To Whom It May Concern,

This constitutes my (the Charging Party) filing of exceptions to the Administrative Law Judge's Decision and Findings of Fact in Case; 19-CA-084278.

Before moving into the full text of the exceptions I am filing regarding the ALJ's ruling in this case, I find it necessary to make clear to those who are charged with the review of this document and case how I have structured it and and the manner I am citing relevant documentation. I do not have a background in law or in the proper (if there is one) way to file an exception. I base most of my structure off of a document procured through an extensive search of the web for an example of a filed exception. When citing a document, I have included the document's abbreviated name[1] and/or exhibit number along with information for identifying the proper page/line numbers or relevant part when other indicators are lacking. Further, I apologize for any glaring grammatical or syntax errors, and specifically if the stating of some facts of the case seems self evident or simplistic. I have done this to the best of my ability and have tried to be as clear as possible in my reasoning. I am also writing in the third person. Yes, I too think this is strange, but it seemed the best way to clearly state the who, what, where, and why of the argument.

The ALJ's decision to not file a complaint in this case rests on two main points.

1. No animus toward the Charging Party's concerted activity was proven by the Acting General Council.
2. The Charging Party would have been terminated regardless of his participation in protected concerted activity.

Throughout this document I will reference testimony and evidence entered during the trial that provides a different view of the outcomes and, in some cases contest the factuality of portions of the ALJ's "Findings of Fact." Attached you will find an index of my exceptions to the ruling with documentation and page number reference for where they come up in this document.

Section 1. A Conversation About Exploitation

The first instance of concerted activity the ALJ takes up in the *Decisions and Analysis* of the case is a conversation that took place in the fall or winter of 2012 between the employer and the employees. The ALJ's relevant 'Finding of Facts" in regards to this conversation starts on pg.4 ln17. In short, a conversation about the way that profit is derived under capitalism took place, the employer took personal offense to it, and it was an integral part in why the employer decided to terminate the Charging Party months later.

The ALJ asserts that this speech does not qualify as protected activity because;

1. Kohut stated to Brousseau that he did not feel 'personally' exploited by him.
2. If taken to its logical conclusion any employee who complained about capitalism to their

1 ALJ=The Administrative Law Judge's ruling; TR=The Transcripts

employer would be engaged in concerted activity.
3. The speech was not meant to induce group activity.
4. The speech is not tied to the employees collective complaint about wages or working conditions.

Firstly, the ALJ's attempt to disqualify the intent or purpose of the speech by tying that the charging party stated he did not feel 'personally exploited' misses the substance of the conversation entirely. The Charging Party's explanation of the process where by a business owner expropriates the surplus value of the employees' labor was specific to the workplace and the profits it generates and capitalist organization generally. When the employer became agitated and directly asked the employee if he felt that Brousseau was personally exploiting him, the employee stated that he did not feel personally exploited by Brousseau, but rather that this was a systemic process of capitalism (Tr. pg.346-342). This was a semantic statement made by the employee to deflect the employer's clear agitation at his explanation. This did not change the meaning of the employee's definition of exploitation, however. In fact, Kohut re-stated that this exploitation was an inherent aspect of the form of economic organization the employer was engaged in, therefore the employee was in effect stating that the employer was engaged in a process of exploiting the employees, but that the employee did not believe it had a personal aspect to it. This in no way disqualifies the speech from being considered protected.

Secondly, the ALJ's assertion that if we followed the Acting General Council's (AGC) argument to its logical conclusion "any employee who opposed capitalism because it creates too much income disparity between owners and workers and expressed this view to his employer would be engaging in protected concerted activity" (ALJ pg.13 ln4-10), fails because of the surrounding circumstances of the speech. If the speech had taken place just between the employer and the employee with no one else present or involved in the discussion, the judge would be correct in her assertion that this does not constitute protected activity. However, the NLRA clearly protects employees' rights to speak about *terms and conditions of employment* while on the job with other employees.[2] In this instance, there was a discussion happening between employees before the Employer entered the room, and while the employer was present. The substance of this conversation has to do specifically with the various ways to economically structure and manage a business in the United States. The conversation about exploitation specifically came about as it relates to the *terms and conditions* of employment and how they differed in these different forms. Clearly the expropriation of surplus value by employers in capitalist business is a term and condition of the employment. Also, there are many different ways to structure a business where this condition is not prevalent, and therefore it is within the realm of reason that employees would discuss these terms and conditions as a form of protected speech.

The ALJ reduces the conversation to a complaint about how capitalism "creates too much income disparity between owners and workers." While this is a simplistic deduction, it is telling. The labor cost of a capitalist business is considered a portion of their costs in doing business. Because it is considered a cost within this framework, employers engage in manipulation of that cost through controlling wages and worker productivity as a means for increasing the Employer's profit. The wages put forth by the employer and the demands of worker productivity are clearly *terms and conditions of employment*. For employees to engage in a discussion that relates directly to these terms and conditions, and to the root of their existence, clearly falls under the protection afforded employees under the Act and should be

2 Specifically if you are allowed to speak about non-related work topics in the workplace. This was clearly the fact in this case as shown in ALJ pg.3 ln.21

protected by the Board.[3]

In her third point, the ALJ claims that the speech in question was not intended to induce group activity. To support her claim, the ALJ cites the political nature of radio programing in the workplace, Kohut's known union membership and that Brousseau had told Kohut that he had read the IWW constitution. Absolutely none of these points shows that the speech was not meant to induce group activity, and the ALJ fails to show any connection in her reasoning. There is nothing that shows that the other employees had a grasp on the basis for how a capitalist businesses uses wage labour and the expropriation of surplus value to generate profit. In fact, testimony by Renee Manly points to the fact that she did not understand this at the time.[4] Engaging in worker education regarding the basis for determining wages and other terms and conditions of employment is a foundation for inducing other workers to take collective action.

