

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

CF TAFFE PLUMBING CO., INC.

Case No. 13-CA-45890

and

MICHAEL SCHMIDT, An Individual

Sylvia L. Taylor, Esq., for the General Counsel.

Daniel M. Purdom & Brian R. Zeeck, Esqs., (Hinshaw & Culbertson, LLP)

Lisle, Illinois, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

Arthur J. Amchan, Administrative Law Judge. On September 1, 2011, the Board issued a decision and order affirming the rulings, findings and conclusions, as modified, in my November 8, 2010 decision in this case. The Board's decision was not published. I am therefore attaching the substantive part of the initial decision to this supplemental decision since my findings in this phase of the case are more easily understood in context.

In that initial decision I concluded that Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of Charging Party Michael Schmidt on February 6, 2010. However, I concluded that Schmidt forfeited his entitlement to reinstatement by sending a threatening text message to co-worker Joseph O'Brien on May 6, 2010, which I found O'Brien immediately forwarded to Respondent. I also concluded that Schmidt's entitlement to backpay was tolled as of May 6, 2010

When filing exceptions to the initial decision, Charging Party Schmidt appended phone records in support of his claim that he did not send O'Brien the May 6, 2010 text. Respondent filed a motion to strike those phone records, which the Board granted on January 14, 2011.

On January 25, 2011, Charging Party Schmidt filed a motion to reopen the record, which the Board granted. On September 1, 2011, the Board directed me to issue revised findings of fact and conclusions of law as to whether Schmidt sent O'Brien the May 6 text message and to reconsider, ***in the event I find that Schmidt sent O'Brien the May 6 text message***, the Charging Party's fitness for future service in light of the Board's February 14, 2011 decision in *Hawaii Tribune-Herald*, 356 NLRB No. 63 (aka *Stephens Media, LLC*). I interpret that Board's Order as mandating the traditional remedy of reinstatement and backpay in the event that I conclude that Schmidt did not send O'Brien this message.

In *Hawaii Tribune-Herald*, the Board reiterated an earlier decision, to wit, that an employer seeking to be excused from its obligation to reinstate or pay backpay to a discriminatee for misconduct which was not a factor in the discriminatory action, has a heavier burden than when it is merely seeking to justify the original determination. Such an employer must prove the misconduct was "so flagrant as to render the employee unfit for further service,

or a threat to efficiency in the plant.” This rule is based on the proposition that the Board takes into account the natural tendency of an unlawfully discharged employee to react to his or her discharge with some vehemence.

5 In any event, since I conclude that Schmidt did not send the text message on May 6, 2010, or at any other time, I am simply obliged to order the traditional remedies.

Charging Party Schmidt did not send Joseph O'Brien any text messages on May 6, 2010

10 I conducted a supplemental hearing on October 17, 2011, which lasted one hour. Pursuant to my suggestion and the agreement of all parties, I conducted the hearing by video conferencing from Washington, D.C. All the parties, witnesses and the court reporter were in the Board's Regional Office in Chicago. Transcript references to the supplemental hearing have an "S" in front of them. The General Counsel, Respondent and the Charging Party filed briefs
15 with respect to the supplemental hearing. I have read these briefs and considered them.

The General Counsel presented the testimony of Kelly Smith, a supervisor for Verizon Wireless, and records that Ms. Smith obtained from Verizon Wireless' records regarding Charging Party's Schmidt's cell phone usage between April 22, 2010 and May 20, 2010, G.C. Exh. 9. Ms. Smith's testimony and these records establish conclusively that Schmidt did not
20 send text messages to anyone on May 6, 2010.

*I credit Schmidt's testimony that he did not send
the "your days are over" text to O'Brien on any date*

25 At the October 17, 2011 supplemental hearing, Respondent called Schmidt as an adverse witness. At first Schmidt refused to answer Respondent's counsel's question as to whether he sent the "your days are over" text on any date other than May 6, STr. 22-24. After I directed him to answer, Schmidt categorically denied ever sending O'Brien this message. At
30 the initial hearing, Respondent confronted Schmidt with copies of three text messages, Exh. R-3, one of which was the "your days are over" text. Schmidt testified first that he had never seen the text; then that he didn't remember sending the text and then that he believed that he had not sent the text, Tr. 103. He acknowledged that he sent O'Brien a text at 1:33 p.m. on February 19, stating:

35 What ever do you no I have copies of all wjo from feb 2009 to feb 2010 I made copies of yourS ray pat randy smart ant I go tell everyone youre a plumber youre a labor just a scab you will be out a job soon. I have a job.¹

40 Schmidt testified that he did not recall sending O'Brien a text at 8:06 a.m. earlier the same day, stating "Keep talking your shit and see what I do."

I credit Schmidt's testimony that he did not send O'Brien the "your days are over" text message at any time and discredit the contrary testimony presented by Respondent for reasons
45 stated below. I would also note in this regard that in my initial decision I found Respondent's witnesses to be generally incredible when testifying as to reasons for which Schmidt was discharged.

¹ This text is on two pages of Exh. R-3, but is obviously one message, Tr. 105.

