

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

M&R INSULATION SYSTEMS, LLC

and

Case No. 4-CA-37864

INTERNATIONAL ASSOCIATION OF HEAT
& FROST INSULATORS & ALLIED
WORKERS, LOCAL NO. 23 HARRISBURG
PA, AFL-CIO

David Faye, Esq., Counsel for Acting General Counsel.

Walter H. Flamm, Esq., Counsel for the Respondent.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Philadelphia, PA on July 14, 2011, pursuant to a Complaint and Notice of Hearing issued on March 31, 2011,¹ by the Regional Director for Region 4 of the National Labor Relations Board (the Board), against M&R Insulation Systems, LLC (the Respondent), alleging it had violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that on or about September 10, 2010, the Respondent unlawfully ordered alleged discriminatee and Union organizer, William B. McGee, to leave its premises, threatened to call the police to have him removed, threatened McGee's safety and the safety of his family, and, thereafter, called the police on McGee because the latter had previously filed unfair labor practice charges against it. In a timely-filed answer to the complaint, the Respondent denies engaging in any unlawful conduct.

All parties at the hearing were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and the Respondent, I make the following²

¹ The unfair labor practice charge underlying the complaint was filed on December 16, 2010, by International Association of Heat & Frost Insulators & Allied Workers, Local No. 23, Harrisburg Pa, AFL-CIO (the Union).

² Counsel for the General Counsel has also filed an unopposed Motion to Correct Transcript, to correct certain grammatical and other inaccuracies in the record. As the Motion is unopposed, the Motion to Correct Transcript is hereby granted.

He arrived there at around 1 p.m., rang the doorbell, and was met by DaBronzo. What happened next is the subject of disagreement between McGee and DaBronzo.

5 McGee's account is that when DaBronzo opened the door, the latter stepped outside and closed the door behind him. McGee told DaBronzo that he wanted to speak with Respondent's owner, M. DaBronzo, and that, before explaining that he was there to refresh his application, DaBronzo, in a very excited manner and seemingly upset, told him, "I can't fucking believe you came here, you got balls to come here, You got the balls to come here, you got balls – you got to be fucking kidding me, you got the balls to come here after you and your family stole money from me, I want you off this property right now." (Tr. 25). McGee claims that 10 as he turned around and began walking away, DaBronzo told him in a loud and hurried voice that he was going to call the police. McGee told DaBronzo that he could do so if he wished, but that he was there simply to "refresh" his application. McGee then resumed heading down Respondent's driveway to his car when he heard DaBronzo remark, "You better watch your back – you better watch your wife and children, there's nowhere you can hide." DaBronzo, 15 McGee claims, went on to say that he (McGee) "should be in a ditch right now, you shouldn't even be standing right now."

20 McGee recalls seeing M. DaBronzo come out of the house towards the end of this encounter and ask DaBronzo if he was Bill McGee. DaBronzo answered it was and, directing himself at McGee, told the latter to watch his back and his wife and family. At that point, McGee continued walking toward his car but heard DaBronzo say, in a loud excited voice, "You better hear me.!" McGee recalls hearing M. DaBronzo tell her husband that he could not say those things out in public, and urged him to come into house. DaBronzo, however, repeated his 25 refrain that McGee had "balls coming here," that McGee had come a long way, and that if he, DaBronzo, received "one piece of mail" from McGee, the latter and his wife and children would be dead. McGee then told DaBronzo to have good day, turned, and continued heading towards his car. (Tr. 26-27, 29). McGee admits he did not call Respondent's office prior to the visit, and denies using the "F bomb" during this incident. According to McGee, the entire incident lasted 30 some five minutes.

DaBronzo, as noted, had a somewhat different recollection of what transpired between him and McGee that day. (TR 55). According to DaBronzo, at around 1 pm on September 10, his doorbell rang and, when he answered it, he encountered McGee who offered him a business 35 card and stated he was there on a marketing campaign. DaBronzo, admittedly "irate" at seeing McGee, recalls telling McGee that he had some "fucking nerve" being there, that he had no business being there, and directed McGee to immediately get off his property. (TR. 60). He further recalled saying to McGee, as the latter turned and began walking away, that he should be sure to tell his wife and kids that he (McGee) had stolen money from M&R Insulation. 40 DaBronzo remembered repeating this same remark to McGee several times as the latter continued walking away towards his car. DaBronzo claims that at one point, McGee turned and said "fuck you" to DaBronzo, patted himself on the back as if congratulating himself for having said it, and then continue on to his car and drive away. (TR. 57-58).

