UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

IN THE MATTER OF	)	
RESPONDENT CORPORATION, Respondent	)	
	)	**CASE NO. 16-CA-091326**
and	)	
	)	
SHEET METAL WORKERS LOCAL #67	)	
A/W SHEET METAL WORKERS	)	
INTERNATIONAL ASSOCIATION	)	

BRIEF IN SUPPORT OF K-AIR CORPORATION'S EXCEPTIONS TO THE ALJ'S FINDINGS

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I. STATEMENT OF CASE

A. Background Regarding Respondent and the Subject LA Fitness Jobsite

Villarreal is the Owner of K-Air ("Respondent"), a residential AC company that has performed commercial contracts. (TR 149:10-14).[1] The subject LA Fitness contract was Respondent's first sizeable commercial job ("Subject LA Fitness Jobsite"). (TR 149:12-14). Respondent was the HVAC subcontractor for the Subject LA Fitness Jobsite and tasked with performing duct work and installing HVACs and grills. (TR 154:16-20). Respondent started working on the Subject LA Fitness Jobsite the first week of August 2012. (TR 155:4-10). The Subject LA Fitness Jobsite ended approximately the first week in December 2012. (TR 155:19 through TR 156:1).[2] Notably, Respondent performed a small commercial job in Dallas, Texas in August 2012 with some follow up warranty work in September 2012. (TR 158:2-17).[3] As of the date of the ALJ hearing, Respondent has not had any other commercial jobs. (TR 240:1-15).

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[1] The ALJ's decision will be cited as ("ALJD __"); the transcript of the proceedings will be cited as ("TR ___"); references to the Respondent's exhibits before the ALJ will be cited as (R-1, R-2, etc.); references to General Counsel's exhibits will be cited as (GC-1, GC-2, etc.); and references to Joint exhibits will be cited as (J-1, J-2, etc.).

[2] The ALJ failed to take this material evidence in to consideration when issuing his recommended remedy. This evidence is material because it demonstrates that the subject job ended; that Plaintiff's position is no longer available; and that there are no similar jobs for Vega. (ALJD 9:45 through 10:4).

[3] The ALJ failed to acknowledge this material information in his analysis. This evidence is material because it demonstrates that Villarreal was out of town when he told Garcia he was going on of town. (ALJD 2:29-35). Moreover, this evidence directly contradicts the ALJ's finding that Villarreal was not being honest when he told Garcia that he could not meet him because he was going out of town and would be out of town for a while. (ALJD 9:19-24).

B. Respondent's Efforts to Hire and Retain Union-Affiliated Workers

On or about August 16, 2012, Gilbert Garcia ("Garcia") went to the Subject LA Fitness Jobsite and was informed by the general contractor that Respondent was the HVAC subcontractor; Garcia left his business card with the superintendent for the general contractor to provide to Villarreal. (TR 91:4 through TR 92:16; GC-4). The business card Garcia left makes clear that Garcia is with Local 67. (GC-4).

After receiving Garcia's business card from the general contractor, on August 20, 2012, Villarreal called Garcia in an effort to hire sheet metal workers to assist Respondent with the work at the Subject LA Fitness Jobsite. (TR 212:3-6). Villarreal left a voice mail message for Garcia. (TR 94:8-10; and TR 212:13-14). Garcia did not return Villarreal's call for at least two weeks and possibly later. (TR 94:6-7; and TR 212:20-25). Unfortunately, when Garcia called Villarreal back, Villarreal no longer needed workers for the Subject LA Fitness Jobsite. (TR 212:1-5).

Moreover, before Villarreal hired Justin Reeder ("Reeder") to work for Respondent, Reeder, on his own initiative, and without being asked by Villarreal, told Villarreal that he had filed NLRB charges against Swisher and that he was interested in joining a union. (TR 113:13 through TR 114:19; TR 127:24 through 128:19; TR 130:4-8; TR 133:2-6; GC-5(a); GC-5(b); GC-5(c)). On or about September 15, 2012, Respondent hired Reeder as a lead man to work at a Yogurt Zone facility and the Subject LA Fitness Jobsite and asked Reeder to help him find workers for the Subject LA Fitness Jobsite. (TR 110:12-22; TR 132:16-20; TR 133:2-8; TR 213:15-25; TR 214:5-14). Reeder continued working with Respondent after John Vega's

termination and through approximately October 11, 2013. (TR 136:13-16).[4]

C. Background of John Vega's Employment with Respondent

Vega has been a member of the union since 1996; however, for a short period of time, his union standing was suspended due to his failure to pay dues in Houston. (TR 12:18 through TR 13:9). Vega learned that Respondent had work opportunities through Reeder, who was already working for Respondent, and who gave Vega Villarreal's phone number. (TR 14:15-17; and TR 14:20 through TR 15:7). As a result of the information received from Reeder, Vega called Villarreal and left a voice mail message. Villarreal called back within 15 minutes. During that discussion, Vega again emphasized his level of work experience. (TR 15:8 through TR 16:1). At the time of this discussion, Villarreal was aware that Reeder had referred Vega to Villarreal. (TR 215:3-5).