At the supplemental hearing, Respondent presented the testimony of Joseph O'Brien. He testified that the text message, "Your days are over starting tomorrow," was sent to him in late March or early April 2010. O'Brien was unable to specify the date on which he received this text. He testified that he immediately showed the text to Respondent's employee, Mark Plada, who was in the truck with him and then forwarded it Chuck Taffe, one of Respondent's partners. O'Brien testified that on May 6, Ted Taffe, Respondent's other partner, asked him to forward to him all the messages he had received from Schmidt, STr. 37-38. O'Brien testified that he did so. There is no evidence that O'Brien forwarded Ted Taffe any other text messages on May 6. O'Brien did forward two others to Chuck Taffe at 10:24 and 10:27 a.m. on March 6, 2010, R-3, which he testified were sent to him by Schmidt on February 19, 2010.

O'Brien's testimony about these messages at the initial hearing on August 30, 2010, appears at Tr. 250-256. O'Brien testified that he received between 5 and 10 text messages from Schmidt, including the one stating that "your days are over starting tomorrow." O'Brien testified that he forwarded these messages to Chuck or Ted Taffe. Respondent's counsel asked O'Brien, "Looking at the dates that's on these, do you believe the dates to be accurate?" O'Brien answered affirmatively, Tr. 252. He said nothing about forwarding the "your days are over" text 4-6 weeks after he received it from Schmidt. Moreover, it is important to note that by the time of the supplemental hearing in this case, Respondent knew that Schmidt was going to be able to prove that he did not send O'Brien any text messages on May 6. This is so in part because I required Schmidt to provide a copy of the relevant phone records to Respondent ten days prior to the supplemental hearing.

Mark Plada testified that he was in one of Respondent's trucks with O'Brien when O'Brien showed him this particular text message. He could not recall the date of this event other than it was "roughly a year and a half ago." He further testified that he advised O'Brien to go to the police. Plada did not testify that he saw O'Brien forward the text or that O'Brien told him that he was forwarding the text message to anyone.

At the initial hearing, O'Brien did not mention that Plada was with him when he received the text. In response to the General Counsel's question, Plada testified that he was driving Respondent's truck when O'Brien received this particular text, STr. 43. At the initial hearing O'Brien testified that, after receiving this text, he was on his way to the police station to get a restraining order, Tr. 256. However, he did not do so, Tr. 269. Plada did not testify about driving to a police station after this incident. I would also note that at the initial hearing O'Brien also did not mention forwarding the "your days are over" text to Chuck Taffe on the day that he received it.

Ted Taffe testified that he asked O'Brien to send him all the texts that he had received on May 6, because O'Brien was very upset. He said O'Brien sent the texts immediately. I would note in discrediting this testimony that O'Brien did not testify that this was a reason for him forwarding Ted Taffe the text on May 6. Moreover, it is improbable that O'Brien was very upset about a text message that had been sent 4-6 weeks earlier, which he had not reported to the police.

Chuck Taffe did not testify at the supplemental hearing. At the initial hearing he testified about receiving a number of text messages from Schmidt. Chuck Taffe also testified that he provided those texts to Respondent's counsel, Tr. 396-97. There are no texts sent directly by Schmidt to Chuck Taffe in the record. However, R-3 includes two text messages printed out by Chuck Taffe on March 6, 2010, which were sent to him by Joseph O'Brien, not Schmidt. However, there is no print out by Chuck Taffe of the "your days are over" text.

At the initial hearing, the General Counsel asked Chuck Taffe if he responded to any texts from Schmidt. He answered affirmatively and then testified as follows at Tr. 411:

5 Well, when Joe O'Brien forwarded me his text, what Mike said that, gosh, doctor shit, see what I'll do, or something like that. I texted Mike, please don't contact my employees. And he texted me something back along the lines, like I didn't contact him. He contacted me first.

10 That Chuck Taffe did not testify about receiving the "your days are over" text or receiving an email from O'Brien forwarding a text so threatening that O'Brien was on his way to a police station are further indications that he never received such a text from O'Brien.

Conclusions of Law

15 1. Respondent violated Section 8(a)(3) and (1) by terminating Michael Schmidt's employment on February 6, 2010.

20 2. Respondent violated Section 8(a)(1) of the Act by telling Michael Schmidt that because he filed or intended to file a charge with the NLRB that it would elicit testimony from its clients disparaging his work.

25 3. Respondent violated Section 8(a)(1) of the Act by telling Schmidt he was not part of Respondent's family because he had complained to the Union that Respondent was not complying with the terms of its collective bargaining agreement.

Remedy

30 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

35 The Respondent having discriminatorily discharged Michael Schmidt, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

45 The Respondent, CF Taffe Plumbing Co., Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

5 (a) Discharging or otherwise discriminating against any employee for engaging in activity reasonably perceived to be the enforcement of a right contained in a collective bargaining agreement.

(b) Telling any employee that because he or she filed or intended to file a charge with the NLRB that it would elicit testimony from its clients disparaging his or her work.

10 (c) Telling an employee that he or she was not part of Respondent's family because he or she had complained to the Union that Respondent was not abiding by its collective bargaining agreement with the Union.

15 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

20 (a) Within 14 days from the date of the Board's Order, offer Michael Schmidt full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

25 (b) Make Michael Schmidt whole for any loss of earnings and other benefits suffered as a result of the discrimination against him as specified in the remedy portion of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to Michael Schmidt's unlawful discharge/lay-off and within 3 days thereafter notify him in writing that this has been done and that his discharge will not be used against him in any way.

30 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this
35 Order.

40 (e) Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 13, 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
45 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

³ 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."

February 6, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

- 5 (f) 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.

Dated, Washington, D.C., November 10, 2011.

10

Arthur J. Amchan
Administrative Law Judge

15

APPENDIX A

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 discharge or otherwise discriminate against any of you for attempting to enforce a reasonably perceived violation of the rights accorded to you in a collective bargaining agreement.