45 DaBronzo claims that his remark to McGee about the latter having stolen money from M&R Insulation had to do with McGee's poor performance during his brief employment with Respondent. Thus, asked to explain what he meant when he accused McGee during this incident of stealing, DaBronzo answered, "What I'm referring to is, any employee who works for me, who shows up late, leaves early, does a horrible job as an insulator, doesn't call his time in, 50 or does call his time in for hours not worked, or he's in a lunch shop somewhere one o'clock in the afternoon because he's tired and exhausted and calls his time in for hours -- and told me he worked that day, that's stealing." (TR. 58).

To support his claim that McGee was a slow or horrible worker, DaBronzo referenced complaints he purportedly received from employees about McGee being a slow worker and “deliberately dragging his feet.” DaBronzo, however, never identified who these employees
5 were that complained to him, nor were any of these unnamed and unidentified employees called as witnesses to corroborate his account. DaBronzo also accused McGee of having “sabotaged” a job Respondent was doing at an elementary school in Allentown, PA. He claims that McGee was identified by customers as the one who had been working at the jobsite at the time, and that Respondent had to go back to the site and redo the work. Again, DaBronzo provided no
10 specifics regarding this incident. Thus, he did not identify the nature of work done at the site or the customers who complained to him about McGee’s work, nor how the work had been “sabotaged” by McGee. (TR. 77-78).

As to his admission of having accused McGee, during the September 10, encounter, of
15 stealing from the Company, DaBronzo denied that the accusation was in any way related to the \$20,000, which he characterized as a “fine” (TR. 59), the Respondent paid out to McGee as part of the NLRB settlement, and also denied threatening McGee or his family with physical harm during this encounter. DaBronzo does claim that McGee used the “F-bomb” during their
20 exchanges, and believes that McGee came to his home to instigate some incident and to harass them. He explained that McGee had “harassed our property in the past, hired private detectives to sit outside our home; monitored our phone calls; followed my wife and children;[and] threatened, along with other business agents, our firm because we are not a union company.” (TR. 61). DaBronzo, however, never claimed that McGee had, at any time during the
25 September 10, incident threatened him, his wife, family, or property. Rather, DaBronzo’s version reflects that McGee simply turned, cursed at him, and then patted himself on the back.

DaBronzo’s very general claim that, in the past, he and his family had been harassed in the above-described manner by McGee, is, like his claim that McGee had been a poor
30 employee who stole from Respondent, unsubstantiated and strikes me as purely self-serving. DaBronzo provided no specifics regarding these purported incidents of harassment and threats by McGee and/or other union agents. Thus, there is no evidence to indicate when or how often these incidents may have occurred, which other Union organizers may have been involved in these incidents, and whether or not the police were called. Given rather serious nature of these
35 alleged incidents as described by DaBronzo, which included harassment of his property, and the following of his wife and children, and the monitoring of his phone calls, one would reasonably have expected DaBronzo to report these rather troubling, possibly unlawful, incidents to the police. Yet, there is no evidence to indicate, nor does DaBronzo claim, that he did so. Notably, M. DaBronzo, who also testified on Respondent’s behalf, made no mention in her testimony of McGee ever following her and her children, of her house or business calls
40 being monitored by McGee, or of being threatened by McGee. She did admit that the police were never called during any of these alleged past incidents. (TR. 90).

M. DaBronzo also provided some testimony regarding the September 10, incident. She recalls hearing the doorbell ring at her home, and following DaBronzo to the door. When the
45 latter opened the door, she looked out and noticed McGee standing there, but was not quite sure who he was. She asked DaBronzo if McGee was the person who had previously worked for Respondent, but before receiving an answer, she observed DaBronzo and McGee “going off on their own like a tangent.” She contends she immediately told DaBronzo to “shut the door” because McGee made her nervous and scared her. M. DaBronzo explained that she was
50 apprehensive because she runs her business out of her home, and has small children living there. She further explained that there are, at times, suspicious cars on the side streets, that there might be other people “on the site,” and that she did not think McGee had the courage to

come to the house by himself, and felt McGee's visit was "a setup." She purportedly believed that there were others around associated with McGee who were there to "do mean things." (TR. 81-82). She again instructed DaBronzo to shut the door.

