

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

**ST. BERNARD HOSPITAL AND HEALTH  
CARE CENTER**

**and**

**Case 13-CA-074311**

**EARL LIGGINS, an Individual**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

On April 30, 2013 Administrative Law Judge Melissa M. Olivero found that St. Bernard Hospital terminated Earl Liggins because he engaged in protected concerted activity.<sup>1</sup> On May 28, 2013, Respondent filed 17 separate exceptions to the ALJ's decision. The vast majority of Respondent's exceptions are, at bottom, premised on Respondent's disagreements with the ALJ's credibility determinations. However, Respondent points to nothing in the record that sufficiently supports calling these credibility findings into question. Given this gaping hole in Respondent's argument, under the Board's established policy of leaving an ALJ's credibility resolutions undisturbed unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect, Respondent's exceptions must be rejected. See, e.g. *Regency House of Wallingford*, 356 NLRB No. 86, slip op. at 10, fn.3 (January 31, 2011) citing *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3<sup>rd</sup> Cir. 1951).

---

<sup>1</sup> In this brief, St. Bernard Hospital and Health Care Center will be referred to as "Respondent"; the Administrative Law Judge will be referred to as "the ALJ"; and the National Labor Relations Board will be referred to as "the Board" and Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge will be referred to as "Respondent's Brief". With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GCX" followed by the exhibit number. References to the ALJ's decision will be designated ALJD followed by the page number and the lines of the page, separated by a colon.

## **I. The ALJ's Well-Reasoned Decision**

The underlying facts in this case are straightforward and relatively simple. CT Technicians at Respondent, led by CT Tech Earl Liggins, engaged in protected concerted activity. Specifically, starting in June 2011<sup>2</sup> they repeatedly complained, first to each other and ultimately in a group to Respondent's Radiology Director Lorie Chew, about the fact that during renovations to Respondent's CT suite, the sink in the CT scanner room was removed and the window between the scanner room and the control room was raised to the point where CT techs found it difficult to see the patient being scanned without standing up. (ALJD 16:29-17:11)

When management in the CT department failed to fully remedy both of these concerns, Liggins decided to take the complaints to a higher level. This included Liggins continuing to press the employees' concerns to radiologist Dr. Joseph Carre, who suggested that he band together with the other technicians to get rid of Chew. (Tr. 35-41; ALJD 5:21-29; 5:36-40) Liggins also decided, based on Dr. Carre's suggestion to band together, to write letters to still higher levels of management, namely Human Resources Director Donna Dertz and Vice President Janet Nohos. (ALJD 5:40-42)

On the morning of September 13, Liggins told Dr. Carre his idea had worked: the techs were banding together. (Tr. 40-41; ALJD 5:47-48) Just a few hours later, Chew effectively admitted that she knew about Liggins' continued protected/concerted activity by ominously warning Liggins that she heard he was trying to get her fired. (ALJD 7:7-12; Tr. 42) Less than two hours after that conversation, Chew falsely accused Liggins of sleeping on the job, which led to his summary termination. (ALJD 18:35-41; Tr. 42-44) All of these facts found by the ALJ about the events of September 13 are based on Liggins' credited testimony and, conversely, the ALJ expressly rejecting Chew's and Dr. Carre's denials as to these events. These facts also form

---

<sup>2</sup> All dates hereafter are in 2011 unless specifically noted otherwise.

the foundation for the AJL's finding that Chew knew about Liggins' continued protected activity, and her finding that Chew had animus toward that activity.<sup>3</sup>

During his termination meeting the next day with Human Resources Director Dertz and Lorie Chew, Liggins gave Dertz and Chew a packet of letters, including the letters he had told Dr. Carre he was writing to management about the sink and the window. (ALJD 8:26-34) After receiving copies of these letters, Dertz rejected Liggins' claim that he was not sleeping at work. Instead, Dertz decided to believe Chew and terminated Liggins based on Chew's uncorroborated allegation that she had found him sleeping while on duty.