That same day, Villarreal interviewed Vega. During the interview, Vega emphasized that he had 17 years' of experience; he could train people; he could coordinate with other trades; he could help Respondent succeed; he could be an asset to the company; and he could meet Villarreal's expectations. (TR 16:18-20; TR 46:11-20; TR 48:14-23; TR 49:12-18; TR 173:24 through TR 174:1). Villarreal hired Vega. (TR 214:17 through TR 215:2). Notably, during the

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[4] The ALJ failed to acknowledge any of the material evidence in this paragraph in his analysis. (ALJD 3:31-33; ALJD 4:8-10; ALJD 9:4-14) This evidence is material because it demonstrates that Reeder notified Villarreal about his interest in joining a union and union charges prior to being hire; despite this information Villarreal hired him and asked him to help find workers; that Villarreal hired Vega even knowing Reeder referred him to Villarreal; and that Villarreal kept Reeder as a worker even after terminating Vega. Moreover, the evidence directly contracts the ALJ's finding that Villarreal asked Reeder about his unfair labor charge against Swisher. (ALJD 4:8-10). In addition, it directly contradicts that ALJ's finding that Villarreal was not pro-union and that he did not want to hire or work with the Union. (ALJD 9:15-19).

interview, Vega mentioned that he was not on good or bad terms with the union and mentioned something about his Houston union-dues experience. (TR 215:6-14; TR 237:16 through TR 238:9).[5]

D. The Totality of Vega's Alleged Union Activity

First, Vega testified that he showed up to work for Respondent on all three (3) days wearing a Brandt hardhat and vest (TR 18:2-5; TR 53:1-2). Vega testified that he obtained the Brandt hardhat and vest from his brother, who previously performed sheet metal work for Brandt. (TR 18:12-13; TR 50:24-51:5). It was clear to Vega that Villarreal did not know who or what Brandt was. (TR 53:3-10). On Monday, September 24, 2012, Vega and Villarreal had a discussion regarding Vega's hardhat. First, on direct examination, Vega testified that **Villarreal asked him** about his hardhat, and specifically asked "[i]f the logo on it, that the company's name was Brandt, if the company was union" and Vega testified that he responded yes. (TR 24:16 through TR 25:1; TR 70:1-22). However, on cross-examination, Vega testified that Villarreal asked him who Brandt was and that **Vega told Villarreal** it was "a HVAC company, a union company." (TR 66:23 through TR 67:4).[6]

Thereafter, Vega testified that in response, Villarreal asked him if he was union to which Vega replied, *inter alia*, that he was a union member, but not a member in good standing. (TR 25:3-8; TR 67:4-9). Vega's testimony as to what transpired after that is again

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[5] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 2:6-15). This evidence is material because it demonstrates that Villarreal hired Vega knowing he had some affiliation with the union. Moreover, the evidence directly contradicts the ALJ's finding that Villarreal did not want to hire or work with the Union. (ALJD 9:15-19).

[6] The ALJ erred in crediting Vega's testimony in this regard as his testimony is inconsistent on the very issue. (ALJD 8:3-15).

inconsistent. Specifically, on direct examination, Vega stated that Villarreal asked him once again if he was union; however, on cross-examination, Vega testified that Villarreal asked him 3 or 4 times if he was union. (TR 25:9-23; TR 67:22 through TR 68:11; TR 69:1-3).[7] Villarreal asked Vega to come back to work the next day. (TR 57:23-25; TR 69:12-16).

