UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ALTERNATIVE ENERGY APPLICATIONS, INC.

and **Case No. 12-CA-72037**

DAVID RIVERA-CHAPMAN, An Individual

Karen Thornton, Esq., Counsel for the General Counsel.
Shaina Thorpe, Esq., Allen, Norton & Blue, P.A., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in Tampa, Florida on April 2, 2013. The Complaint and the Amended Complaint herein, which issued on December 28, 2012 and March 11, 2013 and were based upon an unfair labor practice charge and an amended charge that were filed by Chapman on December 23, 2011[1] and February 2, 2012, allege that Alternative Energy Applications, Inc,. herein called the Respondent, in August, instructed its employees not to discuss their wages with other employees and threatened to discharge employees if they did so, and on about September 11 it discharged Chapman because it believed that he had discussed his wages with other employees, thereby violating Section 8(a)(1) of the Act.[2]

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Facts

Respondent is in the business of weatherizing low income residences, both private homes and apartment buildings. In that process, they caulk windows, apply weather stripping, wrap water heaters, seal the duct systems and, the process that was most involved in the testimony herein, they blow insulation from a truck into the attics of the buildings. The insulation, contained in bags, is dumped into a hopper, is mixed and blown through a tube into the attic area, under the direction of an employee in the attic.

Craig Carreno is employed as the head of the sales department for the Respondent; his brother is Cary Carreno, the President and owner of the company. The nature of the Respondent's business, and the work performed by its employees are crucial to the ultimate determination herein, and as Craig Carreno, herein called Craig, was the most credible witness herein, his description of the business will be fully discussed herein. The Respondent sells

---

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2011.

[2] Counsel for the General Counsel's unopposed Motion to Correct Transcript, as contained in her Brief, is granted.

energy efficient programs to customers of Tampa Electric in order to help them reduce their energy usage. Craig inspects the property in order to determine whether it qualifies for the program. As part of this inspection, he inspects the attic to determine whether there is already enough insulation in the attic so that it would not be feasible for the company to do the work. He also determines whether the crawl space in the attic is adequate for the employees to gain access to the area and to blow the insulation, or if it would be an unsafe area in which to work, and he testified that he has never rejected a job for this reason.

Scott Sipperley, who is employed by the Respondent as a supervisor of the installers, testified that the Respondent posted an ad on Craigslist in July for an installer/driver. Chapman responded to the ad on a Friday and Sipperley interviewed him over the phone; Sipperley asked him when he could start and Chapman said that he could start work on Monday, which he did at an hourly rate of $9.00. He worked Monday through Friday from 7 a.m. to 3 p.m. in an area north of Tampa, Florida. On about August 1, he received a $1.00 an hour wage increase. Cary Carreno, herein called Cary, and Sipperley testified that even though the company policy was that employees receive a dollar an hour increase after ninety days of employment, Chapman told Sipperley that he needed a raise because he was a single parent raising two children, and Sipperley, a single parent raising four children was sympathetic, discussed it with Cary, and gave him the increase. Chapman testified that he received the wage increase after telling Sipperley that the work was very hard and that they were only paid $9.00 an hour, and that when Sipperley told him that he was giving him the $1.00 raise, he also told him “but I do not want you talking to anybody else about this because we have fired employees in the past for talking about their wages,” and Chapman agreed. Sipperley testified that he has no recollection of telling him that he could be fired for talking about his wages: “I don’t know why I would have said that. I’ve never said it to any of our other employees.” As to whether he told Chapman that he had terminated other employees for talking about their wages, he testified: “Not that I can recall. As far as I know, David was our first employee that we ever terminated.” He also testified that he cannot remember hearing that Chapman had discussed his wage increase with others. Cary testified that he never told Chapman, or any other employee, that he was not permitted to discuss his wages with other employees and he never instructed Sipperley to tell him that. Installer/Driver Christopher Hughes testified that he received a raise about six weeks after he began his employment with the Respondent and, at that time, Sipperley never told him not to talk to other employees about it and never said that they had fired other employees for talking about their wage increase. Jose Obando, Jr. testified that he has been employed by the Respondent since it began and he has received many raises. Sipperley never told him that he was not to talk to his coworkers about the raises and he has never seen any employee fired for talking about their wages.