The ALJ's finding as to knowledge is clearly based Liggins' credited testimony regarding his repeated complaints about the window and the lack of a sink, much of which was strongly corroborated by current employee Monica Hopkins. (ALJD 17:33-43) In addition, the ALJ implicitly found that based on Chew's statement to Liggins that she heard he was trying to get her fired Chew knew about Liggins' continued conversations with Dr. Carre about the sink and window. (ALJD 18:10-11) Similarly, the ALJ's finding as to animus is based, in part, on this same credited statement by Chew to Liggins about him trying to get her fired. (ALJD 17:49-18:33)

All of these finding by the ALJ are founded on the ALJ's complete rejection of Respondent's witnesses' testimony to the extent that it contradicted Liggins'. In making her findings, the ALJ also specifically decided that she did not believe that Radiology Director Lorie Chew told the truth in this proceeding. Indeed, Chew was discredited as to all critical elements of her testimony, including whether employees, including Liggins, spoke to her about their concerns about the sink and the window height; whether she told Liggins that she heard he was

---

<sup>3</sup> Significantly, Respondent doesn't even bother to attempt to argue that if the ALJ's credibility determinations as to these critical events are correct that there is still no evidence of knowledge and animus. In other words, Respondent implicitly concedes that this critical testimony by Liggins, if credited, seals Respondent's fate.

trying to get her fired; and whether she actually found him asleep a work. In discrediting Chew, the ALJ relied on the following criteria:

- the fact that she gave confusing testimony, including essentially incoherent testimony about exactly where she saw Liggins shortly after supposedly catching him asleep at work (ALJD 12:11-18);
- the fact that she gave testimony that was contradicted by other witnesses, including Respondent's own additional witnesses (ALJD 12:20-24; 12:fn. 20);
- the inherent probability of her testimony (ALJD 12:24-28);
- the fact that her trial testimony was contradicted by her prior sworn affidavit testimony and her own contemporaneous notes (ALJD 12:30-33; 13:6-12);
- her argumentativeness while testifying (ALJD 13:21-26);
- her non-responsive answers on cross-examination (ALJD 13:21-26); and
- her overall demeanor (ALJD 13:21-26).

All of these factors have long been considered valid bases to evaluate credibility. See, e.g., *Precision Plating*, 243 NLRB 230, 236 (1979), *enfd.* 648 F.2d 1076 (6<sup>th</sup> Cir. 1981); *Double D Construction Group*, 339 NLRB 303, 305 (2003).

Similarly, as with Chew, the ALJ did not believe Dr. Joseph Carre's testimony and the ALJ again relied on standard, well-established factors to reach her decision. Specifically, the ALJ noted that much of Dr. Carre's direct testimony was elicited from leading questions by Respondent's counsel, that he gave contradictory testimony in a sworn affidavit, and his testimony was contradicted by Respondent's other main witness, namely Lorie Chew. (ALJD 15:9-40) In addition, the ALJ noted Dr. Carre's argumentativeness and his unwillingness to admit statements contained in his affidavit. (ALJD 15:23-25)

As with the basis for discrediting Chew, these reasons have strong foundations in extant Board law. For example, leading questions have long been recognized by the Board to be of limited probative value as they are little more than the attorney testifying and objecting to such questions can be futile since the desired answer has already been conveyed to the witness. See, *H.C. Thomson*, 230 NLRB 808, 809 fn. 2, (1977); *Liberty Coach Company, Inc.*, 128 NLRB 160, 162 fn. 7 (1960); *Weather Tec Corp.*, 238 NLRB 1535, 1555 (1978) enfd. 626 F.2d 868 (9<sup>th</sup> Cir. 1980). Thus, the ALJ's refusal to credit Dr. Carre, in part based on his improperly led testimony, is wholly permissible.

Conversely, the ALJ found Liggins to be extremely credible, and, as with her decision about Dr. Carre's and Chew's credibility, she made this finding based on a detailed review of his testimony and careful consideration of his demeanor. The ALJ specifically found that Liggins, like the other witness presented by the Acting General Counsel, was "poised, forthright, and composed" (ALJD 11:38-39); his testimony was corroborated by an independent, neutral witness, current employee Monica Hopkins (ALJD 15: 42-46); and his testimony did not waiver on cross-examination. (ALJD 15: 46) The ALJ also based her decision to credit Liggins on his overall demeanor. (ALJD 15:49-16:6) Under *Standard Drywall*, supra, the ALJ's determination in this regard should therefore not be disturbed.