5 M. DaBronzo claims DaBronzo told her that McGee was there as part of some marketing campaign, and believes she heard DaBronzo say to McGee, "You have a lot of nerve coming here, you know; do your wife and kids know you're a liar and a cheat, and a thief?" She recalled telling DaBronzo again to shut the door, and heard each say to the other, "fuck you" during this verbal altercation. The entire incident, M. DaBronzo contends, lasted no more than 35 seconds. 10 She claims that soon after the incident, she and DaBronzo looked out the window to see if McGee's car was still around, explaining that she did not know for sure if "they're around," presumably referring to McGee and others, and that if they were, it would be a "precursor to something bad happening." It was at this point, she contends, that she called the police to report the incident, and to let them know what happened because there purportedly was a history of things happening at her home.⁴ A police report was prepared by a police officer, 15 Kenneth Stinson, and has been received into evidence as GC Exh. 3. The report reflects that McGee was not present when Stinson arrived, and that M. DaBronzo complained to Stinson that McGee "began harassing her" when he arrived at the DaBronzos' home/office. According to the report, Stinson called McGee and left a message in his voice mail stating that McGee's presence at the DaBronzo home was not welcomed. McGee acknowledged receiving such a message from a police officer. 20

Asked to explain what she meant by a "history of things," M. DaBronzo described how McGee had misrepresented himself when he was first hired, by telling her about some of his personal family problems, and how, after M. DaBronzo mentioned, during the hiring process, 25 that her Company was a non-union operation, McGee replied that his wife was also against unions. M. DaBronzo claims that this was the first time McGee had come to her house but that, because she had had prior court dealings, with McGee, presumably referring to the prior settled NLRB matter, she knew that McGee did not visit the house for "friendly reasons." She expressed her view that McGee's purpose in coming to her house was to cause her Company further problems with the NLRB, and to try to cause the Company financial hardship. (TR. 90). 30

While portraying herself as sympathetic to, and favoring, unions in general, M. DaBronzo testified how one particular union, Local 89, with which she had established a collective bargaining relationship, had abrogated its contract and relationship with the Respondent, 35 causing the Respondent to lose customers when the latter refused to do business with a nonunion firm. M. DaBronzo explained that Local 89's decision to abrogate its relationship with the Respondent adversely and detrimentally affected the Respondent's business operations. (TR. 95-96). 40

⁴ The police report, in evidence as GC Exh. 3, contains, in quotes, a statement made by M. DaBronzo to the police officer who responded, that McGee "began harassing her" on his arrival at Respondent's office. M. DaBronzo, it should be noted, never testified to being harassed by 45 McGee at any time during the September 10, 35-second, incident. Nor did DaBronzo ever claim, in his version of the incident, to having heard or seen McGee "harassing" M. DaBronzo at any time during his visit. In fact, DaBronzo admitted that McGee never addressed himself to M. DaBronzo. (TR. 65). The conspicuous absence of any mention by M. DaBronzo or her husband, DaBronzo, in their respective sworn testimony, that McGee "harassed" anyone during 50 his visit, leads me to believe that M. DaBronzo was not being truthful in reporting to the police officer that she was "harassed" by McGee during this incident.

M. DaBronzo admitted she did not care for and, indeed, disliked McGee, but contends she felt this way not because of McGee's affiliation with the Union, but rather because he had "lied, cheated, and stole" from Respondent, and "did not perform the work he was hired to perform." (TR. 98). She described McGee as a "liar," and, by way of illustration, described one particular incident involving McGee which M. DaBronzo claimed was the "most egregious incident" she had with the former. (TR. 86).

The incident, according to M. DaBronzo, began when she received a call late one night from McGee from the latter's home claiming that there were some union guys outside his house and he did not know what to do. DaBronzo contends she told McGee that he did not have to talk to the them if he did not want to, and that if they were making him uncomfortable, he could call the police or "911". McGee, she contends, abruptly told her he had to go and hung up the phone. M. DaBronzo claims she tried to reach McGee again, and then expressed to her husband, DaBronzo, that there might be trouble at McGee's house, that the union guys might be harassing him, that she was afraid McGee might be in trouble, and proceeded to call "911" and gave them McGee's address which was some 70-80 miles away. She subsequently learned that McGee, in fact, was a union organizer, that the entire incident was apparently a joke of some sort, and that McGee had "lied" and misrepresented himself to her, which she felt was a very mean thing for McGee to do. (TR. 87).⁵

DaBronzo, with whom M. DaBronzo purportedly discussed the incident soon after McGee allegedly hung up the phone, was not asked about this incident either during his direct examination or on rebuttal. Nor was McGee questioned about this alleged incident during his examination. DaBronzo's claim that such an incident occurred, therefore, stands uncorroborated.

