

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**EDIFICE RESTORATION CONTRACTORS, INC.**

**and**

**CASE 08-CA-090945**

**MIKE R. PELFREY, JR.**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE DAVID GOLDMAN'S DECISION AND BRIEF IN  
SUPPORT OF EXCEPTIONS**

Counsel for the Acting General Counsel Gina Fraternali excepts to the following findings of facts and conclusions of law by Administrative Law Judge David Goldman in his Decision and Order which issued on May 20, 2013 (JD-36-13).

First, the ALJ's recommended dismissal of the complaint allegation that Respondent violated Section 8(a)(1) of the Act is based upon his application of the wrong legal analysis and standards, as well as his failure to consider facts and evidence that are material and relevant to the question of whether Respondent's conduct violated Section 8(a)(1) as alleged. Counsel for the Acting General Counsel submits that under the correct legal analysis, the record facts and evidence fully support and warrant a finding that this complaint allegation has been proved and that the Charging Party is entitled to the usual remedy for an unlawful termination.

Second, the ALJ also erred by failing to draw appropriate conclusions of law and to recommend the appropriate remedy for the independent violations of Section 8(a)(1) of the Act alleged in Complaint paragraphs 5(A) and (C). These independent Section 8(a)(1) violations are

also fully established by the record facts and evidence, and are also material and relevant to the determination that Respondent's termination of the Charging Party was unlawful.

#### THE JUDGE'S DECISION

A fair reading of the Judge's decision is that he failed to focus on the precise allegation of the complaint, that is, that Respondent violated Section 8(a)(1) on September 6, 2012, when it terminated Charging Party Pelfrey because he had engaged in the concerted, protected activity of discussing wages with his fellow employees. Not only is the September 6 date alleged in paragraph 6(B) of the complaint, but Respondent itself admitted in its Answer that it had terminated Pelfrey on that date (See, G.C. 1(i) and 1(k)).

Furthermore, the record evidence clearly establishes why Respondent terminated Pelfrey on September 6. By all accounts, Pelfrey was a highly capable skilled employee. Thus, Respondent concedes that during his tenure with the Company Pelfrey received several merit increases. He was also, in the Respondent's view, something of a troublemaker, and this chiefly because Respondent believed that Pelfrey had shared his complaints about wages with his co-workers and had instigated among them dissatisfaction about the wages being paid. Thus, job supervisor Kyle Leeth testified at trial that, "whenever Pelfrey got a raise he would tell other employees." And, although Pelfrey denied it, Respondent firmly believed Pelfrey was also urging other employees to threaten to quit in order to get a raise. Thus, both Kyle Leeth and Amanda Hensley, the Company's office manager, admitted at the hearing their belief that Pelfrey was instigating job actions over wages among its employees. (ALJD p. 5, tr. l. 24 – 31).

Any doubt as to the extent of Respondent's concern about Pelfrey's exercise of his statutory right to discuss with co-workers his and their wages is conclusively resolved by Hensley's handwritten note on Pelfrey's July 2 pay stub, admonishing him – in clear violation of

Section 8(a)(1) – “Please keep your pay rate to yourself.” Furthermore, Hensley testified that this admonition was the direct result of job superintendent Leeth’s stated concern to her over Pelfrey’s actual and suspected exercise of his Section 7 rights (ALJD at p. 5, tr. l. 31-45).<sup>1</sup>

The ALJ’s failure to focus on the September 6, 2012, termination date is critical to the outcome of the case because had he focused on that date he would have had to approach the case using a traditional protected concerted activity and pretext analysis. Because he failed to recognize the significance of the September 6 date and Respondent’s admission that on that date it had discharged the Charging Party, the ALJ felt free to employ a Wright Line analysis.<sup>2</sup> This, in turn, was error and led to a legally unsustainable conclusion.<sup>3</sup>

#### WHY THE ALJ ERRED

There is a single overriding and uncontroverted admission made in this case that both makes the ALJ’s analysis wrong and irrelevant, and mandates a finding that the Acting General Counsel has proved the Complaint allegation that Respondent violated Section 8(a)(1) when it