WE WILL NOT tell any employee that because he or she filed or intended to file a charge with the NLRB that we will elicit testimony from our clients disparaging his or her work.

WE WILL NOT tell any employee that they are not part of our family because he or she complained to the Union that we are not complying with the terms of our collective bargaining agreement.

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, within 14 days from the date of this Order, offer Michael Schmidt full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Schmidt whole for any loss of earnings and other benefits resulting from his discharge and other discrimination, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Michael Schmidt and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CF TAFFE PLUMBING CO., INC.

(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.

The Rookery Building
209 South LaSalle Street, Suite 900, Chicago, IL 60604-1219
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

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, (312) 353-7170.

APPENDIX B

The initial decision (without superseded Conclusions of Law, Order and Notice)

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

CF TAFFE PLUMBING CO., INC.

Case No. 13-CA-45890

and

MICHAEL SCHMIDT, An Individual

Sylvia L. Taylor, Esq., for the General Counsel.

Daniel M. Purdom & Brian R. Zeeck, Esqs., (Hinshaw & Culbertson, LLP)
Lisle, Illinois, for the Respondent.

DECISION

Statement of the Case

Arthur J. Amchan, Administrative Law Judge. This case was tried in Chicago, Illinois, on August 30 and 31, 2010. Michael Schmidt filed the initial charge in this matter on March 8, 2010 and the General Counsel issued a complaint on May 18, 2010.

The Complaint alleges that Respondent laid off the Charging Party, Michael Schmidt, on February 6, 2010 and then discharged him on February 9, 2010 in violation of Section 8(a)(3) and 8(a)(1) of the Act. The Complaint also alleges that Respondent, by Chief Executive Officer Charles Taffe, violated Section 8(a)(1) on February 9, by threatening Schmidt that he would fabricate customer complaints if he did not withdraw his unfair labor practice charge and by telling him that he is not family because he “narced” Respondent out to the Union.

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is a plumbing contractor in Chicago, Illinois, where it annually performs services valued in excess of \$50,000 for various enterprises located in Illinois where such enterprises are directly engaged in interstate commerce. The Respondent admits,

⁴ The General Counsel’s unopposed motion to correct the transcript is granted. The word “narced” (as in narcotics) was mistranscribed as “knocked” at page 9, line 21; page 10, line 20 and page 35, line 24. Also “potable” was mistranscribed as “probable” at page 140, line 13. Page 339, line 23 should read “foreman scale,” rather than “plumbing scale.” Page 21, line 19 should read “get the F out of here.”

and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Chicago Journeyman Plumbers' Local Union No. 130, U.A., is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent is a family owned and operated plumbing business, which has been a signatory contractor with Chicago Journeyman Plumbers' Local Union No. 130, U.A. for years. In 2004, Edward "Ted" Taffe and Charles Taffe, who were journeymen in Local 130, took over the management of Respondent upon the death of their father. They have had a long-standing harmonious relationship with the Union. Respondent's work has consisted mainly of the maintenance of plumbing fixtures and piping in commercial and residential buildings.

In 2005, Respondent hired the charging party, Michael Schmidt, as a plumber. Although the manner in which Schmidt performed his job is an issue in this case, co-owner Charles Taffe admitted that Schmidt was excellent at pipe work, Tr. 401. There is no documentation that Respondent ever disciplined or even reprimanded Schmidt.

Laborer Joe O'Brien, who often worked with Schmidt, testified that Schmidt's work ethic was good, but then in response to a leading question, testified that Schmidt "cut corners" and was often in a rush to leave a job before it was adequately cleaned up, Tr. 231. Plumber Kevin McGuire, testified that he didn't have a problem with Schmidt, but then testified generally about customer complaints about Schmidt, Tr. 323. However, McGuire was unable to think of any specific examples, Tr. 324, 330.

As early as January 2009, Michael Schmidt began complaining to the Union, apparently anonymously at first, that Respondent was violating its collective bargaining agreement by allowing laborers to do work that should be done by plumbers, Tr. 141-43. Kevin Sherlock, a Vice-President of the Union, who is also a field representative for the Union's Pension and Welfare Fund, took note of these complaints and filed them away for consideration in the Fund's next audit of Respondent scheduled for December 2009.

In February 2009 Schmidt complained to Ted Taffe that he was tired of being sent home without work because laborers were doing plumbing work, Tr. 20-21. He demanded that Respondent pay him for showing up at Respondent's office for two hours and then being sent home. When Taffe refused, Schmidt went to the Union Hall and spoke to Business Agent Jimmy Coyne. Coyne told Schmidt to be smart and opined that Schmidt did not want to lose his job.

Schmidt also spoke to Pat Shea, a union business agent, about the laborers doing plumbing work.⁵ After Schmidt called Shea, Chuck Taffe called Schmidt and asked if he called the Union. Schmidt denied that he did so, Tr. 25.⁶

⁵ Neither Coyne nor Shea testified in this hearing; thus Schmidt's testimony about his conversations with them is uncontradicted. Moreover, Kevin Sherlock testified that Shea told him that Schmidt had been to the union hall to speak with Shea. I therefore credit Schmidt's testimony about his conversations with Coyne and Shea. Similarly, I credit Schmidt's uncontroverted testimony regarding his conversation with Ted Taffe in February 2009, a year before Schmidt was terminated.