Lastly, the ALJ erred in her finding that this speech was not tied to collective complaints about wages or working conditions. While the ALJ reasons that the employees' March 2nd letter was only the logical outgrowth of discussions in January or February of 2013 which in turn were directly related to concerns the employees' had regarding the employers switch to noxious adhesive labels, she misses the forest for the trees – if I may borrow a saying. The ALJ's own placement of this conversation puts it squarely within the beginning of 2013 or possibly the end of 2012 (ALJ pg.4 ln.4) Further she attributes the inducement of the employees March 2nd letter to one incident. A review of the letter and relevant employee testimony regarding the letter shows that clearly this was not the only issue raised, but rather a preponderance or dissatisfaction at certain aspects of the workplace were unacceptable. While it is difficult to gauge the affect of anyone event, it is clear that the labels were the proverbial straw that broke the camels back as far as inducing action. The protected speech the Charging Party engaged in was a part of this accumulation. While the letter addressed pay discrepancies based on gender, it clearly also addressed the employees' desire for higher pay; i.e a reduction of profits sent solely to the business owner, or in other terms a reduction in the amount of the employees' surplus value extracted by the employer (GC 4).

It is also of note that the ALJ wrongly states that "Brousseau told Kohut he had read the IWW constitution" (ALJ pg.13 ln.40-41). Not only does Brousseau lie to the court during examination about the existence of that conversation, it is clear from both Phillips' and Kohut's testimony that Brousseau came into the production kitchen and stated that he had read an interview with the "IWW President" and that he had said that "The employing class and the working class have nothing in common."[5] This is quite contrary to how the judge represents the testimony and uses it to support her ruling. While this instance may seem of little relevance, it is the first example of many that will be provided of the Respondent's consistent attempt to hide and lie about his actions throughout the trial.

March 2nd Letter and Retaliation

In her 'Ruling and Analysis" the ALJ argues four points for why Acting General Council did not show

3 ACG cited to cases as precedent in regards to this case. *Fun Striders Inc.*, 250 NLRB 520 (1980) & *Wynn Las Vegas, LLC*, 358 NLRB No. 80

4 TR pg.183 lns.1-12

5 TR pgs.333-334

Animus to the March 2nd letter. Specifically, we believe the Board should take exception to the ALJ's argument that Brousseau's banning of all talk radio a mere three days after the employees engaged in clear concerted activity does not show animus.

The ALJ's argument focuses on two points (ALJ pg.15 lns.32-41);

1. That the act of turning off the radio itself was retaliation.
2. Brousseau's decision to backtrack on parts of his retaliation after being confronted by the employees

On the first point, there is not much argument about whether or not this constituted retaliation. It is certainly reasonable that at the time Brousseau found the programming unacceptable for his daughter to be in ear shot of, and therefore turned it off. However, the respondents *past practices* are what is important when considering the ALJ's argument. The evidence of this case clearly shows that all forms of political talk radio were allowed in the production kitchen prior to this incident. Further, the record clearly shows that the respondent's children were present in the workplace on, at least, a once a week basis. Prior to the employee's engagement in protected activity there had never been an issue raised about employee's listening to talk or politically oriented radio programming and certainly never any talk about something not being allowed. All relevant testimony further shows that the nature of the talk radio listened to by the employees was of an "adult matter" that included discussions about "war and violence" (Tr. pg.126 lns.1-8).

However, the *first work day* after the employees engaged in the protected activity, Mr. Brousseau decided to turn off the radio when his daughter came into the kitchen shortly after he had. If that had been the totality of his response, there would be no argument about his intentions. However, Mr. Brousseau then banned all forms of talk radio. This clearly establishes discriminatory motive based on a *departure from past practice* in this case. All circumstances surrounding the workplace and daily structure were the same before and after the event occurred. The only discernible difference was that the last workday before this happened the employees' had engages in what the court recognized as protected activity. While the ALJ reasons that "There was no evidence, however, that she (Respondent's daughter) was on the verge of hearing an explanation of targeted killings."[6] Mr. Brousseau's own testimony points out that the topics of programming before this had related directly to "war and violence," and that he himself viewed it as adult material.[7] It is clear that similar material had been in the workplace prior to the March 2nd letter and had been met with no action by Mr. Brousseau.

The ALJ also points to the fact that, upon protest by the employees of the clear break with past practices, Mr. Brousseau relented and allowed talk radio in the workplace upon specific conditions twice a week. The ALJ's reasoning here is suspect. Simply because an employer engages in retaliation that, when called out for its farcicality, he then decides to reverse parts of, it does not follow that his actions are then nullified. The policy was clearly out of the bounds of reasonableness and could not be adequately defended when questioned. To dismiss animus simply because the perpetrator's retaliation was inept is wholly unsound.

Another point of importance that relates to this incident is the logs purportedly kept by the employer on the employees. In GC 9 (Kohut's log) under the date "3-5-12" the entry states;

Was listening to politically oriented pod cast on kitchen radio that included adult content

6 ALJ pg.14 lns.38-39

7 Tr. pg.126 lns.1-8. Also see Manly's testimony (TR pg.193 lns. 7-10)

(terrorism). Kitchen policy at that time was that talk radio content of that nature would be turned off if there were children in the room. Persephone (9 years old) was in the kitchen at the time.