## **II. Respondent's Exceptions**

Virtually all of Respondent's exceptions ultimately take issue with the ALJ's credibility decisions. In particular, Respondent vehemently attacks the ALJ's decision to credit Liggins rather than Chew and Dr. Carre concerning the details of the events of that occurred on September 13. By ignoring Liggins' testimony regarding what happened that day, Respondent bootstraps its exceptions into a claim that the ALJ's decision is based on speculation and

conjecture because the Acting General Counsel's case lacks the critical elements of knowledge and animus.

In its Brief, Respondent claims that the ALJ provided no justification for ignoring the unrefuted testimony that Dr. Carre and Chew never discussed the issue of the techs banding together. This claim is pure fantasy, however. The ALJ provided several reasons why she refused to credit this testimony, including that given all the evidence it did not seem likely (ALJD 12:25-28), and the fact that, as discussed above, she found that both of them gave testimony rife with inconsistencies that made them completely incredible. In short, the reason Respondent's attempts to claim that the ALJ's decision lacks sufficient proof of knowledge and animus must be rejected is that the ALJ fully explained in her decision why Liggins' testimony clearly demonstrate both critical facts, by Chew herself, just hours before she falsely accused him of sleeping on the job.

For the reasons discussed below, the ALJ's credibility conclusions should not be disturbed. Similarly, to the extent that several of Respondent's exceptions are arguably about something other than credibility, these exceptions boil down to nothing more than convenient misreading or misunderstandings of the ALJ's decision and/or an unwillingness to accept other well-reasoned aspects of the decision.

Respondent's credibility based exceptions can be broadly grouped into categories based on the witness in question. First and foremost, there are those based on the ALJ's findings against Respondent's key witness, Lorie Chew. Next, there are several exceptions related to the ALJ's discrediting of Respondent's other important witness, Dr. Joseph Carre. Finally, there are several exceptions that directly or by implication relate to the ALJ's decision to believe Earl

Liggins' over Respondent's witnesses. Each category of credibility-based exceptions is discussed in turn below.

#### **A. Specific Exceptions Regarding Chew's Credibility**

In Exceptions 3 and 5 Respondent challenges the ALJ's reliance on Chew's affidavit. The only case cited to support this specious claim, *Sam's Club v. N.L.R.B.*, 173 F.3d 233, 241-242 (4<sup>th</sup> Cir. 1999) is completely inapplicable. (Respondent's Br. p. 8) The *Sam's Club* case involved a situation where one of the General Counsel's witnesses changed her testimony and the General Counsel attempted to impeach her with her own affidavit. *Id.* Instead of merely discrediting the witness, the ALJ credited the affidavit testimony as substantive evidence of an 8(a)(1) violation even though the affidavit was never admitted into evidence. *Id.* The court found that since the affidavit was not in the record it was improper for the ALJ to rely on it to find a violation. *Id.*

Nothing like that occurred here. Instead, Chew's affidavit was merely used by the Acting General Counsel, and only considered by the ALJ, as a basis to impeach Chew, and not as substantive evidence of any fact at issue. This is plainly permissible under Fed.R.Evid. 801(d)(1)(A) since Chew testified at the hearing and the affidavit was a prior inconsistent statement by Chew, and nothing in the *Sam's Club* decision suggests otherwise. Respondent's exception 3 and 5 must therefore be rejected.

In Exception 4, Respondent unconvincingly argues that Chew's affidavit contains only minor inconsistencies. This fanciful claim is wholly without merit. Respondent claims that her change from supposedly finding Liggins with two pillow cases on his head to allegedly finding him with a pillowcase and a sheet on his head is "not materially inconsistent" because both of

her sworn statements involve two linens.<sup>4</sup> (Respondent's Brief at p. 8) Beyond the sheer audacity of the argument, this claim ignores the full extent of Chew's ever morphing story. Her claim actually went from one pillow case (her notes) to two pillow cases (her sworn affidavit) to a pillow case and a full-sized sheet (her trial testimony). Thus, in addition to being a critical change regarding one of the most significant aspects of the case, the new "two linen" theory Respondent desperately latches onto in its exceptions ignores the fact that it is strikingly different from Chew's own contemporaneous notes. (RX-4) This is especially important since Chew failed to even attempt to offer an explanation for this discrepancy at the hearing.