⁶ At Tr. 378 Chuck Taffe testified that he did not suspect Schmidt as being the source of the Union inquiries regarding the laborers performing plumbing work in February 2010. He did not

In mid-December 2009 and January 2010, Schmidt called Sherlock between 6 to 12 times to inquire as to the progress of the audit. He complained to Sherlock specifically about Respondent's laborers, particularly Pat and Ray Johnston, doing plumbing work when plumbers were sent home without work, Tr. 149. Thus, by December 2009, Sherlock knew that Schmidt was the source of the complaints regarding Respondent's contractual violations. Although the auditors did not find any violations of the collective bargaining agreement, as alleged by Schmidt, it is clear that his allegations were at least to some extent well-founded, Tr. 196-99, 267.

Friday, February 5, 2010

Michael Schmidt reported to Respondent's shop at about 7:30 a.m. on Friday, February 5, 2010. He was not initially given a job assignment. A laborer, Randy Gumkowski, was given a job assignment, Tr. 26. Schmidt testified that Kevin McGuire told him there might be some work later at 5000 East End in Chicago. Schmidt testified that he stayed at the shop for 2-3 hours and then told McGuire to call if he received work for him, but that he was going to the Union Hall to complain that laborers were doing Respondent's plumbing work.⁷ Schmidt testified that McGuire never called him that day with a job assignment.

McGuire testified and confirmed that Schmidt complained about sitting around Respondent's shop for 2 hours without a job assignment on February 5. McGuire testified that shortly after Schmidt left the shop, work materialized and that he called Schmidt and that Schmidt "blew it off." He was not sure whether this job was the same job that he had told Schmidt might materialize before Schmidt left the shop.

Ted Taffe, one Respondent's co-owners, testified that the chief engineer of a residential building at 5000 East End in Chicago called him on the morning of February 5, and informed him that a leaking toilet that Schmidt had worked on the previous day was still leaking. Taffe testified further that the building engineer told him that he had to wait for the resident to let him into the apartment. Taffe testified that he told Kevin McGuire to take Schmidt to the job. Later, according to Taffe, McGuire called him to say that Schmidt had left the shop angry. Taffe also testified that his office manager, Barbara Olsen, informed him that Schmidt would not answer her calls to get him to go to the 5000 East End job.

I discredit Taffe's and McGuire's testimony. For one thing, in its position statement of March 31, 2010, Exh. G.C. – 3, Respondent did not claim, when recounting the events of February 5, that there was work available for Schmidt that he declined or did not perform because he would not take Respondent's calls.

Moreover, I find Schmidt's testimony that McGuire never called him more credible than McGuire's account. I find it implausible that Schmidt would refuse a job so quickly after waiting

contradict Schmidt's testimony about the telephone call in 2009.

Ted Taffe testified that Schmidt never complained to him that laborers were doing work that should have been done by plumbers. He further stated that it never occurred to him that Schmidt might be an anonymous complainer about this kind of thing, Tr. 463. I discredit this testimony. Ted Taffe did not specifically address Schmidt's testimony regarding their alleged conversation in February 2009; I therefore credit that testimony.

⁷ Schmidt testified that he met with Kevin Sherlock at the union hall on February 5. Sherlock denies this. I deem it unnecessary to resolve the conflict in their testimony.

2 hours for an assignment. I also decline to credit McGuire's testimony on any material issue in this case due to his apparent lack of candor with regard to his present status with Respondent. Although McGuire testified that he is currently a plumbing foreman for Respondent, the company's payroll records indicate that he has not worked for Taffe since May 2010, Tr. 321, 428, Exh. R-7. I infer that if McGuire was hiding the fact that he is no longer employed by Respondent, this may have influenced his testimony in this matter.

Respondent does not have a policy or workrule regarding how long an employee must wait at the shop for an assignment, Tr. 410. In February 2010, it did not have a policy as to how long an employee must remain on call if the employee does not have a work assignment. It does not pay its employees for the time spent at the shop waiting for an assignment. In response to a leading question from Respondent's counsel, Kevin McGuire testified that he made it clear to Schmidt that he wanted him to be available for an assignment on February 5, when Schmidt told him he was leaving, Tr. 345. I do not credit this testimony.

Saturday, February 6, 2010

On Saturday, February 6, 2010, before noon, Kevin Sherlock called Chuck Taffe, Tr. 377. Chuck Taffe told Sherlock that his office manager, Barbara Olsen, had told him that the Union was looking for more information regarding Respondent's use of its laborers.⁸ Sherlock discussed the Union's audit and mentioned that the Union had received a complaint that Respondent was using its laborers to do plumber's work in violation of the collective bargaining agreement, Tr. 150-51, 377. Sherlock testified that he did not identify the complainant.

Taffe testified he didn't suspect Schmidt. However, I discredit this testimony and to the contrary infer that Taffe inferred or in fact already knew that Schmidt was the person complaining to the Union. He gave no reason for his self-serving testimony that he suspected a different plumber. Moreover, Schmidt had been very open at the shop about his anger over this issue.⁹

At 5:21 p.m. on Saturday, February 6, 2010, after Chuck Taffe had spoken to Sherlock, Ted Taffe called Schmidt and left the following voice mail message:

Hi Mike, it's Ted

I was at the shop today and there is absolutely nothing on the board for next week.

Don't even bother coming in.

I don't know things are just shitty.

⁸ Sherlock had tried to reach Chuck Taffe on Friday and spoke to Respondent's office manager, Barbara Olsen, on that date. Sherlock testified that he was responding to a voice mail message from Taffe.

