UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALTERNATIVE ENERGY APPLICATIONS

and Case 12-CA-072037

DAVID RIVERA-CHAPMAN, an Individual

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

Submitted by:

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I. INTRODUCTION

On May 16, 2013, Administrative Law Judge Joel P. Biblowitz issued a Decision in this case, finding that Respondent violated Section 8(a)(1) of the Act by instructing employees not to discuss their wages with other employees and threatening them with discharge if they did so, and that Respondent did not violate Section 8(a)(1) of the Act by discharging employee David Rivera Chapman because it believed that he discussed his wages with other employees in violation of Section 8(a)(1) of the Act. On June 20, 2013, the undersigned Counsel for the Acting General Counsel filed exceptions and a supporting brief regarding the discharge issue. Therefore, Respondent's answering brief, cross-exceptions and brief in support of cross-exceptions were due 14 days later pursuant to Section 102.46(d) and (e) of the Board's Rules and Regulations, i.e. on July 5, 2013.

On July 5, 2013, Region 12 received Respondent's Motion for Extension of Time to File Answer to Exceptions and Cross-Exceptions, seeking an extension to July 12, 2013, because its attorney who tried the case, Shaina Thorpe of Allen, Norton & Blue, had a medical emergency. The certificate of service for the Motion indicates that it was electronically filed with the Board that day. Also, on July 5, Ms. Thorpe's office called the Regional office and requested the Acting General Counsel's position on the Motion, and the Region stated that the Acting General Counsel would not oppose the request.

It is not clear whether or not Respondent's Motion was properly electronically filed, since it does not appear on the Board's website, and the Region has not received an Order from the Executive Secretary of the Board acting on the Motion. Nevertheless, Respondent filed its answering brief and cross-exceptions on July 12.

In the event that the Board accepts Respondent's cross-exceptions (and answering brief) as having been timely filed on July 12, 2013, the undersigned Counsel for the Acting General

Counsel submits the following answering brief to Respondent's cross-exceptions pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations.

II. ARGUMENT[1]

A. The ALJ correctly rejected Respondent's Section 10(b) defense because it was untimely raised. (Cross-Exceptions 3 through 6).

Respondent argues that the ALJ's finding that it violated Section 8(a)(1) of the Act when its supervisor,[2] Scott Sipperly, instructed employee David Rivera Chapman not to discuss his wages with other employees and threatening him with discharge if he did so, is incorrect because the alleged unlawful statements occurred more than six months before the filing of the amended charge in this case on February 2, 2012. [ALJD 2:9-28; ALJD 5:26-37].

The ALJ correctly found that the Respondent's 10(b) defense was untimely. (ALJD 5:59-51, fn. 5). The unfair labor practice that is the subject of Respondent's belated Section 10(b) defense is alleged in paragraph 4(a) and 4(b) of the Complaint, issued on December 28, 2012. (GCX 1(g). Respondent did not raise a Section 10(b) defense in its Answer and Affirmative Defenses filed on January 9, 2013, or in its Answer and Affirmative Defenses to the Amendment to the Complaint, filed on March 13, 2013. [GC 1(i) and GC 1(l)]. Respondent did not raise a Section 10(b) defense at the hearing before the ALJ on April 2, 2013. Rather, after fully litigating the issue at the hearing, Respondent first raised the Section 10(b) defense in its post-hearing brief to the ALJ, filed on May 7, 2013.

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[1] The Acting General Counsel agrees with Respondent's cross-exception 2. Respondent discharged David Rivera Chapman on September 7, 2011, rather than September 11, 2011, as found by the ALJ. (ALJD 2:39). As used herein, the numbers following "ALJD" refer to tne page and line numbers of the ALJ's decision, reported at JD(NY)-22-13; "GC" refers to Acting General Counsel's exhibits, R refers to Respondent's exhibits, and "Tr" refers to the transcript. Cross exception 7, claiming for attorney's fees, and cross-exception 8, claiming a *Noel Canning* defense, are not appropriately raised and should be denied.

[2] It is undisputed that Sipperly is Respondent's Vice President. [GC 1(g) and GC 1(l), paragraph 3; see also Tr. 9-10].