The only other "union" activity occurred on Monday, September 24, 2012 when Vega worked most of the day in the swimming pool area with "Albert", another mechanic. Vega testified that Albert told Vega that he recognized Vega from International Mechanical, a HVAC company, where Vega allegedly wore union shirts and went on strike with other persons. Vega told Albert that he was a member of the union, but not in good standing, and asked Albert not to tell Villarreal because he was afraid he would get fired. (TR 19:14-20; TR 22:7 through TR 23:13). Vega had no personal knowledge that Albert told Villarreal about Vega's alleged prior union activity and never heard Albert tell Villarreal about Vega's alleged prior union activity. (TR 54:10-23). In fact, General Counsel presented no evidence, not even from Albert, that Albert told Villarreal that he recognized Vega from this alleged union activity.

E. <u>Vega's Last Task</u>

On Tuesday, September 25, 2012, around 1:45 p.m., Vega was working in the gym area when foreman Roger Trinidad ("Trindad") called him off that task and asked him to fix a unistrut that was holding a plenum in the dressing room area. (TR 30:13-16; TR 61:1-12). Vega testified that when he arrived to the subject area that he observed that the unistruts were not fastened properly and that plenum could fall down and kill someone. (TR 30:20 through TR 31:10). Prior

[7] The ALJ erred in crediting Vega's testimony in this regard as his testimony is inconsistent on the very issue. (ALJD 8:3-15).

to attempting to fix it, Vega, without anyone's knowledge, videotaped it "because it was dangerous work, and [he] wanted to show this to the owner." (TR 31:11-15; TR 59: 13-15; TR 143:14-23; GC-2). Rather than notify anyone, including the owner, about the severity of the situation, Vega testified that he made a temporary fix to the area because he could not complete the task **without a welder** coming and welding the area. (TR 31:16 through TR 32:1, TR 32:9-17).[8] **Notably**, Trinidad testified that Vega never mentioned anything about needing a welder before he could complete the task or that he had only "temporarily" fixed the area. (TR 261:5-10; TR 264:5-18; TR 266:13 through TR 267:10).[9]

[8] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 4:50-51). This evidence is material because it is Vega's very own reason for not adequately fixing the subject area and for leaving the subject area the way he did when he left work that day. Moreover, it contradicts Trindad's testimony and Sanchez' testimony, both of which the ALJ found to be credible. (ALJD 8:3-15).

[9] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 5:24-38). This evidence is material because it demonstrates that a welder was not needed to fix the subject area. Moreover, it contradicts Vega's testimony regarding why he left the subject area the way he did when he left work. (ALJD 8:3-15).

Importantly, Vega talked with Villarreal around 3 p.m. right before he left work on Tuesday afternoon and **after** he videotaped the "dangerous" area he was tasked with fixing. Vega did not show Villarreal the video before leaving work Tuesday. (TR 33:24 through TR 34:4; TR 58:6-8; TR 61:20 through TR 62:6; TR 62:14-19).[10] In fact, even though Vega left work that day thinking he would be fired, he did not show Villarreal this video. (TR 34:8-22).[11] Moreover, the next day, September 26, 2012, when Vega returned for his tools, he did not show Villarreal this video. Instead, he warned Villarreal to watch out for bad people. (TR 227:9-20). [12] The video did not capture the subject area after Vega worked on it. (TR 31:11-15; TR 59: 13-15; TR 143:14-23; GC-2).

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[10] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 5:24-26). This evidence is material because it demonstrates that Vega did not notify Villarreal of the situation or of the fact that a welder was allegedly needed to permanent repair the situation. Moreover, it is material because it demonstrates that Villarreal spoke first-hand with the person he saw working in the subject area and that said person never mentioned anything about the subject area or why it was left in the condition it was left in the day he left work.

[11] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 5:24-26). This evidence is material because it demonstrates that Vega did not notify Villarreal of the situation even though he thought he would be terminated. Moreover, it is material because it demonstrates that Villarreal spoke first-hand with the person he saw working in the subject area and that said person never mentioned anything about the subject area or why it was left in the condition it was left in the day he left work.

[12] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 5:24-25). This evidence is material because it demonstrates that Vega did not notify Villarreal of the situation or of the fact that a welder was allegedly needed to permanently repair the situation. Moreover, it is material because it demonstrates that Villarreal spoke first-hand with the person he saw working in the subject area and that said person never mentioned anything about the subject area or why it was left in the condition it was left in the day he left work.

After the employees left the Subject LA Fitness Jobsite, Villarreal walked the area and noticed the dangerous area Vega had been working on that afternoon. Villarreal had seen Vega working in that area that afternoon. (TR 200:15-20; TR 224:4-6; R-3; R-4).[13] Villarreal took photographs of the subject area at 4:30 p.m. on Tuesday, September 25, 2012 right before calling Vega. (TR 222:23 through TR 223:23; TR 225:21-25; R-3; R-4). There is no dispute that the condition Vega left the subject area in was dangerous. (TR 281:7 through TR 283:11).