B. Credibility resolutions

There is no disputing, given the above-described testimony, that an incident occurred in front of the DaBronzos' house/office on September 10, between DaBronzo and McGee, with some minimal involvement by M. DaBronzo. However, there is, as noted, disagreement as to what was said between DaBronzo and McGee during this brief encounter. On whole, I found McGee's version of events to be more credible and reliable than that proffered by DaBronzo and his wife, M. DaBronzo. Several factors lead me accept McGee's account over that provided by the DaBronzos.

First, it is plainly evident, from their testimony and demeanor on the witness stand, that DaBronzo and M. DaBronzo both harbored a deep-seated resentment, animosity, and hostility towards McGee. DaBronzo readily admitted becoming "irate" just from seeing McGee at his

⁵ M. DaBronzo also described an incident, soon after McGee began working, when McGee purportedly failed to report for work on Monday and Tuesday, and did not call in to explain his absence. She contends DaBronzo tried reaching McGee during those two days, was unable to do so, but did reach him on Wednesday wherein McGee told him his father was "gravely ill." DaBronzo told McGee not to be concerned, that he stood by McGee, and that the latter should take care of his family first. Neither DaBronzo nor McGee were questioned about this incident. Assuming, arguendo, that this incident, and the exchange between M. DaBronzo and McGee, in fact occurred, there is no indication that McGee was not being truthful with the DaBronzos in explaining his absence to them. To the contrary, M. DaBronzo's account suggests that DaBronzo was fine with the explanation provided by McGee and encouraged him to "take care of his family first." (TR. 85).

front door on September 10, without knowing, or bothering first to ascertain, why McGee was there in the first place. M. DaBronzo admitted during her testimony that she could not stand to see or even look at McGee, and did not even want to know him. Both described McGee as a liar, cheat, and a thief who stole from them, and attributed their dislike for McGee to what they claim was his poor work performance while employed by Respondent. According to DaBronzo, it was McGee's poor work performance, and his alleged theft of service, e.g., receiving pay for hours not worked, which led him, during the September 10, incident, to, among other things, accuse McGee of being a thief. DaBronzo's explanation finds no support in the record and is simply not credible.

Thus, there is no evidence, other than the DaBronzos' rather self-serving testimony, which I find to be tainted by their extreme dislike of McGee, to show that McGee was, in fact, a slow and poor performer during his brief employment tenure with Respondent. As noted, none of the unnamed employees who purportedly complained to DaBronzo about McGee's slow work were called to corroborate his claim. Nor was documentary evidence, such as warnings, disciplinary write-ups, time and attendance/tardiness records, produced by the Respondent to substantiate the DaBronzos' description and characterization of McGee as a poor or lackluster employee, or to confirm their claim that McGee had somehow "stolen" from them by seeking and obtaining payment for hours not worked. No claim has been made here by the Respondent that it does not prepare, issue or maintain any such disciplinary, or time and attendance/tardiness, records on employees.

McGee, not surprisingly, and in my view credibly, denied the DaBronzos' joint description of him as a poor employee. McGee, in fact, testified that DaBronzo had, on several occasions, praised his work performance. Thus, he recalled one time, while working at a South Mountain Middle School jobsite, receiving a phone call from DaBronzo and being told by DaBronzo during that conversation that he was doing a good job. On another occasion, while at the same jobsite, DaBronzo complimented McGee, as he handed him his paycheck, on doing "one hell of a job." McGee further recalled that, on a different occasion, when he asked DeBronzo for a day off, the latter told McGee not to worry, that his job "was secure with us."

Notably, DaBronzo did not expressly deny telling McGee that his job was "secure," explaining that this sounded like something he would say to his employees. As to the comments about McGee doing a good job attributed by the latter to DaBronzo while at the South Mountain Middle School jobsite, DaBronzo did not outrightly deny making them, stating simply that he could not recall whether or not he made them. McGee expressly denied having had a poor attendance record, and insisted that he always called in when instructed to do so. (TR. 111).