However, when we look at GC 7 and GC 8, Phillips and Manly respectively, there is no mention of this incident. This, despite the fact that all three where in the production kitchen at the time, and all three were admittedly engaged in listening to the program. It is also worth mentioning that in the ALJ's "Finding of Facts" she notes that "...Persephone came into the kitchen and Brousseau turned off the radio" (ALJ pg.5 lns.30-31). If Brousseau turned off the radio, having already been in the kitchen, when his daughter came in, then it does not make sense that it is listed in Kohut's log that he had violated company policy.

The finding of General No Animus

The ALJ states that the Respondent's actions are generally inconsistent with the finding of animus. To support this she cites that the employer allowed the employee's time off work to support organized labour, provided paid maternity to the Charging Party, and sought mediation (ALJ pg.15 lns.23-34).

Firstly, for an employer to allow employees to support organized labor that does not pertain to his business is quite different than not showing animus toward the employees protected activities. In addition, the only time Brousseau allowed the employees time off for a specifically union related event was in January 2012, which is before the employees first engagement in protected activity (TR. pg.33 lns.1-8). The Respondents aggressive questioning of the employees Union affiliation and its constitution show that he did not support the specific labour organization that the Charging party was a part of, and went so far as to state that he felt Unions were no longer necessary.[8] It is also of note that the Respondent lied during his testimony by stating that he never had a conversation with any of the employees about the IWW, and never did any research relating to it, despite his clearly aggressive questioning of the Charging Party's Union affiliation and that Union's constitution.[9]

It cannot be said that the employer's decision to allow Kohut paternity leave was not a nice gesture. Just because an employer decides to take one action that is positive does not controvert his other actions of animus, however. When the ALJ cites Brousseau's decision to hire mediators, it is shown below how she has mistaken the facts surrounding these offers. Specifically that his willingness to hire a mediator came from a threat to stop work by the employees, and that his offer of mediation to Kohut was suspect to say the least.

The Employees' Logs

In her ruling, the ALJ takes issue to AGC's assertion that there was disparate treatment between the charging party and other employees. Specifically the AGC is speaking to the difference in the employees' separate logs kept by Mr. Brousseau (ALJ pg.15 lns.13-21). The ALJ's comments in this paragraph are focused on the fact that 'the three'[10] (as they are referred to during the trial) all took on different aspects of engaging in concerted activity. She ends by noting that "They engaged in the same

8 TR pgs.332-336

9 Brousseau's releveant testimony are on pgs.33-34 lns.12-8. Brousseau also lied in stating that he did not do researchon the IWW though he clearly read the preamble to the constitution.

10 Manly, Phillips and Kohut

protected activities as Kohut, with each of them leading different aspects of it" (ALJ pg.15 Ln. 20-21).

The ALJ's points themselves show no relation to what the AGC was pointing out; that the employees were treated differently in regards to having made the same mistakes. She has simply stated that the AGC contends the treatment was disparate, then does nothing to disprove it and moves on.

As noted above, in Kohut's log (GC9) it is listed that he was responsible for an infraction of company policy on 3-5-12. This same entry does not appear on either Manly or Phillips' logs, despite their presence and engagement in the activity at issue. Both Manly[11] and Phillips[12] testified to making the same mistakes that are represented in Kohut's log, yet do not appear in their own. The ALJ attempts to write off these inconsistencies on the next page of her Decision and Analysis by stating that "There is no evidence establishing Brousseau knew about all of these infractions, however" (ALJ pg.16 lns.13-12). This statement is completely inconsistent with testimony given.

In the first two paragraphs on page sixteen (16) of the ALJ's ruling, she credits Manly and Phillips' testimony that not only did they make the same mistakes, but that Jim knew about at least some of them. In the first paragraph she writes the evidence off by stating it was obvious the logs were not perfectly accurate, while in the second she claims that there was no evidence he knew about the infractions. This series of paragraphs is bordering apologetic for the respondent. In cases where it is obvious Mr. Brousseau knew about infractions the ALJ writes it off as inaccuracy, and for others she reasons that there is no way to prove that he knew about all of the infractions. Not only does the issue that occurred on 3-5-12 contradict this line of reasoning, it is of importance to note that Manly testifies that she had ruined two different recipes that Mr. Brousseau knew about (TR pg.215 lns.10-13). She attests that one of these clearly fell within the timeline of when Mr. Brousseau claims he was keeping these logs (TR pg.215 ln24-25). On the following page of the transcripts, Manly attests to how she was not reprimanded and to the fact that Brousseau knew about the mistake. As Mr. Brousseau belaboringly made clear in his own testimony, a mistake of this magnitude can be very costly to the company. This was Manly's second time making such a mistake, yet it apparently did not warrant mention in her log, even though we see that apparently forgetting to turn on a fan does.[13]

It could not be more evident that the logs, if taken fully as being non-fabricated, are at the very least heavily biased, with clear differential treatment between the Charging Party and the other employees. There are however more problems with these logs, and some of these issues lead us into looking at the inconsistencies of Mr. Brousseau's testimony.

A few things of note about Mr. Brousseau's testimony regarding these lists.