⁹ While Respondent's witnesses testified that Schmidt was angry and stormed out the shop on February 5, they did not confirm that he was upset about laborers getting work before he did. I find that his complaints were in fact about this issue. Laborer Joe O'Brien was assigned a job that day with another plumber while Schmidt waited for an assignment, Tr. 243. O'Brien's testimony and that of Ray Johnston at Tr. 212 also suggests that other laborers were also given work assignments on February 5, while Schmidt was at the shop.

If you want to call the Union and sign up for unemployment, that [is] up to you, but I'm just making calls right now to everyone.

The Union is giving me hassles on other stuff; it doesn't regard you, but I'm just going to be very slow for a while. I'll talk to you later.

G.C. Exh. 4.¹⁰

There would be no reason for Ted Taffe to mention "union hassles" to Schmidt apart from the fact that Taffe knew that Schmidt was the source of some of these problems.

After receiving this call, Schmidt called Ray Johnston, a laborer who has worked for Respondent for 22 years and who sometimes distributes job assignments to other employees. Schmidt asked Johnston if any other employees had received a call from Respondent informing them that there was no work. Johnston told Schmidt that nobody else had received such a call. Then Schmidt told Johnston that if he was being sent home because Respondent's laborers were doing plumbing work he was going to file a grievance and go to the National Labor Association (sic).¹¹ He told Johnston that there was no way he was going to sit at home while the laborers did his work.

Monday, February 8, 2010

Michael Schmidt went to the Union Hall at about between 7 and 7:30 on the morning of February 8 and talked to Kevin Sherlock about filing a grievance over his lay-off. He did not file such a grievance until April. Afterwards, Sherlock called Chuck Taffe and told him that Schmidt wanted to file a grievance over Respondent's use of laborers to do plumbers' work, Tr. 156. Taffe called Schmidt at about 9:00 a.m. and suggested they meet at a Denny's restaurant the next day, Tr. 33-4, 388.

Tuesday, February 9

Schmidt and Chuck Taffe met at a Denny's restaurant on the morning of February 9, Tr. 35, 388-91. Schmidt's account of their conversation is as follows:

A. Well, we both went in there and I sat down and he started talking. And he said I always considered us to be a family shop and I can tell you, you're not part of the family because you knocked¹² me out to the union. He also, and then I said to him if this is such a family shop, why would you send a licensed plumber home and have a non-licensed person do plumbing work? I go no family member would treat their family in that way. And basically he said, well, I'm here to try to make things right between us, and basically after that I told him that I already filed a charge yesterday with the National

¹⁰ From Ted Taffe's complaint about the Union hassles, I find that Chuck Taffe talked to Sherlock before Ted called Schmidt.

¹¹ I credit Schmidt's testimony that he initially called Johnston to determine whether anyone else had been told not to come in the following week. His testimony is far more plausible than Johnston's testimony that Schmidt called him out of the blue to tell him he was filing a grievance because the laborers were doing his work.

Schmidt did not file a charge with the Board until March 8, 2010.

¹² Schmidt said "narced" (as in narcotics), rather than "knocked," see footnote 1.

Labor Association.

And then Chuck Taffe said, well, and then he said, well, that's something else, we shouldn't be even talking then. And I said no, I can always drop the charge. And he said, well, how about I offer you two 40-hour checks or three 30-hour checks for severance if you drop the charge?

Q. Okay. Did you respond to that?

A. I didn't respond to it right away. And he goes, and if you don't drop the charge, I'm going to have my engineer buddies come up with letters about your work ability and that you're not allowed in the buildings, you know, that you've screwed up jobs basically, that I wasn't allowed in the buildings anymore.

Tr. 35-36.

Chuck Taffe testified that he asked Schmidt to air his grievances. Schmidt then compared each one of Respondent's plumbers to himself unfavorably. Taffe testified that then he told Schmidt that Respondent's customers did not want him to work at their facilities, particularly at 900 N. Michigan Avenue, where Schmidt had been involved with a massive water leak from a pipe only a week or so previously.

Taffe testified he then offered Schmidt several weeks of severance pay. He denied threatening to fabricate complaints from customers or anything similar as alleged in complaint paragraph V(a). I credit the essence of Schmidt's account of this conversation. I am persuaded by the testimony elicited by Respondent at trial that upon learning that Schmidt filed or intended to file a charge with the Board that it made a concerted effort to disparage his performance as its employee. Moreover, as discussed below, I find that at least some of this testimony is false. I therefore conclude that Respondent in fact told Schmidt that since he filed or was going to file a charge he was no longer a part of Respondent's family and that it intended to look for evidence with which to disparage him.

By threatening Schmidt with retaliation for his invocation of the Board's processes, Respondent violated Section 8(a)(1) as alleged, *Norris Concrete Materials*, 282 NLRB 289 (1986). Respondent also violated Section 8(a)(1) in equating Schmidt's attempt to enforce the collective bargaining agreement with disloyalty to Respondent by telling him he was no longer part of Respondent's family, *Hialeah Hospital*, 343 NLRB 391 (2004)

Schmidt's account does not make complete sense in that he had not filed a charge with the NLRB as of February 9. However, I find that Taffe did tell Schmidt that if there was any sort of proceeding regarding the circumstances of Schmidt's discharge that he would elicit testimony from customers denigrating Schmidt's job performance.

I make this determination because the reasons advanced by Respondent for laying-off or terminating Schmidt are pretextual. It is clear that he was laid off or fired in retaliation for his complaints to the Union about Respondent's use of laborers to do plumbing work. Moreover, the testimony Respondent elicited from a number of its clients, employees and former employees regarding Schmidt is not credible.