In addition, in Exception 4 Respondent frantically tries to rehabilitate Chew's abysmally unconvincing testimony by drawing on Liggins' testimony and Ereka Worthy's testimony to allegedly corroborate Chew. With respect to attempting to use Liggins' testimony to achieve this goal Respondent notes that at one point in his testimony Liggins stated that Chew asked him why he had a sheet on his head. Respondent is therefore latching on to one lone word by Liggins that is completely contrary to the rest of his testimony<sup>5</sup> and contrary to Chew's own affidavit and her notes.

Respondent's desperate attempt to use Liggins' testimony to bolster Chew's is particularly woeful, however, since it means that even Respondent favors his credibility over Chew's, at least when it suits Respondent's needs. While this may seem like a wise choice by Respondent given the fact that the ALJ found him to be extremely credible (ALJD p. 15:42-16:6)

---

<sup>4</sup> Of course, it should not be overlooked that Respondent only even attempts to make this "minor inconsistency" argument about one of the many differences between her trial testimony and her affidavit. See, e.g. ALJD 12:30-33.

<sup>5</sup> For clarities sake it should be noted that in Exception 4, Respondent incorrectly cites transcript pages 43-44 to claim that Liggins testified that Chew asked him why he had a "sheet" on his head. However, in that particular testimony Liggins makes no mention of a sheet. Presumably Respondent meant to reference transcript page 93, where the supposedly helpful reference to a sheet by Liggins occurs.

he also testified that she asked him why he had a pillow case on his head (Tr. 43-44) and she herself admitted that she only referred to a pillowcase in her affidavit. (Tr. 268)

Respondent also attempts to support Chew's sudden "sheet" testimony at the hearing by relying on the supposedly corroborating testimony of Erika Worthy. This effort likewise falls well short of the mark. The ALJ specifically discredited Worthy using well-established criteria to do so, namely the hesitant and uncertain nature of her testimony.<sup>6</sup> Moreover, the attempt to rely on Worthy's testimony on this point is particularly feeble since Chew claimed Liggins had the sheet on his head, while Worthy testified that she understood Chew to have told her that Liggins had the sheet wrapped around his shoulders. (Tr. 300) In the end therefore, Worthy simply failed to corroborate Chew in any meaningful way and the ALJ properly rejected Respondent's attempt to use it for that purpose. For these reasons Respondent's exceptions 3, 4 and 5 should be rejected.

In Exceptions 1 and 11, Respondent takes issue with the ALJ noting that certain testimony by Liggins was not specifically rebutted by Chew. Along with completely discrediting Chew for all the reasons discussed above, the ALJ correctly noted that Chew did not specifically deny Liggins' claim that during a conversation shortly before allegedly catching him sleeping, Chew told him that she heard he was trying to get her fired. (ALJD 7:11) Respondent attempts to make this seem significant by noting instead that Chew did deny having two separate conversations with Liggins that day. According to Respondent, since Chew denied having two conversations with Liggins that day, she effectively denied the statements attributed to her by

---

<sup>6</sup> As the Board explained in *Aero Corp.*, 237 NLRB 455, 455 fn.1 (1978) finding a witnesses testimony unconvincing is particularly warranted when the witness is "indefinite and uncertain." Similarly, in "*The Union*," 251 NLRB 1030, 1038 (1980) the Board upheld an ALJ's credibility determination in a *Standard Dry Wall* footnote when the ALJ discredited a witness in part because he repeatedly used qualifying clauses such as "I think" and "I believe" while testifying. Therefore, Respondent's Exception 6 regarding the ALJ's basis for discrediting Worthy is devoid of merit and should be rejected.

Liggins in the conversation she says never happened. This exception is without merit for three reasons.

First, the ALJ is absolutely right: Chew simply never specifically denied saying to Liggins on the day she allegedly found him sleeping that she heard he was trying to get her fired. Respondent implicitly concedes this point by failing to point to a specific denial of this statement by Chew in the record. In fact, Chew was never asked whether she said those words to Liggins that day. Accordingly, there is no such denial for Respondent to cite. Respondent's exception regarding this issue is therefore simply wrong as a matter of fact.