1. He claims that he keeps lists on all of his employee's (TR pg.59 lns.17-19 & pg.62 lns.12-15)
2. The lists are chronological (TR. Pg66 ln. 16-17)
3. The entries would be made that day or "maybe by half a day" (TR pgs.66-67 lns.25-3)
4. He claims he would get as much on the lists as possible (TR pg.74 ln.22)

11 Manly's relevant testimony is contained between pages 207-220 of the TR.

12 Phillips' relevant testimony is contained between pages 288-291 of the TR.

13 It is of note that during his testimony, Brousseau claimed he never saw Manly make a recipe mistake (TR pg.144)

A few things of note about GC 9 aka. Kohut's list.

1. The second and fourth entries on this list contain no dates, while all others do.
2. The fourth entry appears to apply to multiple instances.
3. The fifth entry states that Kohut came to work early and started working without consulting Mr. Brousseau. In his testimony Brousseau admits that the production building is locked each night. When asked how Kohut would have gotten in, Brousseau responds he might have had a key, but cannot remember.[14] The Charging Party never had a key for the production building.
4. Mr. Brousseau is startlingly inconsistent for the entry on 2-27-12. In testimony on pg. 177 Brousseau claims twice that he physically saw Kohut use check marks for signing off on the end of day checklist. In separate testimony about the same incident he states that "Well, in this case no one signed off on it" (TR pg.124 ln.10). He is then shamelessly led to a deductive answer by his attorney on the next page (TR pg.125 ln.1-14).
5. The entry for 3-5-12 is already noted above. However, it should also be noted that the entirety of this entry is listed in the past tense, and though in reviewing Brousseau's testimony on this discrepancy he states it would have been more correct for him to state "at the time," the after the fact correction would still not put the entry in anything but the past tense. (TR pg.67 lns.24-25)
6. For the entry 3-8-12, Manly's testimony on pgs. 211-212 is telling. This, like many of the entries, raises concerns on the basis that in his wording Brousseau cites 'protocol' regarding some things, yet there is no hand/rulebook to point to and no evidence to support that such protocol existed.
7. On the second page of GC9 the charging party apparently made five (5) noteworthy mistakes in one day that apparently needed to be listed separately. Interestingly only the first of the series has a date sequence consistent with the rest of the log (i.e. 3-15-12), while the rest use a separate method (i.e. 3-15-2012)
8. The entry for 3-28-12 states that Kohut erred by overfilling the sample bags. Phillips testimony on TR pg.289 lns.19-23 is telling.
9. The entry on 3-28-12 is apparently faulting Kohut for stacking dehydrator trays to high, though under testimony Brousseau cannot remember the incident, and even though it mentions all three employees, it again only appears on GC9.
10. Date Unknown! Considering Brousseau stated that he made entries the day of, or later that day, it seem implausible that while sitting at a computer with the date right there he could not figure it out.
11. For entry 4-6-12, there is no way for Brousseau to know the actual weight of the bins, and it was common practice amongst the employees to remove enough weight from the bins to make them light enough to then be safely picked up and the rest dumped.
12. For the second entry on 4-6-12, a review of Manly's testimony on TR pg.207 lns.13-23 is telling.
13. The entry for 4-5-12 is out of order occurring after 4-6-12. The dates themselves could not be confused, since the fifth of April 2012 was a Thursday, which is when the possibility of this happening could occur.
14. Inconsistent with other entries where a number of mistakes had been purportedly committed on the same day, 4-19-12 lists a number of them together. Surprisingly there is no mark as to

14 Relevant testimony for both parts in contained on TR pg.79-80 lns.21-6

whether Kohut used the check list or not, given that either way that would have logically constituted another infraction.

15. 4-25-12 See #12
16. 5-24-12 Again we see inconsistent testimony given by Brousseau between what is written here, the testimony in his affidavit and his court testimony.

As mentioned above, Mr. Brousseau stated that he kept these sorts of lists on all employees. It is of note that not only was it difficult to get accurate lists based on the subpoena, during the hearing AGC had to request documents responsive to item 8 in the subpoena which states; "Lists maintained to track errors by Respondent's employees..." (TR pg.62 lns.16-23) Even after this second round of asking for compliance, no lists were ever generated except for those supposedly pertaining to Kohut, Phillips and Manly. Mr. Brousseau testified that he began keeping lists on all employees on August 18th 2011. At that time Paul Conrad[15] was an employee of Livin' Spoonful, yet no list exists for him. InManly's testimony she also mentions another full time employee working for Jim at the time of the subpoena, Kate (TR pg.216 ln.20). During the relevant time period for the case and subpoena another person by the name of Annie Minninger was also employed by Mr. Brousseau, yet no list exists for her.

When looking at the logs for both Phillips and Manly, we see that they both conveniently start within one week of each other; 3-21-12 and 3-28-12 respectively. So, even though Brousseau testified that he began keeping lists on all employees in August of 2011, some how neither Manly or Phillips ever did anything of note until the weeks following the employees March 2nd Letter. Manly, who continued to be employed by Brousseau until just after the trial apparently never did anything of note after May of 2012, nearly a full year elapsing in that time.

Lastly, there is no evidence, sans Brousseau's testimony, to support the existent of these lists before Kohut was terminated. Even during Kohut's performance review the list was never mentioned or referenced.

For the ALJ to dismiss all of the contextual issues surrounding the log, including the Charging Party's testimony that some of the entries are pure fabrication is unsound. There are enough discrepancies and convenient happenstances to warrant a review of this evidence by the Board.

