

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

K-AIR CORPORATION

Respondent

and

Case 16-CA-091326

**SHEET METAL WORKERS LOCAL #67
a/w SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION**

Charging Party

**ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND ARGUMENT IN SUPPORT THEREOF**

Jonathan Elifson
Counsel for the Acting General Counsel
National Labor Relations Board
Region 16 Regional Office
819 Taylor St. Room 8A2
Fort Worth, TX 76102

Dated: July 11, 2013

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

K-AIR CORPORATION

Respondent

and

Case 16-CA-091326

**SHEET METAL WORKERS LOCAL #67
a/w SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION**

Charging Party

**ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND ARGUMENT IN SUPPORT THEREOF**

COMES NOW Counsel for the Acting General Counsel, pursuant to Section 102.46(e) of the Board's Rules and Regulations, Series 8, as amended, and takes limited exception to the Decision and Recommended Order of Associate Chief Administrative Law Judge, Joel P. Biblowitz (JD(NY)-23-13) dated May 30, 2013. Specifically, Counsel for the Acting General Counsel takes exception to the following:

1. To the Judge's finding that Respondent did not coerce and threaten employees with unspecified reprisals because of their union activities at JD slip op. at 8, LL. 41-46.¹

¹ Citations are as follows: JD slip op. for Administrative Law Judge's Decision, Tr. for transcript, GC Exh. for General Counsel's Exhibits.

ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS

I. STATEMENT OF THE CASE

In his Decision and Recommended Order, the Judge correctly determined that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union membership and the union membership of fellow employees and Section 8(a)(3) of the Act by discharging John Vega for his union affiliations. (JD slip op. at 9, LL. 29-41). Having found that Respondent engaged in the above unfair labor practices, the Judge ordered Respondent to cease and desist its unlawful conduct and take certain affirmative action designed to effectuate the Act, including making Vega whole. (JD slip op. at 10-11). Counsel for the Acting General Counsel does not except to the Judge's findings in this respect.

However, the Judge also found that Respondent did not coerce and threaten employees with unspecified reprisals because of their union affiliations. (JD slip op. at 8, LL. 41-46). Counsel for the Acting General Counsel takes limited exception to the Judge's findings in this respect.

II. CROSS-EXCEPTION: RESPONDENT COERCED AND THREATENED EMPLOYEES WITH UNSPECIFIED REPRISALS BECAUSE OF THEIR UNION AFFILIATIONS

Counsel for the Acting General Counsel's cross-exception concerns statements made by Respondent's Founder and President, Kyle Villarreal, to Justin Reeder, a friend and co-worker of alleged discriminatee Vega. (JD slip op. at 1).

Reeder, a sheet metal worker with ten years' experience, worked for Respondent from approximately September 15, 2012 to October 10, 2012. (Tr. 109). He held the position of foreman or lead. (Tr. 110). He worked primarily at the same LA Fitness

jobsite where Vega worked. (Tr. 111, 127). Prior to working for Respondent, Reeder worked with Vega at another LA Fitness project operated by Swisher HVAC, another HVAC employer. (JD slip op. at 1, Tr. 113). Reeder previously filed unfair labor practice charges against Swisher, a fact Reeder disclosed upon being hired by Respondent. (Tr. 113, 128, GC Exh. 5(a), 5(b), 5(c)).

Although he could not recall the exact date, Reeder testified that on a Monday in September 2012, while Vega was still employed with Respondent, Reeder and Villarreal spoke in the parking lot of Respondent's worksite at LA Fitness. (JD slip op. at 4, Tr. 115, 145-146). During this discussion, Villarreal asked Reeder about the Swisher charges. (JD slip op. at 4, Tr. 115). Reeder explained the charges. (Tr. 115). Villarreal then asked Reeder if he was a union member. (JD slip op. at 4, Tr. 115, 134). Reeder replied no. (JD slip op. at 4, Tr. 115). Villarreal then said that he did not really have any interest in having union members on the job. (JD slip op. at 4, 9, Tr. 115). He also asked Reeder if he had recommended union employees. (JD slip op. at 4, Tr. 117). Specifically, Villarreal asked if Vega, George and Albert were union members. (JD slip op. at 4). Reeder told Villarreal that Vega had previously been in the union, but was not an active member and was out of a different local. (JD slip op. at 4, Tr. 117, 134). Reeder said that he did not know about the union status of the others he had referred. (JD slip op. at 4, Tr. 117, 138).

During another discussion that occurred while Vega was still employed with Respondent, Villarreal again made coercive statements about union members on his jobsite. (Tr. 146-146) On this occasion, Reeder and Villarreal had a discussion in a van. Reeder observed that Roger Gihardi of Swisher had called Villarreal, but Villarreal

ignored the call. (Tr. 118, 135). Reeder expressed concern that Villarreal was speaking to Gihardi as Reeder had charges pending against Swisher. (Tr. 118). Villarreal said he could make up his own mind about Reeder. (Tr. 118). Reeder told Villarreal that he did not want him to think that he had sent union members to him intentionally. (Tr. 119). Villarreal said he was stressed and again said that he did not want union members on the jobsite. (JD slip op. at 9, Tr. 119).