I found McGee's more detailed and unchallenged description of the compliments he received from DaBronzo regarding his work to be more believable and credible. His testimony stands in sharp contrast to the vague, very general, and unsubstantiated claims made by the DaBronzos regarding McGee's work performance. Accordingly, DaBronzo's proffered explanation at the hearing for why he accused McGee of being a thief during the September 10, incident, is rejected as not credible. No credible testimonial or other evidence was produced by the Respondent to substantiate the DaBronzos' claim that McGee stole money from Respondent, or that McGee was a bad or slow employee. In fact, the Respondent's willingness to rehire McGee several months later for one day lays bare Respondent's and the DaBronzos' claim of McGee as a poor worker, for it is inconceivable that the Respondent would be inclined to rehire, even for one day, an employee who, as claimed by DaBronzo, allegedly "stole" money

from Respondent, and “sabotaged” a work site.⁶

5 Having credited McGee’s account of the September 10, incident over the less reliable and untrustworthy versions proffered by the DaBronzos, I find, as testified to by McGee, that he, indeed, visited Respondent’s office to “refresh” or update his employment application, and that, on seeing and recognizing McGee as a former employee and the one responsible for the prior NLRB charges filed against Respondent, DaBronzo immediately ordered him off the property without bothering to ascertain the reason for McGee’s visit, and threatened to call the police on McGee to have him removed. I further find, consistent with McGee’s credited account, that
10 DaBronzo also threatened McGee and his family with unspecified harm by telling McGee that he should watch his back and should also watch his wife and children, that if he, DaBronzo, received one piece of mail from McGee, the latter and his wife and children would be dead, and that McGee had no place to hide and that McGee should already be dead in a ditch and not be standing right now.

15 With these findings in mind, I turn next to the complaint allegations that the above remarks directed at McGee were unlawful.

20 C. Discussion

1. The Section 8(a)(1) allegations

25 The complaint, as noted, alleges, and I agree and find, that the Respondent violated Section 8(a)(1) of the Act when DaBronzo ordered McGee to leave Respondent’s premises during the September 10, incident, when he threatened to call police to have McGee removed, and when he threatened McGee and his family with physical harm.

30 Section 8(a)(1) of the Act makes it unlawful for an employer “to interfere with, restrain, or coerce” employees in the exercise of the rights guaranteed them in section 7. The test for interference, restraint, or coercion is an objective one, and depends on whether “the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act.” *Santa Barbara New-Press*, 357 NLRB No. 51, slip op. at 25 (2011); *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227-1228 (2000); *Westwood Health Care Center*, 330 NLRB 935, 949 (2000).

35 Here, DaBronzo’s threat to call the police on McGee if he did not leave the premises clearly interfered with, and would reasonably have tended to restrain and coerce, McGee in the exercise of his Section 7 right to apply for re-employment with Respondent. As a former employee and applicant for renewed employment with Respondent, McGee enjoyed the same
40 protections afforded employees under Section 7 of the Act. *Kenmore Electric Company*, 355 NLRB No. 173, slip op. at 4 (2010). While the Respondent contends that McGee’s intent on arriving at its facility on September 10, was to cause problems and to instigate an incident, and that DaBronzo’s comments were prompted by McGee’s poor performance and alleged theft while employed by Respondent, no credible evidence was produced by Respondent to show
45 that McGee’s purpose in going to Respondent’s office that day was anything other than to “refresh” his job application.

50 ⁶ DaBronzo sought to explain away his decision to rehire McGee on December 31, by claiming he was simply following instructions from his attorney who advised him to rehire McGee in order to limit the Respondent’s backpay liability. He nevertheless admitted that he was under no legal obligation to do so.

McGee, as noted, had previously worked for Respondent and had faxed a letter of interest in employment, with his resume, to Respondent several months earlier. I am convinced that McGee, having received no response to his letter from Respondent, decided to personally visit the Respondent on September 10, to, as he credibly explained, “refresh” his application. Nor, in any event, does it matter what DaBronzo’s reason may have been for ordering McGee to leave the premises, and threatening to call the police if he didn’t, for the test for determining whether certain conduct constitutes interference, restraint, or coercion is, as noted, an objective one not dependent on the subjective intent of the actor, DaBronzo in this case. *Kenmore Electric*, supra.