In relevant part, Section 10(b) of the Act provides, "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made ..." Section 10(b) of the Act is not jurisdictional. It is an affirmative defense and, if not timely raised as an affirmative defense in the answer or litigated at the trial, it is waived if first raised in the brief to the ALJ. *Public Service Co.*, 312 NLRB 459, 461 (1993); *DTR Industries*, 311 NLRB 833, 833, fn. 1 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994) [Section 10(b) defense is waived when not pleaded as an affirmative defense in the answer or litigated at trial, and first raised in the brief to the judge].

Respondent's reliance on *Mitchell v. Jefferson County Bd. of Education*, 936 F.2d 539, 543-544 (11th Cir. 1991), a Title VII and Equal Pay Act case, is misplaced. First, it is easily distinguishable based on the fact that the defendant in that case raised a statute of limitations defense in two amended answers. Second, the language in *Mitchell* cited by Respondent is dicta and the *Mitchell* court did not reach the timeliness issue, which in that case was whether the defendant waived the affirmative defense that a pay schedule constituted a bona fide seniority system by not pleading it.

B. Even if Respondent's Section 10(b) defense had not been waived, it would have no merit because the alleged violation of the Act in question, set forth in the amended charge, is closely related to the allegation in the original charge, and it appears that in any event the event in question occurred within six months of the filing of the amended charge. (Cross-Exceptions 1 and 4 through 6).

Respondent's statute of limitations argument is essentially that the alleged instruction and threat could not have happened in early August 2011, as alleged in the Complaint, but rather took place before July 25, 2011, outside of the Section 10(b) period. However, the alleged unlawful statements are closely related to the original charge, and in any event the credited evidence

indicates that they occurred within six months of the filing and service of the first amended charge.

Charging Party Rivera Chapman filed the original charge on December 23, 2011, alleging that he was discharged because he engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act. [GC 1(a)]. The original charge was served on January 9, 2012. [GC 1(b); GC 1(c)]. The first amended charge, which was filed on February 2, 2012 and served on February 3, 2012, added an allegation that in or about August 2011, Respondent threatened employees with discharge if they discussed wages with other employees.. [GC 1(d); GC 1(e); GC 1(f)].

In *Redd-I Inc.,* 290 NLRB 1115, 1118 (1988), the Board enunciated the factors to be considered in making the determinations of whether unfair labor practice allegations added to a complaint are "closely related" to a timely filed charge:

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violation alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act. ...
>
> Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object. ...
>
> Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations in the timely pending charge. See also *Peerless Pump, Co.*, 345 NLRB 371 (2005).

The legal theories of the initial charge (that the Employer terminated Rivera-Chapman because he engaged in protected concerted activities), and the added allegation in the first amended charge (threat of discharge if employees engaged in protected concerted activities and

if they discussed wages with other employees) are closely related because they involve the same section of the Act, Section 8(a)(1), the same sequence of events and factual situation, and the legal theory supporting the discharge allegation is consistent with the animus expressed in the alleged threat. The circumstances of Rivera Chapman's pay raise, first received in his pay check issued on August 10, 2011, including the discussion of the pay raise, the threat associated with the pay raise, and the reasons Respondent discharged him are intertwined. Accordingly, the violations of the Act found by the ALJ are closely related to allegations of the original charge.

Moreover, the credited evidence indicates that Sipperly's unlawful statements to Rivera Chapman likely occurred in August, as he testified, and therefore apparently within the Section 10(b) period, even as related to the first amended charge. Thus, the first amended charge was served on February 3, 2012, and although Rivera Chapman did not know the precise date of the statements made to him by Sipperly, he testified that they occurred in mid August 2011, less than six months earlier. (Tr. 106-107, 117-118). Moreover, the fact that Rivera Chapman's raise took effect on July 25, 2011, does not prove that Sipperly spoke to him about it before that date, as Respondent contends, because Rivera Chapman was not issued a paycheck containing that raise until August 10, 2011, the raise may not have been determined until the end of that pay period on August 7, and the conversation may have occurred on or about that date. (GC 4).

Thus, for these additional reasons, the ALJ did not err by rejecting Respondent's Section 10(b) of the Act.

III. CONCLUSION

Based upon all of the above, in the event the Board accepts Respondent's cross-exceptions, Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's Cross-Exceptions 1 and 3 through 8.

Dated at Miami, Florida this 26th day of July 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS is being filed electronically with the National Labor Relations Board at www.nlrb.gov, and electronically mailed to the following named individuals on the 26th day of July 2013.

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