F. John Vega is Discharged for Substandard and Dangerous Work Product

At approximately 4:30 p.m. on Tuesday, September 25, 2012, Villarreal contacted Vega by telephone. Villarreal asked Vega if he had performed the subject work and Vega stated that he had. Villarreal gave Vega an opportunity to explain the situation; however, Vega stated "that is the best I can do." During the conversation, Vega did not offer to show Villarreal the video he took or explain that it was a temporary fix. As a result of the work and Vega's response, Villarreal made the business decision to discharge Vega and told Vega that he did not have money to pay for mistakes. (TR 196:3 through TR 197:20; TR 198:1-3; TR 224:7 through TR 225:11; TR 226:1-22; TR 230:11-14). Villarreal did not have work for a person that did a horrible job. (TR 205:21-23). Villarreal felt that termination was reasonable under the circumstances and because of the work Vega performed in the subject area reflected in the photographs he took. (TR 227:4-8; TR 231:7-17; TR 241:6 through 242:1; TR 249:3-7; R-3; R-4). Ultimately, Villarreal had to pay another worker, Frankie Sanchez ("Sanchez"), to fix what Vega had done. (TR 230:15-23; TR 272:5-20). It took Sanchez about 1 or 2 hours to fix the

[13] The ALJ failed to acknowledge this material evidence in his analysis. This evidence is material because it demonstrates why Villarreal did not take the actions the ALJ thinks he would have taken had he been the business owner. (ALJD 9:11-13).

subject area. (TR 231:4-6; TR 274:25 through TR 275:2). There is no evidence in the record showing that Sanchez needed a welder's assistance prior to completing the task.[14]

G. After-Acquired Evidence

Vega filled out an employment application with Respondent. (J-1). The application specifically asked whether Vega had ever plead guilty, no contest or been convicted of a crime. (J-1). Vega marked "no" on the application. (J-1). Vega was untruthful when he filled out the application. Specifically, according to the Texas Department of Public Safety Sex Offender Registry, Vega was sentenced to 10 years and is serving probation for violating Texas Penal Code 22.021 to wit: attempt to commit aggravated sexual assault of a 13-year-old female child.[15] The man pictured in said sex offender registry is the same John Vega who testified at the ALJ hearing. Villarreal discovered this information after the ALJ hearing.

II. QUESTIONS PRESENTED

1. Whether the ALJ omitted material facts from his analysis? (Exception Nos. 1, 2, 4, 7, 8, 9, 10, 15 and 16)?
2. Whether the ALJ made findings that contradicted the evidence? (Exception Nos. 3, 5, 6, 14, 16, 19 and 21).
3. Whether the ALJ erred in his credibility findings? (Exception Nos. 11, 12, 18 and 19).

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[14] The ALJ failed to acknowledge this material evidence in his analysis. (ALJD 5:38-45). This evidence is material because it directly contradicts Vega's testimony regarding why he left the subject area in the condition he did. Moreover, it contradicts Vega's testimony, which the ALJ found to be credible. (ALJD 8:3-15).

[15]https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=4955108&SearchType=Name&ResultsUrl=%2fSexOffender%2fPublicSite%2fApplication%2fSearch%2fResults.aspx%3fSearchType%3dName%26FirstName%3dJohn%26LastName%3dVega%26Birthdate%3d%26Sex%3d0%26Race%3d0%26CountyCode%3d0

4. Whether the ALJ erred in concluding that Respondent violated Section 8(a)(1) of the Act? (Exception No. 14 and 20).

5. Whether the ALJ erred in concluding that Respondent violated Section 8(a)(1)(3) of the Act? (Exception Nos. 13, 17 and 21).

6. Whether the ALJ erred in rejecting the unrebutted evidence that Vega would have been laid off in December 2012 regardless of his alleged union activity? (Exception Nos. 22, 27, 28 and 29).

7. Whether the ALJ erred in concluding that the loss of earnings and other benefits should be computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement since the subject LA Fitness job ended mid-December 2012? (Exception Nos. 27 and 29).