Respondent violated Section 8(a)(3) and (1) in terminating Michael Schmidt's employment

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken

place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The General Counsel met his initial burden; Respondent did not establish that it would have terminated Schmidt's employment absent his complaints to the Union.

Michael Schmidt engaged in activity protected by Section 7 of the Act in complaining to the Union about Respondent's use of its laborers to perform work that should have been done by plumbers pursuant to its collective bargaining agreement with Local 130.

As the Board stated in *Tillford Contractors*, 317 NLRB 68 (1995):

When an employee makes an attempt to enforce a collective bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act, *Interboro Contractors*, 157 NLRB 1295 (1966). An employee making such a complaint need not specifically refer to the collective-bargaining agreement. As long as the nature of the complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. *Bechtel Power Corp.*, 277 NLRB 882, 884 (1985); *Roadway Express*, 217 NLRB 278, 279 (1975); *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984).

I also find that Respondent knew that Michael Schmidt was complaining to the Union about its use of laborers to do plumbing work prior to Ted Taffe's call to Schmidt on the evening of February 6. Assuming that nobody at the Union had identified Schmidt as the source of the complaints, which I deem highly unlikely, I find that Respondent inferred that he was the complainant from Schmidt's constant complaints about this issue in the shop and his February 2009 conversation with Ted Taffe.

I infer animus and discriminatory motivation from the timing of the Schmidt's lay-off and discharge, coming within hours of Chuck Taffe's conversation with Kevin Sherlock and Schmidt's complaints at the shop on February 5. I also infer animus and a causal relationship between Schmidt's complaints and the end of his employment from Ted Taffe's reaction to his complaint in February 2009 and Respondent's pretextual reasons for his discharge.

Timing

The timing of Schmidt's termination supports a finding of a casual relationship with his complaints to the Union. Respondent's work had decreased markedly in the year prior to the termination. At any point during the year, Respondent could have laid Schmidt off given the alleged limitations on projects to which he could be sent. If he was in fact responsible for the flood at the John Hancock Center, Respondent could have fired him immediately. However, the one event that clearly precipitated Schmidt's termination was the conversation between Charles Taffe and Kevin Sherlock several hours prior to Ted Taffe's call to Schmidt on February 6. I find Respondent's testimony that it was planning to lay-off Schmidt prior to February 5, to be incredible.¹³

¹³ The Taffes testified that they planned to lay-off four employees, three laborers and
Continued

Pretext

Respondent contends that it laid Schmidt off due to poor economic conditions and because he was the most expendable plumber in its workforce. Respondent submits that work was slow and that many of its customers would not allow Schmidt on its jobsite. However, this contention is inconsistent with its repeated assertion that just prior to his termination, Schmidt had more hours of work than any other plumber, Tr. 176, 378. Moreover, this assertion is not supported by Respondent's reports to the plumbers union of the hours worked by its plumbers, G.C. Exh. 2.

Evidence supporting Respondent's contention that many of its customers would not allow Michael Schmidt to work on their sites

Respondent concedes that during Michael Schmidt's employment it never informed him that any of its customers requested or demanded that he not be sent to their facilities, Tr. 390, 403. However, at the hearing in this matter, Respondent presented three customer witnesses to so testify. The Taffes also testified about complaints they received from other customers about Schmidt's work. It is quite apparent that Respondent sought to build a case against Schmidt after his termination and solicited some of these complaints.

Respondent was Hylan-Nolan Contractors' subcontractor at Palevsky Hall at the University of Chicago in mid to late 2009. The Palevsky Hall project involved the renovation of showers to comply with the Americans with Disability Act. Although the University allowed work to begin at 8:00, the contractors were not allowed to make loud noises until 9:00 since the Hall was partially occupied.

Jim Nolan, a vice-president of Hylan-Nolan, testified that Schmidt refused to comply with the 9:00 a.m. rule. Nolan also testified that Chris Keating, the Director of Residence Halls at the University called him several times and on at least one occasion threatened to remove Hylan-Nolan from the job if Hylan-Nolan did not comply with the University's noise restrictions, Tr. 308-09, 312.

Nolan testified that he received 7 or 8 complaints from his foreman that Schmidt would not comply with the noise restrictions. However, Nolan never discussed these complaints with Schmidt despite the fact that he discussed other matters with him, Tr. 311. Nolan also could not recall contacting Respondent about Schmidt, but then testified that he asked Ted Taffe not to send Schmidt to this worksite on three occasions, beginning in November 2009.

Schmidt, but delayed laying off the laborers due to a telephone conversation between Charles Taffe and Ray Johnston, the brother of one of the laborers laid off a month later. Johnston called Charles Taffe to tell him that Schmidt called him and said he was going to get both Johnston brothers fired.

I find this testimony incredible. If Johnston was upset when he called Taffe, one would expect Taffe to explain the economic necessity of the lay-off and to advise Ray Johnston to ignore the rest of Schmidt's phone call. Indeed, one would expect Respondent to proceed with the lay-off of the other three employees in order to minimize the chances that they would be accused of laying off Schmidt discriminatorily.

Finally, it has not been established that the lay-off of other employees in March was due to economic conditions, as opposed to, for example, pressure from the Union to abide by the terms of the collective bargaining agreement.