Although the Judge credited Reeder as a witness and credited the facts associated with the coercive statements, the Judge found that that Respondent did not coerce and threaten employees with unspecified reprisals because of their union affiliations. (JD slip op. at 8, LL. 41-46). The Judge did not specifically address Villarreal's repeated statements that he did not want "union guys" on the jobsite as independent 8(a)(1) allegations. Instead, the Judge stated that Villarreal's statement to Reeder, "I don't want that to happen here," referred to unfair labor practices and not union membership and thus did not violate the Act. (JD slip op. at 8, LL. 41-46). The Judge erroneously concluded that there was no evidence to support the Complaint allegation that the Respondent coerced and threatened employees with unspecified reprisals because of the Union activities. (JD slip op at 8, LL 44-45). The Acting General Counsel takes exception to this finding. The Board should reverse the Judge and find that Villarreal's repeated statements about not wanting union guys on the job are independent 8(a)(1) violations of the Act.

With respect to Villarreal's repeated statements that he did not want "union guys" on the job and was stressed and did not want union members on the site, Board law supports finding that such statements are unlawfully coercive and/or are threats of

unspecified reprisals to employees with union affiliations. In determining whether employer conduct violates Section 8(a)(1) of the Act, the Board considers whether statements made to employees reasonably tend to interfere with the free exercise of employee rights under the Act. *Metro One Loss Prevention Services Group, Inc.*, 356 NLRB No. 20, slip op. at 1 (2010) (finding that statements, taken together, reasonably conveyed to employees that supporting the union was incompatible with job security). Statements suggesting that union affiliations and/or protected activity are inconsistent with continued employment reasonably tend to interfere with such rights. *Mesker Door, Inc.*, 357 NLRB No. 59, slip. op. at 3-7 (2011), citing *Jupert Medical Pavilion*, 346 NLRB 650, 651 (2006) (settled Board precedent holds that such statements are unlawful because they suggest that support for a union is incompatible with continued employment). Here, Villarreal's statement demonstrated that union affiliation and/or protected activity was inconsistent with continued employment with Respondent and therefore constitutes a coercive threat. Villarreal's statements violate Section 8(a)(1) of the Act.

Respondent's statements are not protected by Section 8(c) of the Act. Under Section 8(c) of the Act, views, argument, or opinion is not evidence of an unfair labor practice as long as it does not contain explicit or implicit threats or reprisal or promises of benefit. *See Ampersand Publishing*, 358 NLRB No. 141, slip op. at 98 (2012). However, when an employer threatens or implies that there will be consequences for engaging in protected conduct, such statements are not protected by Section 8(c). *TPA, Inc.*, 337 NLRB 282, 283 (2001). As stated above, Respondent's repeated statements about not

wanting “union guys” or union members on the job are implied threats and do not fall under Section 8(c) of the Act. Instead, the statements are coercive and unlawful threats.

III. CONCLUSION

In his Decision and Recommended Order, the Judge correctly determined that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union membership and the union membership of fellow employees and Section 8(a)(3) of the Act by discharging John Vega for his union affiliations. (JD slip op. at 9: 29-41). However, as noted above Counsel for the Acting General Counsel submits that the Judge erred in his finding that that Respondent did not coerce and threaten employees with unspecified reprisals because of their union affiliations. (JD slip op. at 8: 41-46). Based on the foregoing, Counsel for the Acting General Counsel requests that the Board grant the limited cross-exceptions with respect to this issue. Counsel further requests that the Board modify the Judge’s Recommended Order to reflect this additional violation of the Act. Finally, Counsel requests any additional relief the Board finds appropriate.

Dated at Fort Worth, TX this 11th of July 2013.

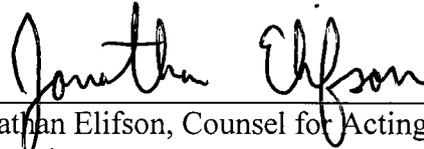

Jonathan Elifson, Counsel for Acting General
Counsel
National Labor Relations Board
Region 16
Room 8A24, Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Acting General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge has been served upon each of the following by e-mail this 11th of July 2013:

Melissa Morales Fletcher, Attorney
GOODE CASSEB JONES RIKLIN CHOATE & WATSON, P.C.
P.O. Box 120480
2122 N. MAIN
SAN ANTONIO, TX 78212
e-mail: Fletcher@goodelaw.com

Gilbert Garcia, Organizer
Sheet Metal Workers Local #67
11 Burwood Ln.
San Antonio, TX 78217-7038
e-mail: ggarcia@smw67.org



Jonathan Elifson, Counsel for Acting General
Counsel
National Labor Relations Board
Region 16
Room 8A24, Federal Office Bldg.
819 Taylor Street
Fort Worth, Texas 76102