8. Whether reinstatement is an appropriate remedy? (Exception Nos. 22-26, 28, 29)

III. LEGAL ARGUMENT

A. THE ALJ OMITTED MATERIAL FACTS FROM HIS ANALYSIS

The ALJ omitted a series of material facts from his analysis, which have a direct relation to the findings made by the ALJ. Respondent incorporates by reference, as if fully set out herein, the references to the evidence and arguments made by Respondent in footnotes 2, 3, 4, 8, 9, 10, 11, 12, 13 and 14 *supra.* For said reasons, the ALJ erred in omitting material facts from his analysis.

B. THE ALJ MADE FINDINGS THAT CONTRADICTED THE EVIDENCE

The ALJ made findings that contradicted the evidence. Respondent incorporates by reference, as if fully set out herein, the references to the evidence and arguments made by Respondent in footnotes 3, 4, 5, 8, 9 and 14 *supra.* For said reasons, the ALJ erred in making findings that contradicted the evidence.

C. THE ALJ ERRED IN HIS CREDIBILITY FINDINGS

The ALJ erred in crediting Vega's testimony. (ALJD 7:48-50). This finding ignores key evidence from disinterested witnesses that undermine Vega's credibility and whom the ALJ too found credible. (ALJD 8:3-15). Respondent incorporates by reference, as if fully set out herein, the references to evidence and argument noted in Section I (Statement of Case); Subsection E (Vega's Last Task); and Subsection F (Vega is Discharged for Substandard and Dangerous Work Product) above.

The ALJ erred in discrediting Villarreal's testimony regarding his desire to hire and work with union members. (ALJD 9:20-25). This finding ignores key evidence establishing the testimony. Respondent incorporates by reference, as if fully set out herein, the references to evidence and argument noted in Section I (Statement of Case) and Subsection B (Respondent's Efforts to Hire and Retain Union-Affiliated Workers) above.

D. THE ALJ ERRED IN CONCLUDING THAT RESPONDENT VIOLATED SECTION 8(a)(1)

Section 8(a)(1) of the Act, 29 U.S.C. Sec. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]." For interrogation which is not in itself threatening to constitute a violation of Section 8(a)(1), it must meet fairly severe standards, normally including the showing of a background of employer discrimination and a demonstration that the circumstances of the interrogation would reasonably induce fear of reprisal. *NLRB v. O.A. Fuller Super Markets*, 374 F.2d 197, 203 (5th Cir. 1967); *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1228 (2000). The Board's applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the "totality-of-the-circumstances" test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), aff'd. sub nom. *See Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

The ALJ found that Villarreal asked Vega and Reeder if they were union members and asked Reeder if Vega, George and Albert were union members. (ALJD 8:37-39). Notably, the ALJ states "[i]t requires no case citation to establish that such a question initiated by a boss to an employee, without legal justification, violates Section 8(a)(1) of the Act." (ALJD 8:39-41). The ALJ says nothing more. Most importantly, the ALJ makes no finding of a background of discrimination by Respondent or that the circumstances of the inquiries would induce fear of reprisal. (ALJD 8:34-46). In fact, the ALJ found that there was **no evidence** to support the allegation that Respondent coerced or threatened employees with unspecified reprisals as is required. (ALJD 8:43-46). Asking an employee if he is a union member alone does not violate Section 8(a)(1) of the Act. *See NLRB v. O.A. Fuller Super Markets*, 374 F.2d at 203; *Rossmore House*, 259 NLRB 1176 (1984), *aff'd sub no;. Hotel Employees & Restaurant Employees Union,*

Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985); *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 415 (5th Cir. 1980). Specifically, these isolated inquiries do not represent the degree of interference, restraint or coercion of employee organizational rights necessary to find a violation of Section 8(a)(1) of the Act. Accordingly, the ALJ erred in concluding that Respondent violated Section 8(a)(1) of the Act by making these inquiries.

E. THE ALJ ERRED IN CONCLUDING THAT RESPONDENT VIOLATED SECTION 8(a)(1)(3) OF THE ACT

To prove a violation of Section 8(a)(3) of the National Labor Relations Act, General Counsel must first establish a *prima facie* case of unlawful discrimination. To do so, General Counsel must demonstrate that the discriminatee's protected conduct was a motivating factor in the adverse employment decision. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd 662 F. 2d 899 (1982); cert. den., 455 U.S. 989 (1972). The is established by proof of: (1) protected activity on the part of each alleged discriminatee; (2) the employer's knowledge of that activity; (3) an adverse employment action against the alleged discriminatee; and (4) a causal connection between the employee's protected activity and the adverse employment action. *Tracker Marine, LLC*, 337 NLRB 644, 646 (2002); *see also*, *W.R. Case & Sons*, 307 NLRB 1457, 1463 (1992). If the *prima facie* showing is lacking, the complaint must be dismissed. *See,* e.g., *Judy Hornby Designs*, 279 NLRB 1271 (1986). Timing alone is insufficient to demonstrate animus. In *Caribe Ford*, 348 NLRB 1108 (2006), the Board found that although the timing of an alleged discriminatee's discharge, "soon after he contacted the Union... may raise suspicions... [M]ere suspicion arising from coincidental timing alone is insufficient to sustain [the General Counsel's prima facie] burden." *Id.* at 1109.