Ted Taffe testified that he talked to Jerry (or Terry) Nolan, not Jim Nolan, who testified in this proceeding. Ted Taffe testified that Jerry Nolan told him that he didn't want Schmidt on any of his jobs and that Ted removed him from the Palevsky Hall project on about January 21, 2010 Tr. 441-2. I do not find this testimony credible.

First of all, Jim Nolan testified that his company's last day on the Palevsky Hall project was January 2, 2010, Tr. 306. Thus, Ted Taffe did not remove Schmidt from this project as he claimed. Moreover, Nolan's testimony is completely incredible. It defies credulity to believe that the University of Chicago, one of Hylan-Nolan best customers (Tr. 309), was threatening to throw Hylan-Nolan off the Palevsky Hall project because of Schmidt's non-compliance and Nolan neither addressed these complaints to Schmidt nor to Respondent.

Moreover, if Hylan-Nolan requested a different plumber, there should have been no reason for Respondent not to replace Schmidt since it claims that work during this period was very slow.¹⁴ I credit Schmidt's testimony that he made noise on the Palevsky project once and that he was never replaced on that project by Respondent. I would also note that in discussing Schmidt's behavior at Palevsky Hall in its March 31, 2010 position statement, Respondent did not claim that he failed to comply with the University's noise restrictions.

Mindy Carlson, the on-site manager at Jackson Towers Condominium, testified that in about 2006 or 2007, Schmidt left a 55 gallon drum and drop cloths in a residential unit. Carlson called Barb Olsen, Respondent's office manager, and asked that Schmidt not be sent back to Jackson Towers. Schmidt apparently did not work at Jackson Towers after this incident but there is no evidence that this was the result of Carlson's complaint. There is no evidence that Respondent reprimanded Schmidt for his work at Jackson Towers.

Brian Stuchly is a superintendent/carpenter, staffed by his employer, Alternative Construction Solutions, at the John Hancock Building in Chicago. He was called as a witness by Respondent and testified to two occasions on which he was unhappy with work performed by Michael Schmidt for Respondent. These events occurred 2-3 years prior to the hearing in this matter (2007 or 2008). Stuchly testified that he asked Chuck Taffe not to send Schmidt back to work on one of his projects. However, he also testified that on the approximately four occasions his employer has used Respondent since 2008, he specifically requested that Respondent send Mark Plada, another of Respondent's plumbers, who is his neighbor and personal friend. Mark Plada may be stationed by Respondent at the Hancock building on a permanent or semi-permanent basis, Tr. 492.

I find that neither Carlson's nor Stuchly's testimony establishes Respondent's contention that Schmidt's work history materially limited the jobsites to which it could send him.

Other evidence of Schmidt's alleged poor performance/errors/misconduct prior to termination

At hearing Respondent introduced evidence of mistakes, misconduct and poor performance on the part of Schmidt during the five years that he worked for it. Respondent contends that it was unaware of the some of these incidents prior to his termination.

¹⁴ To the extent that Nolan suggests that Respondent replaced Schmidt, Tr. 316-17, I discredit his testimony. I would also note that Joe O'Brien, a witness also called by Respondent, to disparage Schmidt, said nothing about Schmidt's conduct at the University of Chicago. O'Brien was also on this project, Tr. 316.

Joe O'Brien testified that Schmidt lied to Respondent about the circumstances under which his company vehicle was broken into in 2007 or 2008. O'Brien did not tell Respondent that Schmidt was working for himself on this occasion until after Respondent terminated Schmidt. Schmidt denied O'Brien's version of this event and I need not determine which is the truth. However, the circumstances under which Respondent learned of O'Brien's account leads me to conclude that Respondent made a concerted effort to find damaging information about Schmidt in order to discredit him. Given this effort, I find it more likely than not that on February 9, at Denny's, Chuck Taffe threatened to gather such information for this purpose if Schmidt pursued a grievance, filed a charge or took any other affirmative action against Respondent.

Respondent elicited information regarding a job on which an elevator shorted out at 134 N. LaSalle St. in about 2005. While Respondent now says this occurred due to mistakes by Schmidt, I find this has not been established.

A week to ten days prior to Schmidt's termination, he cut into a pipe at 900 N. Michigan Avenue. The water was not turned off and there was a flood. Schmidt blames this event of the building engineers at the site. I find the record does not establish that the flood was Schmidt's fault. Joe O'Brien, who was working with Schmidt, testified that both he and Schmidt believed the water was off. O'Brien cut into the pipe as well.

Somewhere between 1-3 years prior to Schmidt's termination, there was a problem between him and a man who operated a newsstand at a jobsite at 200 S. Michigan Avenue. Joe O'Brien testified that Schmidt was ripping dollar bills in half and not paying for a newspaper and soda.¹⁵ Ted Taffe, on the other hand, testified that Schmidt was making fun of man's accent and that he removed him from the job. Given the discrepancy between these accounts, I credit neither. I don't necessarily credit Schmidt's account of the incident either.

Respondent also accuses Schmidt of stealing tools that belong to it and were kept in his company truck. Joe O'Brien did an inventory of these tools after the truck had been sitting on the street in front of Chuck Taffe's house for two weeks. Assuming that tools were missing, once cannot assume Schmidt took them when the vehicle had been sitting on a public street for this period of time. Respondent's assertion in this respect gives further credence to Schmidt's testimony that Chuck Taffe threatened to build a case against him on February 9.

Schmidt's post-termination conduct

After Schmidt was terminated he called several of Respondent's customers. He told some of Respondent's customers that Taffe was using unlicensed plumbers. Schmidt sent text messages to one of the Taffe brothers calling him a "retard" and a fraud. In one of these messages, Schmidt accused Taffe of cheating his customers.