Reviews

When giving her ruling on the ACG's argument about the reviews is pretext, the ALJ reasons that Brousseau's perceptions given in the review are "not so out of line as to create an inference that they stemmed from animus" (ALJ pg.17 ln.11-12). She also reasons that even though Brousseau was using common mistakes made by everyone and Kohut contested the time frame, that this was irrelevant because "Broussseau's point was the bigger picture, not any particular error or errors" (ALJ pg.17 ln.6-7). When examining the evidence and testimony of this hearing it becomes more clear the issues ACG raised in relation to the review as pretext.

If we first examine Brousseau's performance review of the Charging Party, it is important to pay special attention to the two places where Kohut receives a four (4). On the first point (is able to perform

15 Who is mentioned in Manly's testimony as currently being employed (TR pg.216 ln.18)

assigned tasks accurately and in an expeditious manner), Brousseau acknowledges Kohut's speed on the job, the same attribute that led to him being paid more than the other employees according to Brousseau.[16] He then lists three places where he thinks that accuracy/quality suffer as a result. Of these three, we know that based on Manly's and Phillips' testimony the "cracker batter portions/measure cups not carefully leveled" is a false accusation.[17] Further, Brousseau's claim that putting trays into the dehydrators too quickly was a problem, yet this never once appears in his testimony or on the lengthy list of mistakes Kohut apparently made.

The second area where Kohut receives a four is of more importance to understanding why this performance review was being used as pretext. Of note is Brousseau's opening line; "Adam is often enthusiastic and positive about making changes to how he is (sic) goes about tasks..." (GC12). A precursory review of Brousseau's testimony during the hearing shows that he was certainly attempting to paint a different picture. Beginning on pg.75 and through pg.78 we see that Brousseau asserts that after the August conversation concerning exploitation, Kohut "Was often terse when I would bring things up to him" (TR pg.77 lns.14-15). In further testimony that begins on pg.473, Brousseau again states that he had difficulty bringing up work matters and that he was concerned that by doing so he would elicit an "angry response," and as his testimony continues on the subject on pg.476 we see further testimony that he was worried about a *negative response* to bringing up work related issues.

This is the basis for Brousseau's claim that his and the Charging Party's relationship took a real dive directly after the August 2011 conversation. What Kohut's performance review shows is quite a different story all together. "...often enthusiastic and positive about making changes" is magnitudes different than being afraid to raise issue with a supposedly "terse" and easily angered employee. In the same testimony listed above we see that Brousseau claims that he was worried about group cohesion and morale because of Kohut's supposed inability to accept criticism, yet under the summary for Kohut's review Brousseau states; "Adam excels in team environments and facilitates group cohesion and effort toward company goals."

If we look at the review in whole, it clearly shows Kohut as an employee "adept at diplomacy" with "keen insight and informed perspective," "lighthearted and non-defensive" and is a "natural leader" with the ability to "optimize work flow" (GC12). This sort of review is a far cry from the picture Brousseau tries to paint during his testimony, and it is important to make clear that this was on a review that took place nine (9) months after the two's relationship supposedly began to have instant problems, and only a month and a half before Kohut was fired.

While this shows pretext regarding Brousseau's claim that the two's deteriorating relationship was one of the two reasons given for his termination, it also speaks to what Brousseau claimed were mistakes being made in the workplace and the ALJ reasons that there is no pretext. It is important again to look back at the testimony and affidavits given by both Manly and Phillips in regards to this case. Most of the things listed as mistakes for Kohut, were never mentioned or listed for Phillips or Manly, despite the fact that they committed the same mistakes and Brousseau knew about them. Manly's exhaustive testimony on the matter[18] of these mistakes is very revealing of the disparate *treatment* being meted out not only in the reviews by Brousseau but also in the way he handled things related to Kohut generally.

16 TR Pg.330 lns.3-18

17 Manly TR pg.208-209 lns111-2 Phillips TR pg289 lns.9-18

18 TR pgs.207-221 and Manly's Affidavit pg.4 lns.16-25

These differences clearly show pretext in regards to Brousseau's treatment of Kohut through the review process and also proves discriminatory motive by showing departure form past practice and disparate treatment.

The ALJ further cites Phillips' review of Kohut and a statement made by Manly to the effect that she had to provide more instruction to Kohut than other employees as reasons for finding no pretext. Yet when we read over Phillips' review of Kohut it is obviously on the whole a very positive review finding him to be an excellent employee and co-worker. Specifically the ALJ's citing of Manly's testimony that she had to correct Kohut more than other employees is of dubious value to her argument for no pretext. Upon review of the relevant testimony we find that the statement is specific to a period of time relating to a supposed incident that occurred with rinsing celery. The incident and time line of when this statement was true all happened before Kohut received his dollar raise in August 2011 (TR. pg.239 lns.10-24). If we continue with her testimony on the next couple of pages we see that in her review of Kohut from April 2012, it is her view that he has clearly improved, even going on to state specifically that he makes mistakes with no more frequency than herself. The ALJ incorrectly conflates an issue that happened at the beginning of Kohut's employment, even before his largest raise, with ones claimed almost a year later by a separate party. Manly's own testimony clearly disputes the ALJ's reasoning.

The Seed Incident

The ALJ reasons that the facts before her did not point to Brousseau's treatment of this incident as the result of unlawful animus. However, a thorough review of Brousseau's testimony regarding this incident[19] brings up some disconcerting points. Namely, Brousseau's testimony regarding events surrounding the incident and the conversation between himself, Kohut and Nackoney are entirely inconsistent.