Chapman was discharged on September 11. Counsel for the General Counsel alleges that he was discharged because the Respondent believed that he had discussed his wages (or wage increase) with other employees in contravention of Sipperley’s alleged instruction to him not to do so. Respondent defends that he was discharged because he refused to perform all the work that was required, he had a poor attitude, and that it had no knowledge that he spoke to other employees about his wages. Shortly after his termination, Chapman filed a complaint with OSHA alleging that he was terminated because of complaints that he made to OSHA. In an affidavit that he gave to OSHA, he referred to complaints that he made about the working conditions, and stated: “I know that I was discharged because of the complaint I made to OSHA.” In a position statement to OSHA, in response to Chapman’s charge, counsel defends that his discharge could not have been in retaliation for his call to OSHA as it was not aware of any such call, until his OSHA charge, which was filed after his termination. Further, counsel defends that he was discharged for refusing to perform assigned tasks, intentionally putting his foot through the ceiling on two occasions, having a negative attitude about the work, and

undercutting the morale of other employees. In this letter, counsel also states:

> Notably, in less than two months that Rivera had worked for Alternative Energy, he had significantly undercut morale among Alternative Energy's small group of employees. Rivera [Chapman] had disclosed his rate of pay to other employees, prompting the mother of another employee to contact Carreno [Cary] and complain[3]…Furthermore, Rivera presented a negative attitude about performing his duties. He frequently grumbled about the tasks he was assigned and his refusal to perform assigned tasks resulted in other employees having to pick up his slack.

In Chapman's written Response to OSHA to counsel's letter, he states: "The accusation that I spoke to the other employee [sic] about my pay is false because I had gotten threatened at the time of the pay increase by the supervisor that if I spoke I would get fired." Later in the statement he states: "I have never disclosed my pay rate to any of the other 2 employees. I remember very well being threatened with loss of employment by Scott if I divulged my pay rate; he also mentioned that they had fired people previously for this."

Respondent presented a number of witnesses who testified about Chapman's work and attitude. Hughes had been employed by the Respondent until about April 2012, when he voluntarily left its employ; he worked with Chapman for about two months; his stepmother and Cary are friends. He testified that Chapman, "…didn't want to do what he was told to do…The last job…that he worked on, he didn't feel that the attics were workable. So, he basically said that he wasn't going to do it." Because of his refusal to do the work, Hughes had to do blow the insulation in the attic, and that situation had happened previously, as well. On another occasion, while they were working at a church, they were taking turns working in the attic, and Chapman refused to take his turn. They almost got into a fight on this occasion, but they were separated by a maintenance employee. He never told any of the bosses about Chapman's refusal to perform this work prior to the time he was discharged. In a statement that Hughes provided to the Respondent dated February 13, 2012, he states, *inter alia*, that Chapman was lazy, insubordinate, that he always tried to find the easiest half-way to complete a job, he had a bad attitude and only changed his attitude when a supervisor appeared at the worksite. He testified that after Chapman fell through the ceiling "two days in a row" he said, "I'm done, I'm not doing this anymore, this is ridiculous. The company is asking too much of us." Obando, whose father is also employed by the Respondent, has not worked alongside Chapman at jobsites, but has spoken to him at the company's warehouse. He testified that Chapman complained about the masks and tools that they used on the jobsites and this indicated to him that he was not a good employee and he told Sipperley about Chapman's complaints and his poor attitude : "When you complain a lot, it's because you are always going to find something to not do the work." He testified that the employees always had the proper tools to work with, and nobody else complained about the equipment that was supplied to them.

Sean Farrell is a manager of the Respondent. He only met Chapman on one occasion; it was on a jobsite and he got the impression that Chapman "was not going to work out, that he was not somebody that we would want working for us." The reason for this impression: "The first thing out of his mouth was he was complaining that he wasn't getting paid enough, that it was hot. I was like, yeah, it's a hot job. There's not much we can do about it." In addition, he was told by Hughes, Sipperley, Craig and Cary that Chapman refused to do his work, although he never knew this on a first-hand basis. Craig testified that he met Chapman at a school job, introduced

[3] It is clear that Hughes' stepmother called Cary, but when, what was said in this conversation, and whether Chapman was discussed, was not established.

himself, and asked how was he doing? Chapman gave his name and said that it was a very difficult job, and Craig responded: "Absolutely, it is a difficult job." He saw him again at the River Grande Apartments job (where Chapman went through the floor of the ceiling). Chapman called him to say that they were having trouble gaining access to the attic in order to blow the insulation. Craig testified that there are full attics in which a person can stand and walk in and out of the attic, and there are limited access attics, where you cannot stand and you have to crawl through the attic area; River Grande was a limited access attic. Each unit had its own access to the attic, but you could see through to the adjacent attic as there was no firewall between them. Chapman said that they were having trouble with access, that they couldn't crawl through the attic to gain access to the entire area. Chapman told him that the access was too limited, and he told Chapman:

> You can't crawl through there. I said I understand. What you do in that case is go in the access of apartment A, blow that area, come down, go to apartment B, go through that attic access, and then blow the area over that apartment. It is more work, it takes longer, it's extra steps, but when you have a limited access attic, that is the absolute best way to deal with it.

