



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
**REGION 7**

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June 20, 2011

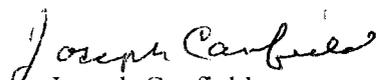
Lester Heltzer, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> St., NW  
Washington, DC 20005-3419

Re: Random Acquisitions, LLC  
Case 7-CA-52473

Dear Sir:

Enclosed is Counsel for the Acting General Counsel's Answering Brief to Random Acquisitions L.L.C. Exceptions to the Decision of the Administrative Law Judge. As indicated on the last page of the document, copies have been served on all parties of record.

Very truly yours,

  
Joseph Canfield

Counsel for the Acting General Counsel

Enclosures

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

**RANDOM ACQUISITIONS, L.L.C.**

Respondent

**and**

**Case 7-CA-52473**

**SHERRIE CVETNICH, Charging Party**

An Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF  
TO RANDOM ACQUISITIONS, L.L.C.'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**BACKGROUND**

Respondent owns and operates Heritage Towers, an office building in Battle Creek, Michigan. Linda Tessin has served as the operating manager of Heritage Towers since 1994. Linda Tessin's daughter Sherrie Cvetnich worked at the facility as a banquet employee and cleaning common areas in the building. Theresa Burge, no relative to Tessin, performed the same work. Tessin's son Eric Cvetnich worked at the building as a maintenance employee. There were no other employees working there.

In August 2008, Timothy Hogan purchased the building and became the Employer. Tessin remained the building operating manager, but on September 25, 2009, Hogarth Joseph, a friend of Hogan, was put in overall charge of the building. (Tr. 53,

344) Paragraph 8 of the Complaint which issued in this matter (GC Ex. 1 (c)) alleges that “On October 16, 2009 Respondent terminated its employees the Charging Party (Sherrie Cvetnich), Eric Cvetnich and Teresa Burge.” On March 21, 2002, the Administrative Law Judge issued his decision (ALJD), finding that these terminations occurred on October 16, 2009, and violated Section 8(a)(1) of the Act.

### **RESPONDENT’S EXCEPTIONS**

On June 8, 2011, Counsel for the Acting General Counsel was served Random Acquisitions. L.L.C.’S Exceptions to the Decision of the Administrative Law Judge.<sup>1</sup>

#### **Exception No. 1**

Respondent’s Exception No. 1 contends that the Administrative Law Judge (ALJ) improperly relied on Respondent’s Answer to paragraph 8 of the Complaint.

On March 13, 2011 Respondent filed with the Board a Motion for Leave to Amend Answer to Conform to the Evidence. To date, the Board has not yet ruled on Respondent’s motion. In effect, Respondent’s Exception No. 1 renews that motion, and attempts to withdraw its answer to the Complaint and now asserts that not only were Sherrie Cvetnich, Eric Cvetnich and Teresa Burge terminated prior to October 16, 2009, but that Sherrie Cvetnich and Eric Cvetnich were not statutory employees.

Respondent’s initial Answer to the Complaint (GC Ex. 1 (g)) submitted on July 21, 2009, admitted to paragraph 8 of the Complaint. In an Amended Answer to the

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<sup>1</sup> The copy of Respondent’s exceptions received by Counsel for the Acting General Counsel does not indicate compliance with paragraph 102.46(j) of the Board’s Rules and Regulations, series 8, as amended, in that it does not indicate that the Charging Party was served with a copy of the exceptions.

Complaint, submitted on September 28, 2009, just two days before the start of the trial, Respondent again admitted to paragraph 8 of the Complaint. (GC Ex. 1(L)). At the start of the trial, Respondent changed its answers to Complaint paragraphs 1, 2 and 3(a), (b), and (c) from denials to admissions. (Tr. 7-8) Yet, Respondent made no request to change its answer to any other paragraph of the Complaint. Thus, Respondent failed to challenge either the date the employees were terminated or the fact that they were employees.