The motivational link is established by proof of antiunion animus. *Oaktree Capital Management*, 353 NLRB 1242, 1242 (2009). The Board has long held that evidence of union animus must be substantial. In *Raysel-Ide, Inc.,* 284 NLRB 879 (1987), the Board noted that proof of animus must be "strong enough to support a conclusion that the respondent was willing to violate the law by discriminating against employees, in order to keep the union out." *Id.* at 880; *see also*, *Obars Machine & Tool*, 322 NLRB 275 (1996) (Board affirmed dismissal of 8(a)(3) allegation where credible evidence of substantial union animus was not presented); *Fibrocan Corp.*, 259 NLRB 161, 171-172 (1981).

Only after General Counsel establishes a *prima facie* case does the burden of proof "shift" to the employer to demonstrate that "the same action would have taken place in the absence of the employees' union activity." *Manno Electric,* 321 NLRB 278, 280 n. 12. Importantly, however, the Board's utilization of "shifting" burdens of proof "does not undermine the established concept that General Counsel must establish an unfair labor practice by a preponderance of the evidence." *Wright Line*, 251 NLRB at 1089. Moreover, the Board has found that it is not necessary for a respondent to prove that the misconduct actually occurred in order to meet its burden under *Wright Line*. *Affiliated Foods*, 328 NLRB 1107, 1107 n. 1 (1999).

1. ALJ ERRED IN CONCLUDING THAT THE GENERAL COUNSEL ESTABLISHED A *PRIMA FACIE* CASE

A Section 8(a)(3) violation requires a showing of antiunion animus. *Valmont Industries v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). That is, "[u]nwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participation in union activities. Accordingly, determining whether the employer's actions were motivated by anti-union animus is necessarily the crucial first step in a [Section] 8(a)(3) case." *Id.*

There is no question that the ALJ failed to consider all of the facts surrounding whether Respondent harbored anti-union animus. Specifically, the ALJ's erroneously failed to consider the evidence that Respondent attempted to hire union members when the LA Fitness project began by calling Garcia. (TR 212:3-6). As noted previously, the ALJ improperly discredited Villarreal's testimony in this regard. Additionally, the ALJ did not even take into account that Respondent hired, and continued to employ Reeder, who openly admitted union affiliation and openly admitted that he had filed a NLRB charge against his prior employer. Moreover, the ALJ failed to take into account that aside from the subject charge, no other charges have ever been filed against Respondent. (TR 102:19-25; TR 220:14-16). Respondent has never been found to have violated Section 8(a)(1) or Section 8(a)(3). Rather, it appears the ALJ considered only the timing of events and inquires made by Villarreal. (ALJD 9:4-13).

For the reasons noted, these "events" fail by a long shot to meet the Board's standard enunciated in *Raysel-Ide, Inc.*, 284 NLRB 879 *supra*, where the Board stated that the proof of animus must be "strong enough to support a conclusion that the Respondent was willing to violate the law by discriminating against employees, in order to keep the union out." *Id.* at 880.

2. ALJ ERRED IN FINDING THAT RESPONDENT FAILED TO ESTABLISH IT WOULD HAVE DISCHARGED VEGA IRRESPECTIVE OF HIS UNION ACTIVITY

Assuming *arguendo* that the ALJ properly found that the General Counsel met its initial burden, the ALJ erred in finding that Respondent failed to establish it would have discharged Vega irrespective of his purported union activity. Specifically, it is undisputed that Vega represented that he had 17 years' experience when he interviewed with Villarreal. According to Vega, he had not concluded the subject task prior to leaving the job site that day and could not complete the task without the assistance of a welder; therefore, he made a temporary fix before leaving the job site. (TR 31:16 through TR 32:1, TR 32:9-17). Trinidad's credible testimony

establishes that Vega never stated anything about needing a welder prior to completing the task. (TR 261:5-10; TR 264:5-18; TR 266:13 through TR 267:10).