In short, by immediately directing McGee to leave the Respondent’s premises without so much as affording him an opportunity to explain his presence, and threatening to call the police to have him removed after learning that McGee was there to refresh his employment application, the Respondent, through DaBronzo, interfered with, restrained, and coerced McGee in the exercise of his Section 7 rights, and thereby violated Section 8(a)(1) of the Act. Whether or not McGee may have felt coerced by DaBronzo’s threat is of no real import, for the coercive nature of such a threat is not determined by its success or failure but rather whether, as stated, the threat would reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights. *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999).

Further, DaBronzo’s threat to physically harm or cause death to McGee and his family if he, DaBronzo, were to receive just one piece of mail from McGee, was also coercive and unlawful under Section 8(a)(1) of the Act. The record reflects that the only piece of mail most recently sent by McGee to Respondent was his November 9, 2009, letter and resumé seeking re-employment, which I find was indeed faxed to and, in all likelihood, received by the Respondent. While there is no evidence of any other mail having been sent by McGee to Respondent, it is quite likely that the Respondent may have received some mail relating to the prior settled unfair labor practice matter from the Board. Indeed, having denied ever receiving McGee’s November 9, 2009, letter and resumé, I find it more likely than not that DaBronzo was objecting to receiving any union or NLRB-related mail from McGee or from the NLRB relating to any further charges that might be filed by McGee. Again, the underlying motivation for DaBronzo’s threatening remark to McGee and his family is of no real consequence, for, as stated, the question here is whether such a threat would have the tendency to interfere with, restrain, or coerce McGee in the exercise of his Section 7 rights. I find that it would and that the threat violated Section 8(a)(1) of the Act, as alleged.

2. The Section 8(a)(1), (3) and (4) allegations arising from M. DaBronzo’s conduct

It is further alleged in the complaint that the Respondent also violated Section 8(a)(1), (3), and (4) of the Act when M. DaBronzo called the police on McGee after the latter had already left the Respondent’s premises. Thus, Counsel for the General Counsel contends that M. DaBronzo’s decision to call police on McGee was motivated by her animosity to McGee as a Union organizer and in response to his efforts to gain re-employment so as to continue his “salting” campaign.

Regarding the Section 8(a)(3) allegation, in determining whether certain employer conduct violates this provision of the Act, the Board applies the causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s protected conduct was a motivating factor in the employer’s

adverse employment action. To satisfy this burden, the General Counsel must show that the employee in question, here job applicant McGee, was engaged in protected activity, that the Respondent had knowledge of the employee's protected activity, and that the Respondent bore animus towards the employee's protected activity. See, *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). If the General Counsel is able to make a prima facie case of discrimination, the burden under *Wright Line* shifts to the employer to demonstrate it would have taken the action even in the absence of any protected activity by the affected employee.

Here, according to his credited account of the September 10, incident, McGee went to Respondent's office for the sole purpose of "refreshing" his job application, and made that fact known to DaBronzo after the latter threatened to call the police on McGee if he did not immediately leave the premises. (See TR. 26-27). Thus, there is no question but that McGee was engaging in lawful, protected activity when he visited Respondent's facility on September 10, and that the Respondent was fully aware of such activity by McGee prior to M. DaBronzo calling and filing a report with the police. That Respondent bore animus towards McGee is readily apparent from its unlawful eviction of him from its premises, threatening to call the police on him if he did not leave even after learning that he simply wanted to refresh his employment application, and thereafter threatening McGee and his family with physical harm. Respondent's stated explanation, provided by DaBronzo, for evicting McGee, namely, because McGee had been a poor employee and who stole money from Respondent, was, as previously noted, not credible and lacked other evidentiary support.

Indeed, it is readily apparent from M. DaBronzo's testimony that her reason for calling the police after McGee departed had nothing to do with McGee's alleged poor past performance or alleged theft of service during his prior employment with Respondent. Rather, her testimony makes patently clear that it was McGee's involvement with the Union and his association with other union supporters, the unfair labor practice charges McGee had previously filed against Respondent, and her belief that McGee's September 10, visit was intended to provoke Respondent into doing something that could trigger more unfair labor practice charges and financially harm the Company, that prompted her to call the police. (TR. 90-91).