Shortly thereafter, he received a text message from Chapman showing a foot through the attic floor, saying, this is what happens when you try to crawl through the attic. He understood that to mean that Chapman did not follow his directions of blowing one unit at a time, and crawled through the attic to do both units: "I just felt that it was unnecessary for that to have happened because I know from experience that if we had simply gone into each attic access, we could have successfully done that job without an incident." Craig then went to the River Grande apartments to attempt to correct the situation, by contacting their contractor to repair the damage, and to be sure that the resident of the apartment was being taken care of. Shortly thereafter, he told Cary and Sipperley of the incident, and that if Chapman had followed his instructions, it would not have occurred.[4] On September 2, while working in the attic at the same location, Chapman's feet went through the ceiling again, and he sent another text and picture to the company.

Cary, Sipperley and Farrell met in Orlando on August 30 to discuss the company's operation as well as some employee issues. One of subjects that they discussed was Chapman and they decided that he "was not a good fit for the company" and should be discharged. One of the reasons that they considered him not a good fit was that he had a bad attitude and was undercutting morale. Cary testified that they did not believe that he was undercutting morale by disclosing his wages to other employees. Even when shown the position statement that they provided to OSHA, as set forth *supra,* he testified that this did not contribute to his discharge. Cary testified that the reasons that they terminated Chapman were that he didn't want to work, resulting in other employees complaining about him, he was not a right fit for the job and "it wasn't the right skill set," and Chapman made it clear to him and to the other employees that he wasn't happy at the job by saying that the work was too hot and the pay was too low. On notes that he took at this August 30 meeting, Cary wrote: "Not fit for AEA philosophy. Let's terminate." In addition, he put his foot through the ceiling on two occasions, the second after they had decided to discharge him. Sipperley testified that he does not know the nature of Hughes' stepmother's call to Cary, and does not remember that the conversation was spoken of when they decided to terminate Chapman at this meeting. Farrell testified that he was at the August 30 meeting where they decided to discharge Chapman and whether he talked about his wages

[4] Respondent's records state that in 2012 they performed 13,600 jobs and there were fifty seven situations where employees' feet broke through the ceiling.

to other employees was never discussed at this meeting. Since he had the most knowledge of Chapman's work, he presented the facts to Cary and Sipperley, recommended that Chapman be dismissed, and neither Cary nor Farrell disagreed with his recommendation. Sipperley did not meet with Chapman to tell him that he was discharged until September 7 because Cary, who handles the paperwork for the company, was out of town and he had to wait until he returned. On the morning of September 7 he met Chapman and told him that his services were no longer needed. He doesn't remember Chapman's response, other than it was "very antagonistic."

III. Analysis

There are two violations alleged herein: that Respondent, by Sipperley, instructed Chapman not to discuss his wages with other employees and threatened to discharge him if he did so[5], and discharged him on September 7 because it believed that he had discussed his wages with other employees, in violation of Section 8(a)(1) of the Act. As stated above, the most credible and believable witness herein was Craig; his testimony was direct, brief, and responsive to the questions, whether asked by counsel for the Respondent or Counsel for the General Counsel. On the other hand, the least credible witness was Cary, whose answers were evasive, rarely responsive and were never brief, especially in response to questions from Counsel for General Counsel, where he often attempted to explain more than was asked of him. Sipperley was more credible than Cary, but did not have a clear recollection of the facts, which could be a result of the fact that the situation occurred eighteen months prior to the hearing. Finally, Chapman, Farrell, Hughes and Obando appeared to be fairly credible witnesses testifying to the events as they best remembered them.

Chapman was the only witness who testified about the alleged threat from Sipperley. Hughes and Obando testified that neither Sipperley, nor any other supervisor, threatened them when they were given wage increases, and Sipperley testified that he has no recollection of making such a threat. As between Sipperley and Chapman, I found Chapman to be more credible. He had a better recollection of the facts, and admitted to facts that were not helpful to his case, such as the fact that he did not tell other employees about his raise. In addition, the reality of the situation is that Sipperley gave Chapman a raise about two months earlier than normal company policy, and might have been concerned that the other employees would learn about it. I therefore find that the Respondent, by Sipperley, in August, told Chapman not to tell anyone else about his wage increase and threatened to fire him if he did so, in violation of Section 8(a)(1) of the Act. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Windstream Corporation,* 352 NLRB 510, 513 (2008).