Moreover, the evidence establishes that: (1) Villarreal took photos of the unistrut area after Vega worked on it and before he called Vega; (2) Villarreal asked Vega if he worked on the area and Vega said he did; (3) Villarreal provided Vega with an opportunity to respond, but Vega replied only "that is the best I can do."; and (4) as a result of this response and the substandard and dangerous work reflected in the photographs he took, Villarreal made the decision to discharge Vega. (TR 196:3 through TR 197:20; TR 198:1-3; TR 200:15-20; TR 222:23 through TR 223:23; TR 224:4 through TR 225:11; TR 225:21-25; TR 226:1-22; TR 230:11-14; TR 227:4-8; TR 231:7-17; TR 241:6 through TR 242:1; TR 249:3-7; TR 281:7 through TR 283:11; R-3; R-4).

Villarreal made a legitimate, non-discriminatory decision to terminate Vega's employment. Simply put, there is no evidence that any other worker performed a substandard and dangerous work product to the degree that Vega did. Since there are no similarly situated employees against whom to compare Vega, General Counsel did not prove and the ALJ erred in finding that Vega was discriminated against. It is well established that "the Act does not provide employees with immunity from otherwise legitimate employment decisions simply because of their status as union supporters." *Framan Mechanical*, 343 NLRB 408, 411 (2004). Thus, there was no discrimination. Moreover, and importantly, after Villarreal discharged Vega, he kept Reeder, a union-affiliated worker, at the Subject LA Fitness Jobsite; a fact the ALJ failed to consider. (TR 231:18-20).

The Board, as well as the Courts, has consistently held that it should not substitute its judgment for that of the employer regarding the necessity for a discharge where legitimate business reasons exist. For example, in *Gem Urethane Corp.*, 284 NLRB 1349 (1987), the Board concluded that the layoff of 23 employees during an organizing campaign did not violate the Act when it was undisputed the employer was having financial difficulty. In reaching its conclusion, the Board held that it would not substitute its judgment for that of the employer regarding the necessity for the layoff:

> Whether procedures other than layoff might have been more or equally effective in remedying the Respondents economic loss is not a matter the Board is empowered to decide.

284 NLRB at 1350.

In *Ryder Distribution Resources, Inc.*, 311 NLRB 814 (1993), the Board reversed the ALJ and held that the company lawfully discharged all 26 of its full time drivers who were responsible for making deliveries to one of its accounts. The Board found that the employer's decision to layoff the drivers was due to "driver inefficiency causing excessive 'controlled variable costs...includ[ing] workers' compensation claims, driver abuse to equipment, bodily injury/property damage to third parties, physical accident damage to equipment, and cargo claims." *Id.* at 815. The Board reached that decision despite the fact that just one month prior to the layoffs the union began distributing authorization cards to drivers. The Board observed:

> [R]ather than substitute our business judgment for that of the Respondent, as the judge did in outlining a plan whereby the Respondent could have had a profitable year in 1990, we focus on the Respondent's **motivation** underlying its business decision.

311 NLRB at 817 (emphasis added).

In *Framan Mech., Inc.*, 343 NLRB 408 (2004), the Board ruled that the employer lawfully discharged employees during a union organizing campaign even though the employer was aware that the alleged discriminatees were involved in the campaign. The Board echoed its prior rulings, noting that it is "well-settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful..." *Id.* at 412 (internal citations omitted).

Similarly, in *Baptista's Bakery, Inc*, 352 NLRB 547 (2008), the Board found lawful the company's decision to layoff five employees during an organizing campaign where the company was experiencing lower sales than expected. *See also Tinney Rebar Services, Inc, et al*, 354 NLRB No. 61 (2009) (The Board affirmed ALJ decision dismissing an 8(a)(3) allegation. The ALJ noted that the Board admonishes judges "not to substitute their business judgment for that of the employer, because the action taken may have been exercised on the basis of the employer's particularized business judgment."); *Aero Detroit, Inc.*, 321 NLRB 1101, 1105 (1996) (The Board held that an ALJ had "improperly substituted her business judgment for the Respondent's by faulting its decision to implement the layoff [of 23 employees] when it did...").

In the face of this consistent Board precedent, this Board should conclude that the ALJ erred in finding that Respondent did not satisfy its burden under *Wright Line* simply because it did not undertake the investigation the ALJ thought should have been undertaken.

