finding. Moreover, the Administrative Law Judge has failed to comply with the Board’s Rules, by failing to incorporate factual findings and evidence in support of his conclusions.

In answering Respondent’s Exceptions and Brief in Support of Exceptions, the General Counsel has failed to satisfactorily explain away these key inadequacies of the Administrative Law Judges decision.

For these reasons, Respondents submits to the Board that the Administrative Law Judge erred in his decision, that the decision should be reversed, and that the unfair labor practice and complaint should be dismissed.

Respectfully submitted by:

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CERTIFICATION OF SERVICE

I hereby certify that on Thursday July 26, 2010, a copy of the foregoing *Reply Brief in Support of Respondent's Exceptions to Administrative Law Judge's Decision*, together with a copy of this *Certification of Service*, were served upon the following parties/attorney(s) of record by "E-Filing," electronic mail (where applicable) and regular U.S. mail at their stated business address(es).

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Under penalty of perjury, I declare that the foregoing is true to the best of my information, knowledge and belief.

/s/Kathryn L. Johnston
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