M. DaBronzo, however, also suggested that she called police because she feared that McGee and "the other people he associates with" might return and could very well be on the way," suggesting implicitly that she acted out of concern for her and her family's safety. I find this explanation unconvincing, for there is nothing in the record, including the DaBronzos' own testimony, to indicate that McGee had, either by words or deed, threatened the DaBronzos in any way during his September 10, visit, or that he had done so on prior occasions. Nor is there any evidence in the record, or in the DaBronzos' testimony, to indicate that McGee expressed an intent to return to the DaBronzos' home, either alone or with other Union organizers, following his eviction. Consequently, M. DaBronzo's suggestion that she called police out of fear that McGee might return alone or with others to possibly harm her or her family is not rooted in anything McGee may have said or done during his September 10, visit, or during any prior contacts he may have had with the DaBronzos, and is, in my view, wholly unfounded. Rather, I find her explanation in this regard, like her claim that McGee had been a poor employee who stole from Respondent, and her statement in the police report that McGee "harassed" her during his September 10, visit, not to be true. Indeed, if anyone had cause to be concerned for his safety it was McGee, not M. DaBronzo or her family, for it was McGee and his family who were directly threatened by DaBronzo with physical harm during his September 10, visit, threats, which I find, M. DaBronzo was fully aware of since she witnessed the entire incident.

In sum, I find that M. DaBronzo called the police on McGee not out of concern for her

safety, but rather in retaliation for what she and her husband, DaBronzo, perceived to be McGee's audacious attempt to "refresh" his application for employment with Respondent after having filed unfair labor practice charges against it for his alleged prior unlawful discharge, and collecting \$20,000 in backpay as part of a settlement agreement, which the DaBronzos' deemed to be "stolen" money.⁷ Further, given M. DaBronzo's explanation that she believed McGee came to the house to provoke an incident which would enable him to file more charges with the Board, it is reasonable to believe that, in calling the police on McGee and having the officer convey to McGee that he was not to return to the Respondent's office, DaBronzo intended to discourage and hopefully prevent McGee from seeking re-employment or engaging in any further "salting" or other Union organizing activities. Accordingly, I find that Counsel for the General Counsel has made a strong prima facie showing that M. DaBronzo's September 10, decision to call the police on McGee after the latter had already left was unlawfully motivated by antiunion animus.

The Respondent, I further find, has offered no credible explanation to rebut Counsel for the General Counsel's prima facie case. The only explanation proffered by Respondent, through M. DaBronzo, that she called the police after McGee had left out of fear that McGee might return alone or with other Union associates to possibly harm her or her family is, as noted, not credible and one which I find to be clearly pretextual. It is well-settled that a respondent cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation. *Kenmore Electric*, supra, slip op. at 9; *Jesco, Inc.*, 347 NLRB 903, 907 (2006). Nor is M. DaBronzo's belief that McGee was intent on provoking some incident which might trigger additional charges being filed with the Board against Respondent a legitimate defense. While McGee's purpose in seeking to have his employment application "refreshed" may have been part of an effort to renew a "salting" campaign among Respondent's employees, "salting itself is protected, concerted activity, even if it is intended in part to provoke an employer to commit unfair labor practices." *Kenmore Electric*, supra, slip op. at 4. Accordingly, I find that Counsel for the General Counsel's prima facie case remains intact, and that the Respondent violated Section 8(a)(3) and (1) of the Act, as alleged, when M. DaBronzo called the police on McGee following his September 10, visit to Respondent's facility.

The complaint, as noted, further alleges that M. DaBronzo's conduct in calling the police on McGee also violated Section 8(a)(4) and (1) of the Act. Section 8(a)(4) prohibits adverse action against an employee, or, as in this case, a former employee and job applicant, "who has filed charges with, or given testimony before, the Board. As with a Section 8(a)(3) allegation, A *Wright Line* approach is used for analyzing alleged violations of Section 8(a)(4) of the Act, and the remedy is the same. *Newcor Bay City Division*, 351 NLRB 1034, fn. 4 (2007). Thus, Counsel for the General Counsel here has the initial burden of proving that McGee's conduct in utilizing the Board's processes, e.g., filing charges with the Board, was a motivating factor in M. DaBronzo's decision to call the police on McGee.