First, Brousseau claims that in the "two to three weeks" prior to this incident he noticed that the seeds were soaking up more water (TR Pg.97 lns.10-17). However, both Manly and Kohut's testimony regarding the seeds shows that the first time this new batch of seeds was used was the previous Monday when Manly soaked them and she herself saw that there was a change (Manly's specific testimony can be found on TR pgs. 223-224). While the timing itself was off, it seems clear that Brousseau understood that their was a difference with this new batch of seeds before Kohut came back to work on that Thursday. Despite knowing that there was a difference however, Brousseau never consulted Kohut regarding this, either before the Friday meeting or during. It is also of note that despite involving the business' co-owner in the meeting, Brousseau failed to disclose to even his wife that the seed supplier had changed (TR pg.463 lns.10-11).

Related to this is Brousseau's consistently shifting testimony about the meeting and what Kohut said during it. In three different places where Brousseau is asked about this incident he claims first that all Kohut would say was "I followed protocol" and "Oh, I get it" (TR pg.96-97 lns.24-1). Then when next asked about this incident by his own lawyer on pg.146 he states that Kohut said "I swished it around with my hand," but when asked if Kohut had stated he followed 'protocol' Brousseau then says "I don't recall him saying that" (TR pg.146 lns.14-25). Then in testimony from the next day, Brousseau then states that "he explained he followed protocol...and he wouldn't say anything else" (TR pg.478 lns.19-

19 TR pgs.89-100

24).

While these inconsistencies in testimony may seem minor, they point toward what only a review of the full court transcripts and documents can reveal; Brousseau's testimony is consistently shifting and seeming to have more relation to how to make himself out in a positive light than to an actual recollection of the events that happened. This is important in understanding the true nature of the seed incident and its relation to the letter drafted and presented by the employees on June 4th. The fact that Brousseau chose to withhold his knowledge of a difference in the way the seeds had been soaking up water from Kohut before his Thursday shift and then even from his wife when brining her into a retaliatory meeting, speaks volumes of his true intentions in regards to terminating Kohut.

In his court testimony he even avoids mentioning that he made the exact same mistake regarding the seeds the very next time they were soaked. We first hear about this incident during Manly's testimony, and she states herself that the seeds that Brousseau soaked looked the same if not worse than the one presented as GC 13 (TR pgs.22-256). She even states that "It was like there was more water in it and it – but it still looked the same," in relation to the seeds she viewed on May 28th. So according to Manly, Livin' Spoonfull's longest standing employee, the only difference between the seeds Kohut soaked and Brousseau soaked was that Brousseau's appeared to have a bit more water. This just happens to be the same issue that Brousseau knew about, but did not inform Kohut of, before he soaked the seeds the Thursday prior. It also begs to question why then, when Kohut stated that he had followed protocol and explained what he had done in regard to the seeds, Brousseau refused to accept what he said. Even after it was pointed out to Brousseau that he had made the same error he refused to lift the unprecedented threat levied against Kohut. This then sets the stage for the employees engagement in collective activity for the purpose of mutual aid and protection on June 4th.

June 4th

It was the result of these interactions and the obviously disparate treatment that Kohut was receiving which led to the employees drafting the second letter that was presented to the Respondent on June 4th. In her ruling, the ALJ dismissed the argument by the ACG that Brousseau's response to being handed the employees' letter on June 4th is case for pretext. Specifically she argues that;

> *Immediately afterward, in response to Minninger, Manly and Phillips saying they did not feel safe, Brousseau agreed to meet with the employees and, at his expense, hire a mediator to help resolve things.*[20]

I would implore the Board to review the case and find where this assertion is supported by evidence. Contrary to the ALJ's assertion, the testimony is clear the Brousseau in fact refused to allow a mediator when it was asked for on June 4th. Manly, Phillips and Kohut's testimony all point out that Brousseau refused to allow a mediator for any future meeting on June 4th. The witnesses[21] testimony is consistent in this fact. All of the witnesses are also consistent in that after Brousseau received the letter, he scanned it for a matter of seconds and *immediately*[22] became angry and standing between the employees and the production building's only exit began to insist that they talk about the letter then, despite all of the employees being off the clock and some stating that they felt unsafe. While the ALJ dismisses Brousseau's remark about the employees not being his equal, she fails to cite this testimony to his immediate reaction. This may just be a lay person's view on what can legally be defined as

20 ALJ pg.17 lns.42-44

21 Here I am using 'witnesses' to refer specifically to Manly, Phillips and Kohut.

22 Manly pg.226 ln.23; Phillips pg.283 ln.15; Kohut pg.397 ln.18

animus, but if an employer's reaction to employees engaging in protected activity is so openly and wantonly hostile toward said action, I'm not sure what sort of grounds need to be met in order to prove animus.

In Manly and Phillips' testimony we see more clear evidence of Brousseau's disparate treatment of Kohut. Both testify that while blocking the exit and demanding that the letter be spoken about immediately, Brousseau's response to Kohut attempting to speak was to silence him and tell him he would not be allowed to talk.[23] Then when Minninger asked if there could be a ground rule that people would not interrupt one another Brousseau refused and stated that he had to control the conversation and that is when he exclaimed he and the employees were not equals. For the ALJ to not only dismiss pretext based on something wholly false and unsupported by the testimony and further ignore the testimony by all other parties involved is disconcerting in the least.