Respondent declined the ALJ's offer to make an opening statement explaining its position or defense to the Complaint allegations prior to the introduction of any testimony. (Tr. 16). On two separate occasions during the trial, Respondent again declined to make a statement regarding its position on the Complaint allegations, despite being asked to do so by the ALJ. (Tr. 99-102, 212) It was not until Respondent submitted its Brief to the Administrative Law Judge, after the conclusion of the trial, that Respondent, for the first time, argued that Sherrie Cvetnich and Eric Cvetnich were not employees because the building manager Linda Tessin is their mother, and that Eric Cvetnich was a supervisor because he assertedly hired his son Zach to work at the building.

Respondent now seeks to amend its Answer by the circular route of asking the Board to allow it to belatedly amend its answer to conform to the evidence. In part, Respondent contends this would not prejudice the Acting General Counsel.

Respondent is incorrect in contending that an amendment to Respondent's answer would not be prejudicial to the Acting General Counsel. To the contrary, because Respondent admitted the date of the terminations and the status of the discriminatees as

employees in its answer, and thus did not dispute these allegations, Counsel for the Acting General Counsel did not submit certain evidence which supported the date of the terminations as being October 16, 2009, and the status of Sherrie and Erik Cvetnich as employees within the meaning of the Act. Further, Counsel for the Acting General Counsel relied on the Respondent's answer relating to both the date of the terminations and the status of the alleged discriminatees in his brief to the Administrative Law Judge. Thus, on page 18 of the brief, Counsel for the Acting General Counsel stated:

Hogan also insists that they (the alleged discriminatees) were fired on October 3 when he instructed Joseph to fire them. In its answer to the Complaint, Respondent admits the employees were terminated on October 16. (GC Ex. 1(1)).

While Counsel for the Acting General Counsel did further argue facts refuting Hogan's claim that the employees were fired prior to October 16, he also relied on Respondent's Answer to the Complaint. Further, in reliance on Respondent's Answer to the Complaint, Counsel for the Acting General Counsel's Brief to the Administrative Law Judge did not address the status of the alleged discriminatees as statutory employees.

Section 102.23 of the Board's Rules and Regulations gives the Board discretion to allow a respondent to change its answer after the hearing. However, in *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005) the Board, citing *Vencure Ancillary Services*, 334 NLRB 965, 969 (2001) enf. denied on other grounds 345 F.3d 318 (6<sup>th</sup> Cir. 2003), concluded that an attempt by a respondent to amend its answer when raised for the first time in its post hearing brief to the administrative law judge "was untimely raised." See also *T. Steel Construction, Inc.*, 351 NLRB 1032 (2007); *Oakwood Healthcare* 348 NLRB 686 (2007). Further, the ALJ specifically found Respondent's answer admitting

the status of Sherrie and Eric Cvetnich as employees is binding. The ALJ cited *D.A. Collins Refractones*, 272 NLRB 931 (1984) where the Board found “the judge was correct in holding that a statement in a party’s pleading is an admission.” While Section 102.23 of the Board’s Rules and Regulations provides that the Board may allow an employer to change its answer after the hearing, the Board should not permit Respondent to do so in this case. Respondent had ample opportunity to move to change its answer either before or during the trial. To allow Respondent to change its answer at this point would create an injustice against both the Acting General Counsel and the alleged discriminatees.

Respondent’s Exception No. 1 contends that Sherrie and Eric Cvetnich are not employees within the meaning of the Act. While Respondent did state the grounds for contending that Sherrie and Eric Cvtneck are not employees in its brief to the ALJ, contrary to Section 102.46(b)(1) the Board’s Rules and Regulations, Series 8, as amended, Respondent’s Exception No. 1 fails to concisely state the grounds for contending that they are not employees.