F. REINSTATEMENT IS NOT AN APPROPRIATE REMEDY

1. VEGA'S POSITION NO LONGER EXISTS AND THERE ARE NO SUBSTANTIALLY EQUIVALENT POSITIONS

The Subject LA Fitness Job ended approximately the first week in December 2012. (TR 155:19 through TR 156:1). Moreover, Respondent has not had any other commercial jobs. (TR 240:1-15). Thus, Vega's former position no longer exists and there are no substantially equivalent sheet metal positions; therefore, reinstatement is not the appropriate remedy.

2. AFTER-ACQUIRED EVIDENCE

Even assuming *arguendo* that Vega was unlawfully discharged, he is precluded from seeking reinstatement or full back on the basis of after-acquired evidence of misconduct. After the ALJ hearing, Villarreal learned that Vega lied on his employment application regarding his criminal history. The application specifically provides that false or misleading information may result in discharge. *See* J-1. Thus, even in the absence of any union activity, this misconduct would have led to the termination of Vega at the time it was discovered; therefore, reinstatement is improper. *See John Cuneo, Inc.*, 298 NLRB 856 (1990)(Board held that if any employer shows that an employee engaged in misconduct for which it would have discharged an employee, reinstatement is not ordered and backpay is terminated on the date that the employer learned of the misconduct); *First Transit, Inc.*, 350 NLRB 825, 828-30 (2007). For these reasons, Vega should be precluded from reinstatement.

Moreover, Vega did not disclose that he was sentenced to 10 years and on probation for attempt to commit aggravated sexual assault of a 13-year-old female child on his application. Registered sex offenders are not qualified to work for Respondent because of the restrictions that may be placed upon the sex offender. Specifically, probation conditions, parole laws and/or city ordinances may prohibit sex offenders from going in, on, or within a specified distance of a

premise where children commonly gather (i.e., schools, day care facilities or playgrounds). In the event Respondent contracts to provide services near these areas, said sex offender would be not be qualified to perform work for Respondent. As a registered sex offender, Vega is not qualified to work for Respondent. Accordingly, reinstatement is not a proper remedy.

Finally, Respondent provides residential AC services, which requires Respondent's workers to enter the homes of residential customers that may have women and/or children in their homes. In the event an unthinkable incident occurred at the hands of Vega, Respondent could be deemed negligent for employing such an individual knowing of his criminal history. For this reason, Respondent cannot reinstate Vega and it is against public policy for the Board to order Respondent to reinstate Vega. Thus, reinstatement is not a proper remedy.

G. THE ALJ ERRED IN HIS LOSS OF EARNINGS COMPUTATION

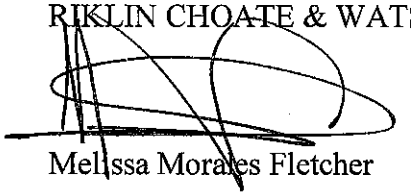
The intent of the Act is to restore the employee to the situation to that which would have taken place had the violation not occurred. The unrebutted evidence demonstrates that the Subject LA Fitness Job ended approximately the first week in December 2012. (TR 155:19 through TR 156:1). Thus, the ALJ erred in concluding that the loss of earnings should be computed from the date of discharge to the date of proper reinstatement. Accordingly, assuming *arguendo* that Respondent unlawfully discharged Vega, the loss of earnings should be from the date of discharge to the mid-December 2012 because the job ended on that date and because reinstatement is an inappropriate remedy as previously noted.

V. CONCLUSION

As established above, the ALJ's findings are contrary to the compelling evidence as well as the law. As a result, Respondent respectfully requests that the ALJ's decision be reversed; that his recommendation and order be vacated; and that General Counsel's Amended Complaint be dismissed in its entirety.

Respectfully submitted,

GOODE CASSEB JONES
RIKLIN CHOATE & WATSON



Melissa Morales Fletcher

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

IN THE MATTER OF	)	
RESPONDENT CORPORATION, Respondent	)	
	)	**CASE NO. 16-CA-091326**
and	)	
	)	
SHEET METAL WORKERS LOCAL #67	)	
A/W SHEET METAL WORKERS	)	
INTERNATIONAL ASSOCIATION	)	

CERTIFICATE OF SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Brief in Support of Exceptions to ALJ Findings was timely filed via the NLRB E-filing system and was served on the following on the date below by undersigned counsel for Respondent Corporation via electronic mail:

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Dated this 26th day of June.

Melissa Morales Fletcher