Schmidt also sent a number of text messages to Respondent's laborer, Joe O'Brien, with whom he had often worked. A text sent February 19, stated, "Keep talking your shit and see what I do." On May 6, Schmidt sent O'Brien a text which read, "Your days are over starting tomorrow."¹⁶

¹⁵ O'Brien said this occurred 1-1 ½ years ago at Tr. 235-36, but testified that it happened 2-3 years ago at Tr. 273.

¹⁶ Respondent introduced 4 text messages which O'Brien forwarded to the Taffes. Schmidt admitted to sending some of these, but not the others. All of these messages were sent from the same number, thus I find that Schmidt sent them all.

The effect of Schmidt's post-termination conduct on his entitlement to reinstatement and back-pay.

The Board's usual remedy for a discriminatory termination is reinstatement and backpay. It is well established that, if an employer claims a discriminatee is not entitled to reinstatement or reinstatement and full backpay, it is the employer's burden to prove that the discriminatee engaged in misconduct for which the employer would have disqualified any employee from continued or future employment. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993), *enfd.* in pertinent part 39 F.3d 1312 (5th Cir. 1994). Generally, the employer must "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990). The Board will not, as a general rule, infer or assume that an employer would have disqualified an individual based on the nature of his misconduct. *John Cuneo*, *supra* at 857 fn. 7.4

While there is no evidence that Respondent had a preexisting policy regarding conduct such as Michael Schmidt's May 6 text message, I conclude that this message, which on its face appears to threaten physical violence, is the type of conduct for which any employer would discharge an employee. I am unaware of any case in which the Board has denied reinstatement or tolled backpay in the precise context presented by the instant case. However, I believe the Board's decision in *Lear-Siegler Management Service*, 306 NLRB 393 (1992) logically mandates such a result.

In *Lear-Siegler*, the Board denied reinstatement and tolled backpay because the discriminatee threatened a potential witness that he would report a violation of the potential witnesses' probation. The decision is predicated on the integrity of the Board's processes, something that is not necessarily an issue in this case. However, I deem Schmidt's May 6 text message to be more egregious than the one relied upon by the Board in *Lear-Siegler*. Schmidt's message appears to threaten physical violence which the discriminatee's statement in *Lear-Siegler* did not. Thus, I conclude that Respondent is not required to reinstate Michael Schmidt and that its liability for back pay ended on May 6, when employee Joe O'Brien forwarded the text message to Respondent.

I do not find that Respondent's liability for back pay terminated earlier than May 6. Schmidt's telephone calls to other employees which related to their employment were protected. I view them as essentially statements informing coworkers that Schmidt intended to insure that collective bargaining agreement would be enforced, that only plumbers would do plumbing work and that, as a result, some coworkers might lose their jobs.

Finally, I do not find that Respondent's liability for backpay terminated on March 6, (as opposed to May 6) when O'Brien forwarded three text messages to Respondent that he had received on February 19. First of all, the context in which these messages were sent is unclear. O'Brien was clearly assisting Respondent in its efforts to get rid of Schmidt by, for example, doing an inventory of Schmidt's truck two weeks after Schmidt had returned it. Moreover, the fact that O'Brien waited two weeks to forward these messages to Respondent indicates that he did not regard them as a physical threat. Without knowing the context in which the texts were sent it is impossible to determine whether they were threatening from an objective standpoint.

Allegedly Disloyal Statements

Employee appeals concerning working conditions made to parties outside the immediate employer-employee relationship may be protected by the Act. However such communications are not protected without limit, and will lose the protection of the Act, if maliciously false, i.e., statements made with knowledge of their falsity or with reckless disregard for their truth or falsity. Such communications may also lose protection where they constitute a public disparagement of the employer's product or undermining of its reputation, *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006).

Respondent presented the testimony of Allen Cain, the on-site property manager for Sadler Property Management at the John Hancock Center. Cain testified that sometime between February and April 2010, Schmidt called him and told him that Respondent used substandard materials, that its employees were non-union and that Taffe was overcharging Cain. Cain also testified that Schmidt disparaged the quality of Respondent's work.

Schmidt denied that he told Cain that Respondent did substandard work. He testified that he only told Cain that Respondent was not sending licensed plumbers to his building and was billing its employees as plumbers. I credit Schmidt over Cain on account of the exaggerated and false testimony elicited by Respondent from Nolan. Moreover, I conclude that Schmidt did not lose the protection of the Act by his statements to Cain because it has not been established on this record that they were false.

Alleged Witness Intimidation

Respondent also contends that Schmidt tried to intimidate witnesses Nolan and Sherlock by threatening to sue them if they testified. Schmidt denies that he ever spoke to Nolan and testified that he threatened to report Sherlock to the Department of Labor. While I do not necessarily credit Schmidt's testimony, I do not credit that of Nolan or Sherlock either. I have already explained my reservations regarding Nolan's credibility.

With regard to Sherlock, I believe he may have been less than completely candid about mentioning Schmidt's name to Taffe in his telephone conversation of February 6. Sherlock also struck me as being too eager generally to lend support to Respondent's position. One example of this was his testimony about Respondent's surprise when confronted with the fact that it was not strictly complying with the terms of the collective bargaining agreement, e.g. Tr. 199. I find that it has not been established that Schmidt engaged in witness intimidation that would forfeit the protection of the Act.