Counsel for the General Counsel here clearly has made a prima facie showing of Section 8(a)(4) discriminatory conduct towards McGee. As evident from the discussion above regarding the Section 8(a)(3) allegation, the Respondent was fully aware of McGee's status as a

⁷ DaBronzo's initial angry remark to McGee, on first seeing him at his front door on September 10, that McGee must be "fucking kidding" and had "balls" coming to his house after McGee and his family stole money from him, a clear reference, as previously found, to the \$20,000 backpay Respondent had paid to McGee, makes patently clear that the DaBronzos were both surprised and angered by McGee's visit, and viewed his appearance as impudent and audacious.

Union organizer and knew full well that McGee had earlier filed charges with the Board which led to a settlement agreement and a \$20,000 backpay award for McGee. It is also fairly apparent that the Respondent held McGee personally responsible for its problems with the NLRB, for, in her testimony, M. DaBronzo recounted how she had had prior court dealings with McGee, a clear reference to the charges McGee had filed against Respondent with the Board, and emphasized that she had lost count of the “many NLRB charges” McGee had filed against Respondent. (TR. 90-91). Thus, one can reasonably infer from M. DaBronzo’s apparent exasperation at having to respond to the “many NLRB charges” filed against it by McGee, which presumably includes the charges which led to the \$20,000 backpay award to McGee, that the DaBronzos’ were fed up with having to respond to said charges.

I am convinced that M. DaBronzo’s decision to call the police was therefore motivated, at least in part, by the charges McGee had previously filed against Respondent, and that she did so in the hope that the directive from the police officer for McGee to keep away from the DaBronzos’ home would intimidate and deter McGee from filing any further charges against Respondent with the Board. Accordingly, I find that Counsel for the General Counsel has demonstrated that M. DaBronzo’s conduct in calling the police was designed to retaliate against McGee for having filed charges with the Board, and to deter him from filing any further charges.

The Respondent, for its part, has presented no credible evidence to rebut Counsel for the General Counsel’s prima facie case. Its only explanation, provided by M. DaBronzo, that she called the police out of fear that McGee might return to possibly harm her or her family, was, as noted, not credible. Having failed to present a credible explanation for M. DaBronzo’s conduct, I find that the Respondent, as alleged in the complaint and asserted by Counsel for the General Counsel, violated Section 8(a)(4) and (1) of the Act when M. DaBronzo called the police on McGee.

Finally, I agree that M. DaBronzo’s decision to call the police on McGee independently violated Section 8(a)(1), since such conduct would reasonably tend to interfere with, restrain, or coerce McGee in the exercise of his Section 7 right to apply for employment like any other employee without regard to his status as a Union organizer or “salt.” *Kenmore Electric*, supra, slip op. at 6.

Conclusions of Law

1. The Respondent, M&R Insulation Systems, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Association of Heat & Frost Insulators & Allied Workers, Local No. 23, Harrisburg Pa, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By ordering McGee to leave its premises, threatening to call the police to have him removed, and threatening to physically harm McGee and his family, the Respondent violated Section 8(a)(1) of the Act.

4. By calling the police on McGee, after evicting him from its premises, because of his activities on behalf of the Union, and to retaliate against him for having filed unfair labor practice charges with the Board, the Respondent violated Section 8(a)(1), (3), and (4) and (1) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify McGee, in writing, that it does not object to McGee “refreshing” or updating his job application.

5

(b) Within 14 days after service by the Region, mail, at its own expense, a copy of the attached notice marked ‘Appendix’¹⁰ to all its current employees at their home addresses, and post copies of the notice at its facility in Newtown, PA. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 10, 2010.

10

15

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

20

Dated, Washington, D.C. October 20, 2011

25

George Alemán
Administrative Law Judge

30

35

40

45

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

50

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interfere with, restrain, or coerce William McGee or any of you in the exercise of your right to engage in protected activity by ordering you to leave our premises, threatening to call the police to remove you from our premises, threatening you with physical harm, or by calling the police on you.

WE WILL NOT call the police on William McGee or any of you in order to discourage you from engaging in Union or other protected activity, or to retaliate against you for having filed an unfair labor practice charge against us with the National Labor Relations Board, or deter you from doing so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify William McGee, in writing that we do not object to his “refreshing” or updating his job application with us.

M&R INSULATION SYSTEMS, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

615 Chestnut Street, One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106-4404
Hours: 8:30 a.m. to 5 p.m.
215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.