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<sup>1</sup> It is interesting to note that the ALJ failed to comment on the direct conflict between the testimony of Respondent’s own witnesses, Hensley and Leeth, in connection with the pay stub note. Hensley, who had no particular reason to be less than truthful on the point, testified that Kyle Leeth came to her and instigated the message. Leeth, on the other hand, flatly denied having done so. The conflict is significant because subsequently the ALJ found Leeth credible when he testified that animus towards Pelfrey for talking about wages was not the motivation for not keeping him on after September 6, but rather, that this decision was not taken until later in September when the Company learned of Pelfrey’s complaints about workmanship (ALJD at p. 5, tr. l. 39-50, and ALJD p. 6, tr. l. 1-2).

<sup>2</sup> Wright Line, 251 NLRB 1083 (1980)

<sup>3</sup> The Charging Party’s conversations with the University of Toledo and prevailing wage organizations are better suited for compliance proceedings. A determination as to whether Pelfrey lost the protection of the Act at some point after September 6, 2012 is immaterial to the allegations that he was terminated on September 6, 2012. General Counsel asserted in the Complaint, and the ALJ acknowledged, that Respondent unlawfully terminated Charging Party on September 6, 2012, not that it failed to re-hire him on an indefinite time period going forward. (ALJD at p.17, tr. l. 26-27 and GC 1(i)) Yet, the ALJ still analyzed the case as if whatever action the Charging Party took or engaged in post-September 6<sup>th</sup> was a continuum of why he was discharged. Any arguments asserted by General Counsel in its post-hearing brief relating to Charging Party’s actions after September 6, 2012 were in anticipation of Respondent’s defense, not an invitation or tacit admission that the ALJD should apply Wright Line in this case.

terminated Charging Party Pelfrey on September 6, 2012. Simply stated, it is that in its Answer to the Complaint Respondent admits that it terminated Pelfrey and that it did so on that date.

Once that admission was made, this case is straightforward. As noted previously in this brief and as found by the ALJ, Charging Party Pelfrey was engaged in concerted protected activity when he discussed with his co-workers his wages and their wages. And, there can be no question that Respondent's supervisors and managers were aware of, and concerned about, Pelfrey's exercise of statutory rights. Indeed, Respondent could hardly contend otherwise given the testimony of its own witnesses and the admission of the July 2 pay stub on which the Company independently violated Section 8(a)(1) by admonishing Pelfrey to discontinue his concerted, protected activity.

Having established that Pelfrey was engaged in concerted protected activity, that Respondent was aware of that activity and held animus toward Pelfrey for engaging in that activity, the only remaining question under the Meyers Industries (Meyers II) analysis that the ALJ should have employed but failed to employ, is what were the immediate circumstances surrounding Respondent's admitted decision on September 6, 2012, to end Pelfrey's employment?

Counsel for the Acting General Counsel submits that the answer to that question is also clear cut and fully supported by record evidence. Thus, as admitted by the Respondent and found by the ALJ, at some point before the end of the university job in early September, job manager Kyle Leeth, who had no love for Pelfrey because of the latter's protected concerted activity but admitted that he respected Pelfrey's high job performance, responded to Pelfrey's earlier inquiry and stated that he was likely to have six to eight additional weeks of work for him

on another job. Despite that representation, and by its own admission, Respondent terminated Pelfrey on September 6, 2012.

On or about that date,<sup>4</sup> Pelfrey telephoned Company owner and President John Hall to follow up and confirm Leeth's representation that there would be at least several weeks of additional work for him. Pelfrey testified that during this conversation Hall told him, "no, there is no more work for you," testimony that is entirely consistent with Respondent's admission that it had terminated Pelfrey at the end of the university job.<sup>5</sup>

In point of fact, and as the record plainly shows, between the date of this conversation and late October 2012, the Company had nine ongoing projects (GC 8). Even more telling as evidence of the pretextual nature of Hall's representation to Pelfrey and its claims at hearing that it had no available work, the Company brought on an admittedly less qualified worker, Rocky May, for a job that began on September 26 and lasted until October 9 (GC 18, tr. 271-272).