On The Issue of Mediation

The ALJ argues that Brousseau's offer for mediation with Kohut was "a genuine offer, as evidenced by the fact that Brousseau already had decided on a mediator and that he had told the other employees he had planned mediation for just himself and Kohut" (ALJ pg.18 lns.1-3). She also points to Brousseau's testimony on the matter as evidence of its credibility. There are a number of issues with this reasoning.

Here again we run into the same problem that has been coming up with Brousseau's testimony throughout the hearing. When testifying about his interest in having a mediator he first states that he stepped outside after the conversation about the letter and "I thought to myself, you know, what I really need to do is get some help with my relationship with Adam, so I decided I would get some mediation" (TR pg.103 lns.19-21). Brousseau later testifies, "I had been thinking about – I had been planning to do, you know – it was on my list of things to do was – to get me a mediator help (sic) with my personal relationship with Adam as employer/employee" (TR pg.476 lns.20-23). He also gives competing versions of Kohut's response to the offer. On page 103 he testifies that Kohut says no unless he can "sign off on the mediator," while on pg 477 he testifies that Kohut's response was "absolutely not, no way." His recounting is a far cry from that given by Kohut regarding the exchange, and unlike Brousseau, Kohut's testimony regarding the matter is consistent.[24]

While the ALJ faults Kohut for choosing not to mediate with Brousseau on his unilateral terms, she is clearly not looking at the context of the situation and how it relates to pretext. When reviewing the employees testimony it is clear the Brousseau only came up with the idea of offering mediation *after* being presented with a letter calling out his retaliation and disparate treatment of Kohut. His offer for mediation only came about as a way to deflect the group activity that his actions had induced. By stating that his issues with Kohut were personal and that therefore he would not talk about it with the other employees,[25] Brousseau then attempted to deflect the group activity into a private meeting with himself, the Charging Party and a 'mediator' whose identity he would not reveal.
To fault Kohut, who not only stated that he was interested in mediation, but made multiple attempts to find a mutually agreeable solution, is beyond the bounds of reason.

Within the context of the situation, the employees were engaging in clearly protected forms of activity

23 Phillips on pg.284 and Manly on pg.227
24 Kohut's testimony on the matter can be found on pgs.400-402 and also under cross examination on pgs. 443-449
25 Kohut Aff. Pg.8 ln.21

and were requesting a workplace meeting for the purposes of mutual aid and protection. The employer, who immediately showed animus to the activity, refused to speak about the issues he had with the Charging Party by stating they were personal and not work related matters. He then pulled the Charging Party aside and asked him to a meeting with a 'mediator.' After the Charging Party stated that he was indeed interested in mediation, he asked Brousseau who the mediator he had in mind was, but Brousseau refused to reveal the identity. This immediately raised an alarm for Kohut. Given that Oregon is an 'at will' employment state, there is nothing that would keep the Respondent from bringing in a personal friend to a meeting where only the three were present, thus giving the Respondent unilateral ability to fire the Charging Party for supposed actions during the 'mediation' where the only other witness would be the Respondents personal friend. For the Charging Party to express concern in this instances is eminently reasonable, and should further be seen as an extension of the employees' concerted activity.

Meyers Industries, 281 NLRB 882 (1986) has set precedent that an employee can engage in protected activity even when taken individually, specifically when other employees have foreknowledge. In this instance, the employees discussed and drafted a letter for the purposes of mutual aid and protection. The ALJ herself recognized this as protected activity. The employer's response was to attempt to move the Charging Party into a position where he was not a part of this group activity. That the Charging Party refused this attempt and insisted on having known people present clearly falls within the bounds of what was in the context of the letter given to the employer. For that reason, and even though at this specific moment the charging party was removed from the other employees, the requirements under *Meyer's* were fulfilled because the other employees had foreknowledge and the action is directly related to what has already been established as protected activity.

Further, testimony given by the Respondent as to the identity of the person he had in mind only proved the Charging Party's concerns. Though the ALJ claims Kohut based his thoughts about Dan Duggan only on evidence that Brousseau had been to his property and discussed a business opportunity, Kohut's testimony clearly states that Duggan was known by the employees to be a personal friend of Brousseau.[26] It is also of note that during Brousseau's own testimony he admitted that Duggan was not a professional mediator.[27]

Pretext can also be seen in the disparate treatment between this offer of 'mediation' and that given to the other employees when they threatened not to work the day that Kohut was terminated. A review of the employees testimony and affidavits reveals that on June 6th – the day Kohut was fired – the employees expressed their concerns with continuing to work because of Brousseau's decision to fire Kohut. It was only after this threat to stop work that Brousseau finally agreed to meet with the remaining employees and a mediator – quite contrary to the ALJs statement on the bottom of page 17. In this instance, Brousseau found an independent mediation company in order to restore the employees to work. This is a far cry from refusing to say who you have in mind for a private mediation, especially when that person was proven to not only not be a mediator, but in fact a close friend of the Respondent. Clearly the Respondents offer of mediation was not some benign attempt to repair a supposedly wayward relationship

In her closing paragraph, the ALJ asserts that Kohut's refusal to mediate on Brousseau's terms leads us to the other reason for Kohut's termination; the breakdown of the two's relationship. However, as was

26 TR pg.402 lns.8-13
27 TR pg.154 lns.6-14

shown in the section above regarding the Charging Party's reviews, it is clear that no real evidence on this supposed break down in the two's relationship can be found, outside of Brousseau's constantly shifting testimony. The first time any person outside of the Respondent had heard anything about this supposed breakdown was on June 4th, when Brousseau attempted to deflect the employees engagement in protected activity.