Respondent’s Exception No. 1 further contends that Sherrie and Eric Cvetnich and Teresa Burge were discharged prior to October 16, 2009. Respondent’s Exception No. 1 does state the grounds for contending that the alleged discriminatees were discharged prior to October 16, 2009. In effect, Respondent contends that the alleged discriminatees were terminated prior to that date because part-owner Timothy Hogan directed Hogarth Joseph to terminate them. On October 5, 2009, Joseph called Tessin and directed her to terminate Sherrie Cvetnich and Burge. Tessin testified that she convinced Joseph that she could not do the work alone. Joseph agreed that the hours of Sherrie

Cvetnich and Teresa Burge would be reduced to 20 hours a week and they would only work on banquets. (Tr. 378-79) Tessin then informed Sherrie Cvetnich and Burge of the change. (Tr. 378-79) Tessin testified that thereafter Sherrie Cvetnich and Burge only worked banquets. (Tr. 386) Both Sherrie Cvetnich and Burge verify that their hours were cut to 20 hours a week, and during the last two weeks of their employment they only worked banquets. (Tr.392, 398)

The ALJ found that neither Tessin, nor Hogan and Joseph were credible witnesses (ALJD p 22, fn. 74) and specifically declined to credit either Joseph or Tessin regarding this phone conversation (ALJD, *Id.*) Rather the ALJ also noted that Respondent's oral argument at hearing supported the conclusion that while Respondent was contemplating firing the alleged discriminatees, no action was taken until October 16. (ALJD, p. 22, L 18-20) Respondent makes no claim that Eric Cvetnich was terminated prior to October 16, 2009. and there is absolutely no evidence to support the claim. (ALJD, p 22, fn 73)

### **Respondent's Exception No. 2**

Respondent's Exception 2 contends that the alleged protected, concerted activity of the alleged discriminatees on October 16, 2009, could not have been the reason for their discharge because they were terminated prior to that date. In support of this claim, Respondent argues the same evidence which it claims supported Exception No. 1. In effect, Exception No. 2 is a corollary of the same argument Respondent advanced in support of Exception No. 1, and should be dismissed for the same reasons.

### **Respondent's Exception No. 3**

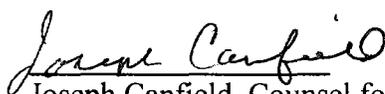
Respondent's Exception No. 3 claims that even if the alleged discriminatees were not terminated prior to October 16, 2009, their protected, concerted activity was not the basis of their discharge because they were terminated for other reasons. Specifically, Respondent claims that the alleged discriminatees were discharged because of: the dire financial circumstances of Respondent; Hogan's distrust of the alleged discriminates; and, the actions of Linda Tessin. Respondent avers that Linda Tessin: (1) issued a contract for a canopy repair to a company which employed her son Mike Cvetnich; (2) issued a check to her son (the company that repaired the canopy) instead of issuing a check to Consumer Energy; (3) opened credit accounts; and (4) on one occasion forged the signature of Tim Hogan. Finally, Respondent notes that a sheriff's deputy went to Heritage Towers in order to execute on Respondent's property to satisfy a garnishment against Linda Tessin.

The allegations in Exception No. (3), including the claims that the alleged discriminatees were terminated because Respondent was experiencing dire financial circumstances and the actions of Linda Tessin, fail to comply with Section 102.46(c)(1) of the Board's Rules and Regulations, Series 8, as amended, in that Respondent does not present a concise statement of the case containing all that is material to the consideration of the questions presented. In any event, the ALJ correctly rejected these arguments as pretextual. (ALJD, p 24, L 2-3) The ALJ found that Respondent may have had grounds to be concerned about Tessin's management of the property, but Respondent took no action against her or the alleged discriminatees until the employees engaged in protected, concerted activity on October 16. (ALJD, p 22, L 18-24, p. 23, L 4-11)

## CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge and find, based on the record evidence, that the Respondent violated Section 8(a)(1) of the Act in discharging Sherrie Cvetnich, Eric Cvetnich and Teresa Burge on October 16, 2009, because of their protected, concerted activity.

Dated at Detroit, Michigan this 20<sup>th</sup> day of June, 2009

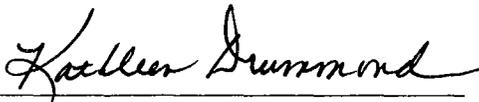


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I certify that on June 20, 2011, I served Counsel for the Acting General Counsel's Answering Brief to Random Acquisitions, L.L.C.'S Exceptions to the Decision of the Administrative Law Judge on the following parties of record:

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