Of course, it is true that Pelfrey had made complaints to the University of Toledo about the quality of the work done by Respondent on that job, but while that issue may be relevant to the question of whether as of the time the Company became aware of these allegations it would have been privileged to refuse to consider hiring Pelfrey for jobs that commenced after that date, that is an entirely different matter and cannot alter the fact that on September 6 it had decided to terminate Pelfrey's employment.

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<sup>4</sup> See ALJD at p. 6, fn. 5.

<sup>5</sup> Hall's testimony on this conversation is slightly different. Based on his failure to recognize the significance of the conversation coming, as it did, at the conclusion of the university job, the ALJ generally credited Hall but observed the differences were not "material" and did not "make any difference to the outcome of the matter." Contrary to the ALJ, this conversation is both material and relevant. Having said that and as discussed later in this brief, Hall's claim that there was "no work" under any possible construction was merely a pretext to cover up the fact that Pelfrey was terminated.

RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT ON THREE SEPARATE OCCASIONS

The weight of the evidence shows that Respondent maintained and promulgated a work rule that employees were not to discuss wages. The Acting General Counsel alleged that Respondent not only maintained a work rule prohibiting discussion of wages but that on three occasions Respondent's agents made coercive statements to Charging Party not to discuss his wages. (ALJD, p. 11, tr. 1. 40-50 and p. 12, tr. 1. 1-35, fn.8) The ALJD states that Respondent "essentially admitted" that its agent instructed Charging Party to keep his pay rate to himself, when its office manager wrote on Pelfrey's pay sub to keep his wages to himself. (ALJD, p. 12, tr. 1. 12-14) Although the ALJ found that this writing itself violated Section 8(a)(1) of the Act, he failed to make a finding on two other alleged coercive statements, stating that "[s]uch findings would be cumulative and would not materially affect the remedy." (ALJD, p. 12, tr. 1. 12-14, fn.8)

Board precedent is clear that, while threats to employees may be similar, a finding of multiple violations of Section 8(a)(1) is appropriate. In Owens-Corning Fiberglas Corp., 185 NLRB 75 (1970), the Board held that similar statements made by two foreman to the same employees "were not merely cumulative but rather that they constituted further violations of Section 8(a)(1)." Moreover, in Structural Finishing, Inc., 284 NLRB 981, 982 (1987) the Board held that when "a message imparted by statements is the same, but the threats were made independently of each other", each statement violates Section 8(a)(1) of the Act.

This precedent is instructive. Here, on three separate occasions, Respondent's agents made similar statements and imparted the same message to the Charging Party—do not discuss your wage rate or raises with employees. Pelfrey testified that when job manager Kyle Leeth

handed him his July 2 paystub with the office manager's written message to keep his pay rate to himself, Leeth verbally told him he should not be discussing wages on the jobsite. A few weeks later, Pelfrey recalls Leeth again instructing him again not to discuss his wages. (ALJD, p.5, tr. l. 47-50) And, of course, a few weeks after the last recitation of the unlawful rule Pelfrey was terminated.

Respondent's unlawful conduct by promulgating a bad rule and attempting to enforce and maintain that rule *three times* failed to muzzle Pelfrey's wage discussions. As a last recourse, Respondent terminated him. In failing to make these determinations, the ALJ ignored that multiple violations of Section 8(a)(1) are material to Charging Party's discharge and support a finding of Respondent's animus and its true motive for deciding to terminate him on September 6, 2012.

#### CONCLUSION

Accordingly, it is respectfully requested that the Board reverse the Administrative Law Judge and find that Respondent violated Section 8(a)(1) of the Act on September 6, 2012 when it terminated Charging Party Pelfrey. Additionally, it is respectfully requested that the Board find that Respondent violated Section 8(a)(1) of the Act on about June 17<sup>th</sup> and July 2<sup>nd</sup> when Leeth instructed Charging Party not to discuss his wages with other employees.

It is further requested that the Board order the Respondent to cease and desist from engaging in such conduct. The Acting General Counsel requests that the Board revise the ALJ's recommended Order and Notice to conform to the exceptions described above.

Dated at Cleveland, Ohio, this 17th day of July 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Board, and served by electronic mail on the following parties, this 17th day of July, 2013:

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