The remaining allegation is that the Respondent discharged Chapman on about September 7 because it believed that he had discussed his wages with other employees in contravention of Sipperley's orders. This issue is to be judged under the guidelines established in *Wright Line*, 251 NLRB 1083 (1980). The initial issue, under that test, is whether Counsel for the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to terminate Chapman. If that has been established, the burden then falls to the Respondent to establish that it would have terminated him even in the absence of his protected conduct. Counsel for the General Counsel alleges that Chapman was discharged because the Respondent <u>believed</u> that

[5] Counsel for the Respondent, in her Brief, for the first time, alleges that this allegation is barred by Section 10(b) of the Act because it was not alleged until the filing of the First Amended Charge on February 2, 2012. Even if true, this defense in untimely.

he had discussed his wages with other employees. The two principal difficulties with this allegation is that Counsel for the General Counsel has not established the basis for the Respondent's alleged mistaken belief, and the Respondent has established that Chapman was, in fact, not a satisfactory employee.

The sole evidence establishing that Chapman spoke to other employees about his wages is contained in the position statement dated October 21 provided by counsel for the Respondent to OSHA, stating that he "…had disclosed his rate of pay to other employees, prompting the mother of another employee to contact Carreno and complain." However, this statement was not further supported by any other testimony. Sipperley testified that he knew that Hughes' stepmother called Cary, but didn't know anything else about the conversation, and Cary testified that he received a telephone call from Hughes' stepmother, but never testified about the substance of the call. The position statement also states that he was fired for his poor attitude, for refusing to perform the assigned tasks, and for putting his foot through the ceiling, and when Chris, Sipperley and Farrell met in Orlando on August 30, they decided that Chapman should be discharged because he was "not a good fit" for the company. In addition, testimony from Craig, Farrell, Hughes and Obando establishes that he didn't follow direction (Craig's testimony about the River Grande Apartments job) and that he, at times, performed the work that he wanted to do, rather than what he was assigned to do (the testimony of Craig and Hughes) as is also set forth in Respondent's position statement. While Cary testified that Chapman asked him to "break the law" by not making the required deductions from his pay as required by the State of Florida for child support, I find that this was an afterthought on the part of the Respondent and played no part in its decision to discharge Chapman on August 30.

Although I have found that Sipperley told Chapman not to discuss his August wage increase with any of the other employees, with a threat of discharge for violating the directive, there is no direct evidence that he did discuss the wage increase with any other employees and there is credible evidence to support the Respondent's defense that he was not a good fit for the company. Although Respondent's position letter refers to his alleged statement to other employees about his rate of pay, that statement, alone, is not enough to satisfy General Counsel's burden under *Wright Line.* I therefore find that Counsel for the General Counsel has not sustained her initial burden herein, and recommend that this allegation be dismissed.

Conclusions of Law

1. Respondent has been an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. Cary Carreno, Scott Sipperley and Sean Farrell are supervisory employees and agents of the Respondent within the meaning of Section 2(11) and 2(13) of the Act.

3. Respondent, by Sipperley, violated Section 8(a)(1) of the Act on about August 1, by ordering Chapman not to discuss his wages with other employees, and threatened to discharge him if he did.

4. Respondent did not further violate the Act by discharging Chapman on about September 7, 2011.

The Remedy

Having found that the Respondent violated Section 8(a)(1) of the Act by telling Chapman not to discuss his wages with other employees, I recommend that the Respondent be ordered to

cease and desist therefrom and to post the Notice to Employees referred to below.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[6]

ORDER

The Respondent, Alternative Energy Applications, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Instructing its employees not to discuss their wages with other employees and threatening to fire them if they did so or any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its facility in Valrico, Florida, and all other facilities and warehouses that it maintains, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 12, 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 August 15, 2011.

(b) 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.

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 16, 2013

Joel P. Biblowitz
Administrative Law Judge

---

[6] 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.

[7] 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."

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 tell you not to talk to fellow employees about your wages and threaten to fire you if you do 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.

ALTERNATIVE ENERGY APPLICATIONS, INC.

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.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530
Tampa, Florida 33602-5824
Hours: 8 a.m. to 4:30 p.m.
813-228-2641.

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, 813-228-2662.