

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

FRESH & GREEN'S OF WASHINGTON, D.C., LLC

Respondent,

and

Case 5-CA-65595

UNITED FOOD AND COMMERCIAL WORKERS,
INTERNATIONAL UNION, LOCAL 400

Charging Party

**CHARGING PARTY, UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 400'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTION AND BRIEF**

Carey R. Butsavage, Esq.
Butsavage & Associates, P.C.
1920 L Street, NW
Suite 301
Washington, DC 20036
202 861-9700
202 861-9711 fax
cbutsavage@butsavage.com
Counsel to UFCW Local 400

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Introduction

This matter is before the National Labor Relations Board (“Board”) pursuant to a complaint alleging that employee Maria Yliquin was discharged for her union activities in violation of Section 8(a)(3) of the National Labor Relations Act (the “Act”). Administrative Law Judge (“ALJ”) Joel Biblowitz, after a two-day hearing on February 27 and 28, 2012, issued his decision on May 8, 2012, finding that Ms. Yliquin was discharged for her union activities on behalf of the Charging Party, United Food and Commercial Workers Union, Local 400 (“Local 400” or the “Union”).

The Respondent, Fresh & Green’s of Washington, DC, LLC (“Respondent” or “Fresh & Green’s”) has now filed exceptions and a supporting brief challenging various aspects of the ALJ’s decision. All of these exceptions are without merit, and should be summarily rejected by the Board conclusively. Proving that 26 pages can be written without any factual foundations or plausible arguments, the Respondent’s exceptions are a classic case of “who do you believe, me, or your own eyes?” The Respondent, with no factual or legal support whatsoever, asks the Board to reverse the ALJ’s credibility determinations, ignore the clear record evidence of Ms. Yliquin’s sustained union activities, and overturn abundant evidence of the Respondent’s anti-union animus. This the Board should decline to do.

I. The ALJ’s Credibility Determinations Were Correct and Should Not Overturned.

Casually asking the Board to overturn 60 years of settled law with regard to credibility determinations by its trial judges, *Standard Dry Wall Products*, 91 NLRB 544 (1950), the Respondent here requests that the Board simply disregard the record evidence and reject the ALJ’s findings that Ms. Yliquin was a credible witness and that her supervisor Mary Huffman, was not. Even a cursory reading of the testimony of Ms. Yliquin and Huffman demonstrates at

once the reasons for the ALJ's crediting of Ms. Yliquin and discrediting that of Supervisor Huffman. Thus, although giving as a reason for Ms. Yliquin's discharge her "difficulty" with vendors, Huffman was forced to admit on cross-examination that Ms. Yliquin's "issue" with a vendor arose because of the vendor's use of profanity, his refusal to abide by the Company's accepted protocol for vendors, and his racist comments directed at Ms. Yliquin (TR.274-8).¹ Ms. Huffman then admitted that Ms. Yliquin was not at fault in this incident, it was used as a basis for her discharge (TR.238).

In a similar vein, although Huffman testified that employees complained to her about alleged "threats" from Ms. Yliquin (and that this was another reason for discharge), she could not give even one name of an employee who was supposedly threatened by Ms. Yliquin, nor give any details of any investigation about this alleged conduct which, if proven true, would be of the most serious nature (TR.269-271). Certainly, Yliquin was never disciplined for this alleged conduct. Moreover, although these alleged "threats" were put forth as a reason for Ms. Yliquin's discharge (her "disrespectful" attitude), they apparently were not so serious that Huffman noted that Ms. Yliquin was "recommended for rehire" on her termination form. (GC.15)

In these circumstances, not only has the Respondent failed to show that the Judge's credibility determinations should be overturned, it has highlighted the testimonial failures of its main witness, the individual who, according to the employer, made the decision to discharge Ms. Yliquin. The Respondent's contentions regarding credibility determinations should be rejected in their entirety.

¹ References to the transcript will be designated as ("TR.__").

II. The Employer's Failure To Discharge Shop Steward Crabbe Is Completely Meaningless.

Inexplicably, the Respondent devotes a large portion of its brief to making the argument that because another Local 400 Shop Steward was not fired, this means that either: a) the Respondent had no anti-union animus; or b) because it did not discharge Shop Steward Crabbe as well as Ms. Yliquin, it gets a free pass with regard to Ms. Yliquin's discharge.

It is well settled by now that simply because the employer did not discharge all [or many] employees engaged in union activities, this "does not exculpate [it] from the charge of discrimination as to those discharged." *NLRB v. Nabors*, 196 F. 2d 272 (5th Cir. 1952). As the Board has noted, "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not take similar action against all [or other] union adherents. *Master Services*, 270 NLRB 543, 552 (1984). See also *Conley Trucking*, 348 NLRB 308 (2007).

Here, whatever be the relative merits of Crabbe and Ms. Yliquin as shop stewards, or whatever be their respective degrees of performance, Crabbe's tenure as a shop steward had nothing whatever to do with whether or not the discharge of Ms. Yliquin was violative of Section 8(a)(3).

III. The Respondent's Anti-Union Animus

The Respondent would have the Board believe that simply because it had signed a collective bargaining agreement with the Union and fired most of the employees of Super Fresh, it could not have harbored any anti-union animus toward Ms Yliquin. Of course, this is not the case, nor has it ever been the law. As the Board has repeatedly noted, evidence of anti-union animus is rarely directly acknowledged by putative Respondents, and therefore must be inferred from surrounding circumstances. In this case, the relevant facts and circumstances are that Ms. Yliquin was a shop steward who was not shy about confronting the Employer (in the person of

Store Manager Huffman) about what she perceived as wrongs committed by the Respondent. She was discharged despite a long tenure with the Respondent, despite a record without any negative write-ups or evaluations, despite high customer satisfaction responses and even despite the recognition by Huffman (albeit grudging) that she was a good worker.

In these circumstances, the ALJ was perfectly correct in disbelieving the purported reasons for discharge of this excellent employee and instead making the completely reasonable inference that anti-union animus, i.e., Ms. Yliquin's persistent and vocal complaints about conditions in the Fresh & Green's store, was the real reason behind her discharge.

The Board will infer wrongful motivation when it finds an employer's proffered non-discriminatory reasons pretextual. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). Direct evidence of union animus is not necessary to support this inference and may be established by the record on the whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A "finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone*, 255 NLRB at 722; see also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) (finding no evidence to support discharge for insubordination). An employer's accusation that the employee had a "bad attitude" has long been considered a veiled reference to the employee's protected activities. *Rogers Elec.*, 346 NLRB 508, 520 (2006) (employer stated employee was a "bad apple"); *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) (employee discharged for not having "the right spirit").

So it is in this case. Ms. Yliquin was characterized as "disrespectful" and "not a team player." But she had no written warnings, had substantial responsibility within the store, was a

long-time employee (18 years) and was much liked by her customers. In these circumstances, the ALJ correctly concluded that the reasons advanced by the employee for her discharge did not in fact exist.

Conclusion

For all of the forgoing reasons, the Board should uphold the ALJ's finding that Ms. Yliquin was discharged because of her union activities.

Respectfully submitted,

/s/ _____
Carey R. Butsavage
Counsel to UFCW Local 400