Second, although Chew's general denial of a second conversation with Liggins that day might have been somewhat troubling if it could have been shown that the ALJ overlooked it entirely, as Respondent concedes the ALJ did no such thing. Rather, the ALJ specifically discussed this testimony by Chew in her decision and Respondent's exceptions expressly recognize that the ALJ was well aware of it because Respondent cites to the portion of the ALJD where she specifically notes that exact testimony. (ALJD 7:24-25) The ALJ was therefore fully aware of this implied rebuttal evidence, the ALJ simply rejected it as being insufficient to rebut Liggins' testimony to the contrary.

Third, as discussed above, the ALJ simply flatly refused to believe Chew. Thus, the fact that the ALJ considered her general denial to be insufficient, including noting the lack of a specific denial about making that statement, is clearly not in error.

In Exceptions 2 and 12, the ALJ rejected the incredible denials by Chew and Dr. Carre regarding various statements about "banding together." Based on his poor credibility compared to Liggins, the ALJ effectively rejected Dr. Carre's claim that he never told Liggins to band together. The ALJ likewise rejected Dr. Carre's claim that Liggins did not tell him, on the

morning of September 13, 2011, that he and the other employees were banding together.<sup>7</sup> As discussed in detail above, the ALJ properly refused to credit Dr. Carre's self-serving denials based on well-accepted credibility principles. Because of Chew's similarly deficient credibility, Chew's likewise self-serving denials were rejected. By these two exceptions (2 and 12), Respondent is merely taking issue with the ALJ's credibility determinations against Respondent's witnesses, which, for the reasons discussed herein and by the ALJ, should be rejected.<sup>8</sup>

### **B. Specific Exceptions and Arguments Related to Dr. Carre's Credibility**

In Exception 7, Respondent contends that the ALJ erred in finding that Dr. Carre's testimony was contradicted by his sworn affidavit. To make this argument, Respondent cherry picks one of the few items about which Dr. Carre's testimony did not change, while completely ignoring the areas where his testimony clearly did change.

For example, during cross-examination Dr. Carre claimed he didn't understand why the techs were concerned about the lack of a sink. (Tr. 211) However, he had stated in an pre-hearing affidavit that he not only knew full well what the employees' sink concern was about, he went a step further in the affidavit and admitted that he agreed with the employees-- he thought that the technicians "really should wash their hands between each patient" and that he too would

---

<sup>7</sup> Because the ALJ found that Liggins' continued efforts to press for changes at Respondent regarding the sink and the window was the logical outgrowth of the earlier undisputedly concerted actions of the employees, Respondent's complaints in its Brief that Liggins' assertions about banding together were actually false is of no moment. (Respondent's Brief at p. 10) What matters is that Liggins engaged in protected concerted activity, (a finding that Respondent did not except to) and that Dr. Carre's and Chew's denials were expressly discredited by the ALJ. Critically however, given the evidence that the ALJ did credit, she concluded that the Acting General Counsel had carried his burden of establishing, by a preponderance of the evidence, that Respondent knew about Liggins' continued protected concerted activity.

<sup>8</sup> Exception 12 is also highly misleading insofar as it suggests that Liggins testimony as to his conversation with Dr. Carre on September 13 was equivocal. Liggins' testimony was not the slightest bit equivocal. Liggins credibly testified that that morning he told Dr. Carre that his idea had worked, we the techs have banded together. (Tr. 40-41; ALJD 5:45-48) While Liggins admitted it was not a lengthy conversation and that it was in the hallway, this does not somehow equate to Liggins being uncertain that the conversation even occurred, as Respondent's exception 12 implies.

be annoyed if he had to leave the room each time we wanted to wash his hands. (Tr. 211-13; GCX-6 at p. 3) Like Dr. Carre himself at the hearing, Respondent's Brief makes no effort to explain this discrepancy or explain why it could not, or should not, have formed part of the foundation upon which the ALJ could properly chose not to credit him. Respondent's unsupported exception on this point should therefore be rejected.

