

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

C.F. TAFFE PLUMBING CO., INC., Respondent, and MICHAEL SCHMIDT, an Individual, Charging Party.	CASE 13-CA-45890 Arthur J. Amcham Administrative Law Judge
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**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to §102.46 of the Board's Rules and Regulations, Respondent C.F. Taffe Plumbing Co., Inc. ("Taffe") submits the following brief in support of its exceptions to the Supplemental Decision of the Administrative Law Judge ("ALJ"), issued November 10, 2011. The Respondent's exceptions are being filed contemporaneously with this brief

IDENTIFICATION OF THE ISSUES

- Whether Michael Schmidt Sent the "your days are over" Text.**

INTRODUCTION

Following the initial hearing in this matter, the ALJ issued a decision and recommended order, finding that Taffe Plumbing had violated the National Labor Relations Act in that it terminated Michael Schmidt for engaging in protected conduct. However, the ALJ also found that Schmidt's remedies of backpay and reinstatement were cut off as of May 6, 2010, after he sent a text message to another employee of Taffe Plumbing in which he threatened physical violence. The National Labor Relations Board (the "Board") remanded this case and directed the

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ALJ to make a factual determination of whether or not Schmidt did, in fact, send a text message to an employee of Taffe Plumbing indicating “your days are over.” The Board directed the ALJ to reopen the record to admit evidence and further testimony, and for the ALJ to determine Whether Schmidt sent Joe O’Brien the text message. The Board further directed the ALJ that, in the event he finds that Schmidt sent O’Brien the May 6 text message, to apply the postdischarge standard set forth in *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011).

Following a supplemental hearing, the ALJ issued a supplemental decision in which he credited the testimony of Schmidt that he did not sent the text message. Further, the ALJ discredited the testimony of all of Respondent’s witnesses. The ALJ discredited the testimony of Joe O’Brien who testified as to the time and place he received the text message, how he knew it came from Schmidt, the events that led up to his receipt of that text message, and the events that followed. The ALJ also discredited the testimony of Mark Plada, who testified to having been with O’Brien when O’Brien received the text message, and having seen first hand the text message and that it came from Schmidt. Finally, the ALJ discredited the testimony of Ted Taffe regarding his receipt of the text message from O’Brien after having asked O’Brien to forward it to him on May 6, 2010. The testimony of these three witnesses in this respect was entirely uncontested and uncontroverted. Yet, despite the clear inconsistency in the testimony by Schmidt, and despite his blatant refusal to answer what should otherwise have been a harmless question if he honestly did not send the text message, the ALJ credited Schmidt’s testimony, and found that Schmidt did not send the “your days are over” text to O’Brien on any date. (ALJD, p. 2, ln. 23-24.)¹

¹ “ALJD” refers to the Administrative Law Judge’s Supplemental Decision.

The ALJ determined that because he determined that Schmidt did not send the subject text message, he is simply obliged to order the traditional remedies, and so ordered backpay and reinstatement. (ALJD, p. 2, ln. 5-6.)

ARGUMENT

1. The ALJ's Finding that Schmidt Did Not Send the Subject Text Message Inexplicably Ignores Schmidt's Refusal to Answer Directly Whether or Not He Sent It.

The ALJ recognized that at the remanded hearing Respondent called Schmidt as an adverse witness. (ALJD, p. 2, ln. 26-27.) Respondent asked Schmidt the direct and straightforward question (and the question that was the very reason for and focus of the remanded hearing) of whether, at any time, Schmidt sent a text message to Joe O'Brien stating, "your days are over." (ALJD, p. 2, ln. 27-29.) Schmidt refused to answer this question:

Q. Okay. Is it your testimony today that you did not at any time send this text message?

A. I will not answer that question, respect to the court. The Board made a direct order that this date be open for the date of May 6 and I will not answer any questions outside of the scope of the Board's order. You're asking me a question outside of the scope of the Board's order and I will not answer it.

(Tr. at 22, ln. 12-19.)²

After being directed by the ALJ to answer the question, Schmidt's denied having ever sent the text message. (ALJD, p. 2, ln. 29.) This categoric denial is blatantly inconsistent with Schmidt's refusal to answer the question in the first place. Yet, nowhere in the ALJ's decision does he reconcile this inconsistency in Schmidt's testimony. Rather, the ALJ categorically credit's Schmidt's testimony that he did not send O'Brien the "your days are over" text, without providing any basis therefore, without providing any explanation as to why such testimony

should be credited despite the obvious inconsistency, and without any discussion of Schmidt's refusal to answer the question beyond simply acknowledging that he initially so refused. (ALJD, p. 2, ln. 43.)

Common sense dictates that, if Schmidt honestly did not at any time send that text message, he would have had no reason or motivation to refuse to answer the question, and particularly in such a vehement manner. An honest answer in the negative would only help his case, not hurt it. It's for this reason that his clear refusal to answer the question directly calls into question the credibility behind his answer that followed. His response was not honest. The subsequent testimony of O'Brien, Plata and Taffe only reaffirmed the questionable testimony by Schmidt. Yet, again without any explanation therefore, the ALJ credited Schmidt's testimony over that of three other witnesses, despite the glaring inconsistency. (ALJD, p. 2, ln. 43.)

Respondent recognizes that the ALJ is granted discretion in making credibility determinations of the witnesses who testify at the hearing. However, in this instance, to categorically credit testimony which, logically, does not make any sense, is a clear abuse of discretion.

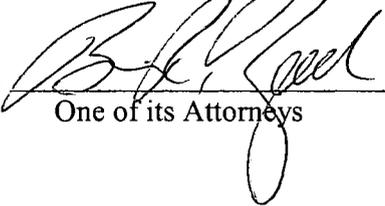
CONCLUSION

For all of the above reasons the National Labor Relations Board should reverse the Decision of the Administrative Law Judge entered on November 10, 2011, vacate his Remedy and Order, and affirm the prior decision and recommended order, cutting of Schmidt's right to reinstatement and backpay as of May 6, 2010.

² "Tr." refers to the transcript of the remanded hearing.

Respectfully submitted,

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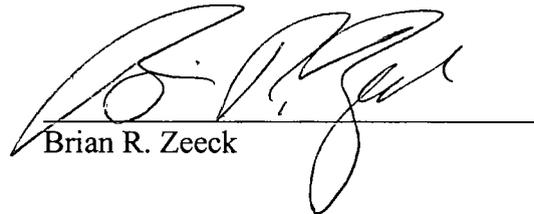
STATEMENT OF SERVICE

The undersigned states that on this 7th day of December, 2011, he caused copies of the foregoing Respondent's Brief in Opposition to the General Counsel's Exceptions to be served by UPS Overnight upon the following:

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December 7, 2011

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