Conclusion

Clear animus toward the employees protected activity is shown throughout this case. However, the animus and related retaliation is mostly directed at a singular employee. What is clear from all testimony is that even though multiple parties engaged in the protected activity, it was Kohut who Brousseau pinpointed as the ringleader. In his affidavit and in his testimony he states that Kohut was the one who did most of the talking, even going so far as to say he was speaking for the other employees.[28] It is also uncontroverted fact that one of the more contentious issues regarding the employees first letter and subsequent meetings was the wage discrepancy between Kohut and the other employees. The only way this discrepancy could have become general knowledge was through the Charging Party's, and the employer clearly understood this. Phillips also notes that Brousseau referred to at least one of the letters as "Kohut's Letter."[29] It is clear that at the least Brousseau saw Kohut as the source of the employees concerted attempts at improving their working conditions.

What a review of the hearing and the relevant documents shows is an employer who acted to single out an employee that he deemed the leader in the employees' concerted activity. When his employees confronted Brousseau's attempts to single out Kohut for biased, unfair and at times manufactured reasons, he decided to cut his losses and terminated Kohut. Pretext regarding the firing can be seen in the fact that no existence of a supposedly poor working relationship can be seen before June 4th when Brousseau unilaterally stated it. His claims of being unable to speak with Kohut about supposed performance issue are dis-proven by his own review of Kohut and he failed to show any evidence of it after the fact.

What the hearing further reveals is the Respondent's constantly shifting testimony, and his blatant attempts to mislead the ALJ by omitting facts and in some cases outright lying. Specifically we can look to his testimony that he never knew of Kohut's membership in the IWW (TR pgs.33-34 lns.12-12). He claims this even though he referred to Phillips and Kohut as 'Wobblies,' and later came into the production kitchen and interrogated Kohut about the per-amble to the IWW constitution. Twice he claims that he never saw Manly ruin a recipe batch resulting in the loss of product and money to the company,[30] yet Manly by her own admission clearly did and states he had knowledge of it.

It is further suspect that the Respondent's claim that the letter presented to Brousseau by the employees on June 4th played no part in their decision to terminate Kohut. By Brousseau's own admission, he did not come up with the idea for mediation until the letter was given to him. His clear animus toward the protected activity and the circumstances surround the offer for mediation, when coupled with the timing – the employee's next work day – of the Charging Party's termination all lend weight to the connection between the employees' protected activity taken on June 4th and Kohut's termination on June 6th.

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28 TR pgs.55-58

29 TR pg.299 ln5

30 See both TR pg144 lns.9-10 & pg.160 lns.16-20

The issues that have been raised here are numerous, but it is not without reason. Without looking more closely at the testimonies given, and reviewing the ALJ's, at times factually incorrect, judgment regarding this case, we can then look at the macro aspects it.

Prior to when Kohut was hired at Livin' Spoonful there was no union activity taking place. As Kohut became accustomed to the companies operations and integrated himself into the workforce he became aware of workplace issues that could and should be addressed by the employees. His consistent engagement of other employees in conversation regarding the terms and conditions of their employment – both theoretical and not – was the precursor to the employees' concerted activities that began with the March 2nd letter. The two claims that the employer has against Mr. Kohut can not be substantiated by any of the employees, and excepting through hearsay, are not substantiated by the employer's wife and co-owner.

The discrepancies between the employees' logs and their testimony relating to the workplace and past practices of the employer puts serious doubts on their reliability. The clear differential treatment between Kohut and the other employees is not evident to anyone (sans Brousseau) until after the employees engaged in protected activity on March 2nd 2012. From this point on the employees became aware of the desperate treatment and when it took a startling turn on May 25th with Brousseau actually threatening one of Kohut's shifts due to an issue related to new seeds soaking up more water than had previously been experienced, they became concerned. When on the next workday it was discovered that Brousseau himself made the same error, the employees confronted him about it. After he begrudgingly admitted that the new seeds did in fact require new protocols to be soaked correctly, but did not remove his threat against Kohut, it became clear to the employees they needed to take action. To that effect they collectively drafted a letter that addressed clear inequitable treatment of an employee and upon handing Brousseau the letter asked that he read it, and that they have a discussion about it in the near future.

Brousseau immediately became angered by the fact that the employees had addressed a letter to him regarding this issue and lost his composure completely. It was only after he received this letter that he came up with the idea to offer 'mediation' with Kohut over their supposed personal issues. Brousseau, taking Kohut away from the other employees, then attempted to induce Kohut away from the protection of group activity and into a meeting between the two of them and a secret 'mediator' whose identity he refused to disclose. Kohut, in line with what the group had just attempted to address, expressed concern over meeting with Brousseau and an unknown person. After Kohut made suggestions about having other people present at the meeting, or having a person they both could agree on be present, Brousseau stated that he would "think about it." Upon Kohut's arrival for his next scheduled shift, Brousseau immediately terminated him, refused to speak to the cause of termination and ejected Kohut from his property.

We believe that given the circumstances regarding the timing, the lack of evidence supporting the Respondent's claims, and the preponderance of testimony affirming disparate treatment and departure from past practice, this case requires that the Board review the Administrative Law Judge's ruling, find exception to it, and issue complaint against the Respondet.

Thank you for your time in considering the exceptions provided here.

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Exception 12; The ALJ wrongly finds that Brousseau's offer of mediation was genuine (ALJ pg.18 lns.1-5).....**pg.12-13**