In Exception 8, Respondent apparently takes issue with what it deems an implied finding by the ALJ that in September Dr. Carre relayed to Chew concerns made to him by the CT techs. The portion of the ALJ's decision referenced in this exception refers only to complaints about the employees working conditions and specifically that the ALJ noted that Dr. Carre admitted that he spoke to Chew about the window issue, but denied talking to her about the employees' complaints about the sink. The ALJ found this odd inconsistency hard to reconcile. Why would Dr. Carre talk to her about one of the employees concerns and not the other? However, based on the portions of the transcript also cited by Respondent in this exception, it appears that Respondent is impliedly once again challenging the ALJ's refusal to credit Dr. Carre's denial that he suggested to Liggins that he band together with his co-workers and that he told Chew that Liggins told him that he was banding together with his co-workers to try to get Chew to address the employees' work-related concerns.

With respect to relaying employee concerns to Chew, as the ALJ noted, Dr. Carre admitted that he told Chew about the employees concerns about the window. (ALJD 15:14-15; Tr. 207-208) Although Dr. Carre also denied telling Chew that employees had complained to him about the lack of a sink, the ALJ viewed this contradiction as "difficult to believe" thereby suggesting that this formed yet another reason why his testimony was not worthy of believe—in short, it simply didn't make sense.

As for the unspoken aspect of this exception, namely that Respondent is again challenging the ALJ's decision to reject Dr. Carre's and Chew's denials that they discussed the employees banding together in September, this exception also lacks merit on this point. First, the ALJ specifically rejected their denials on this issue. (ALJD 6:fn.9) Second, it is no great inferential leap to conclude, as the ALJ clearly did based on the credited testimony by Liggins, that: 1) Liggins did, in fact, tell Dr. Carre that he was banding together with his co-workers (ALJD 16:25-27) and 2) Chew did, in fact, tell Liggins that she heard he was trying to get her fired. (ALJD18:14-17) From that testimony the ALJ clearly found that Chew was aware that employees were banding together about her failure to act on their complaints, and had animus toward that protected concerted activity.

One final argument advanced in Respondent's Brief regarding Dr. Carre bears mentioning. Respondent claims that it doesn't make sense that Dr. Carre would tell Liggins to band together, then go to Chew and "push off the blame onto Liggins." (Respondent's Brief at p. 11) There is, however, a simple and logical explanation for this supposedly significant "logical hole" in the facts as found by the ALJ. Specifically, as Dr. Carre confessed in his affidavit, he sympathized with the CT techs complaints about the sink having been removed. (Tr. 212-13; GCX-6 at p. 3) Around this time, Dr. Carre was also hearing repeated complaints by the techs about this problem. Perhaps growing tired of the complaints to him, it is perfectly logical to believe that Dr. Carre would suggest to Liggins that he talk to the head of the department to try to get the matter fixed. It is also perfectly logical that Dr. Carre would report to Chew that Liggins had told him that Liggins and the other techs were banding together because Chew knowing about the employees' concerted effort would be the only way that Dr. Carre's suggestion that this would get her to fix the problem would actually work. Put differently, based

on Liggins testimony, Dr. Carre came up with the idea that concerted action might prompt Chew to address the sink and window concern. In order for it to actually work though, Chew needed to know that the employees were about to, as Respondent called it, start an “uprising against Chew.” Thus, it was part of Dr. Carre’s own plan that Chew find out about the uprising. Not so that Liggins would get fired, as Respondent seems to posit, but because he too wanted the employees concerns addressed. This inference is particularly compelling when one considers the fact that Dr. Carre testified in his affidavit that he agreed that the techs really should wash their hands between patients. (Tr. 211-13).

**C. Exceptions Grounded in the ALJ’s Determination that Liggins’ Should be Credited Over Respondent’s Witnesses**

Respondent’s Exception 9 is effectively a claim that the ALJ erred in concluding that Liggins’ should be credited despite a discrepancy regarding how long he had been working on certain letters he wrote and then gave to Respondent on the day he was terminated. Specifically, Respondent disagrees with the ALJ’s characterization of the discrepancy as “minor.” However, this is the only discrepancy Respondent can point to in his testimony, thus, calling it minor can hardly be seriously quibbled with. In addition, the date that Liggins started to prepare the letters is nothing more than a peripheral point since it makes no difference to any important element of the case. Therefore, regardless of the ALJ’s word choice to describe Liggins’ slight discrepancy on an insignificant peripheral matter, the ALJ’s decision to nonetheless credit him despite it cannot reasonably be faulted.

This is particularly true since it has long been recognized that it is entirely proper to credit some, but not all of a witnesses testimony. *Maximum Precision Metal Products*, 236 NLRB 1417 (1978). Therefore, even assuming that the ALJ discredited some of Liggins’

testimony, this does not mean it would be somehow inappropriate for her to nonetheless credit the rest of his testimony, as she clearly did here.

Respondent's exceptions 13 through 15 are also yet again nothing more than challenges to the ALJ's decision to credit Liggins over Respondent's witnesses. In Exception 13 Respondent takes issue with the ALJ characterizing the timing of Liggins' termination as "suspicious." Of course, such a claim ignores the fact that the ALJ credited Liggins and found that he told Dr. Carre, just hours before being accused of sleeping on the job, that he was banding together with his co-workers. Perhaps if the ALJ had refused to credit this testimony it would make sense to say the timing was not suspicious. But that's not what the ALJ did. And, critically, other than weakly arguing that its own witnesses frequently changing stories should have been credited instead of Liggins', Respondent points to nothing in the record that detracts from the ALJ's related factual determinations.

Exceptions 14 and 15 deal with the ALJ's determination that Liggins was not sleeping at work and the related corollary finding that Respondent's asserted reason for terminating Liggins was mere pretext. These exceptions are also nothing more than a refusal by Respondent to accept that the ALJ believed Liggins' denial of the sleeping accusation and, conversely, rejected Chew's claim that he was sleeping. Since the ALJ believed Liggins, the asserted basis for his termination was, by definition, nothing more than pretext.

### **III. Exception Based on Respondent's Incorrect Reading of the ALJ's Decision (Exceptions 10)**

In Exception 10, Respondent takes issue with that it deems an implied finding by the ALJ that the letters Liggins' wrote addressing his on-going concerns about the lack of a sink and the window height could establish that Respondent knew about Liggins' protected/concerted activity. While it's true, as Respondent notes, that the letters came after the sleeping accusation,

this exception ignores a critical fact. Namely, that Respondent's own witness, Donna Dertz, went to great lengths to explain that the final decision to terminate Liggins was not made until the conclusion of the meeting where Liggins gave the letters to Chew and Dertz. (ALJD 9:16-23) Therefore, the letters themselves do provide a basis to establish knowledge by Respondent prior to the decision to terminate him. In other words, while its certainly true that the accusation of sleeping on the job occurred before the letters were given to Respondent, since the decision to terminate Liggins had not yet been made, the ALJ is correct that the letters are yet another way that Respondent was put on notice, before Liggins was fired, that he was engaging in protected activity.

#### **IV. CONCLUSION**

Based on the foregoing, the Acting General Counsel respectfully submits that the record in this case strongly supports the ALJ's finding that Earl Liggins was terminated because he engaged in protected concerted activity in violation of Section 8(a)(1) of the Act. Accordingly, the Acting General Counsel requests that Respondent's Exceptions be overruled and that the ALJ's decision, including her findings, conclusions, and recommendations, be adopted by the Board.

Dated at Chicago Illinois this 11<sup>th</sup> day of June, 2013.

Respectfully submitted by:



---

Jeanette Schrand  
Counsel for Acting General Counsel  
National Labor Relations Board – Region 13  
209 S. LaSalle Street – Suite 900  
Chicago, IL 60604  
phone: 312.353-7589  
e-mail: jeanette.schrand@nlrb.gov

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of **Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions** has been electronically filed with the NLRB Executive Secretary and served upon the following parties via electronic mail this 11<sup>th</sup> day of June, 2013:

**Counsel for Respondent:**

Scott Gilbert, Esq.  
Hinshaw & Culbertson LLP  
E-mail: sgilbert@hinshawlaw.com

**Charging Party:**

Mr. Earl Liggins  
E-mail: earlliggins@yahoo.com



---

Jeanette Schrand  
Counsel for Acting General Counsel  
National Labor Relations Board – Region 13  
209 S. LaSalle Street – Suite 900  
Chicago, IL 60604  
phone: 312.353-7589  
facsimile: 312.886.1341  
e-mail: jeanette.schrand@nlrb.gov