

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

**THE MARLEIGH GROUP, INC. d/b/a
ALLIED LIGHTING SERVICES AND
THE EVOLUTION LIGHTING GROUP,
LLC d/b/a YESCO, A SINGLE EMPLOYER,
SINGLE INTEGRATED ENTERPRISE AND
ALTER EGO**

and

CASE 08-CA-086251

JOHN SECUNDE, An Individual

and

CASE 08-CA-091262

**INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL 6**

and

CASE 08-CA-095918

D. SCOTT GALLENTE, An Individual

EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL¹

On September 12, 2013, Administrative Law Judge Bruce D. Rosenstein issued his Decision and Order (JD-59-13) in this matter.² Counsel for the Acting General Counsel excepts to Judge Rosenstein's finding that Respondent did not violate Section 8(a)(1) and (3) of the Act by terminating employee John Secunde. (ALJD pp. 5-6) Specifically, Counsel for the Acting General Counsel excepts to the following portions of Judge Rosenstein's decision:

¹ Exceptions were originally due on October 10, 2013. As set forth in the Agency's Federal Register Notice of October 1, 2013, due to the government shutdown, the Board, *sua sponte*, granted an extension of time to file or serve any document for which the grant of an extension was permitted by law. These Exceptions are being filed within the timeframe allotted by the Board's extension of time.

²“ALJD, p. _____” will indicate the page in the ALJ's Decision JD-59-13. “Tr” will be used to reference the transcript, “GC” will be used to refer to General Counsel's exhibits and “R” will be used to refer to Respondent's exhibits.

1. Page 4, Lines 39 – 43 describing Mark Wasserman’s account of his May 30, 2013 meeting and follow-up letter to John Secunde;
2. Page 5, Lines 17-19 asserting the record does not support a finding that John Secunde was terminated in retaliation for seeking the assistance of the Union and that the only mention of the Union during Secunde’s 2012 term of employment was during his initial interview;
3. Page 5, Lines 22-24 describing Counsel for the Acting General Counsel’s opening statement as asserting that John Secunde vocalized his intent to contact the Union during his meeting with Wasserman;
4. Page 5, Lines 35-39, asserting that John Secunde’s employment was separated due his poor workmanship and that Secunde may have resigned his position;
5. Page 5, Line 47 asserting that John Secunde did not testify that he engaged in any union activity during his 2012 term of employment;
6. Page 5, Footnote 11 asserting the Counsel for the Acting General Counsel argued that evidence related to John Secunde’s 2010 term of employment should be relied on to establish animus;
7. Page 6, Lines 5-6 asserting Counsel for the Acting General Counsel did not sustain the allegations in paragraph 14 of the Complaint; and
8. Page 16, Lines 32-42, and Page 17, Lines 28-35 to the extent the Order and related Notice provisions do not provide for a reinstatement and back remedy for John Secunde.

BRIEF IN SUPPORT OF EXCEPTIONS

Counsel for the Acting General Counsel respectfully excepts to Judge Rosenstein's finding that John Secunde was not terminated in retaliation for his union activity. Judge Rosenstein found that Secunde's separation from employment resulted from his poor workmanship. (ALJD p. 5) However, Judge Rosenstein failed to address the events that led to Secunde's suspension for poor workmanship being converted to a termination. A careful review of the timeline of events on Secunde's last day of employment establishes that Secunde's statement that he intended to contact the Union regarding his suspension was the only possible reason for his final separation from employment with Allied Lighting Services (Allied).

There is no dispute that on May 30, 2013, President Mark Wasserman³ and Manager Jesus Rosado⁴ called Allied employee John Secunde into Rosado's office to discuss what they considered to be his poor workmanship at the North Point garage project. (Tr 86-95; 238-39) Secunde was called into the office to meet with Wasserman and Rosado. Wasserman asked Secunde if he had been paid last week. Secunde replied "Yes," to which Wasserman stated that he and Rosado had not been paid and had not been able to feed their families. Wasserman blamed this on Secunde and his poor performance at North Point garage. When Secunde tried to respond, Wasserman yelled at him to "shut up." Wasserman gave Secunde the option of being suspended for ten days or correcting the work on his own time. Secunde chose the suspension and left the meeting. (Tr 238-39)

When Secunde left the suspension meeting he was still employed by Allied. At hearing, Wasserman was adamant that he had not terminated Secunde, but merely suspended him. (Tr 88) When Secunde left the suspension meeting, he spoke briefly to employee Pete Sherer. Sherer

³ Mark Wasserman was the owner and President of Allied. (Tr 26-27, GC 1(s), p. 4)

⁴ Jesus Rosado was a manager at Allied. (Tr 130, GC 1(s), p.5)

testified that Secunde told him he would see him in ten days. (Tr 313-14) After leaving Allied's offices, Secunde called union representative Tony Watroba. Watroba testified that Secunde reported to him that he had been suspended. (Tr 465-66)

In his Decision, Judge Rosenstein suggests that during the hearing Wasserman consistently maintained that Secunde left the meeting before being suspended. (ALJD, p. 5) However, this description of Wasserman's account of his meeting with Secunde is incomplete. While Wasserman did eventually testify that Secunde left the meeting before being suspended (Tr 98), Wasserman's initial testimony was that he suspended Secunde during the meeting. (Tr 88) In fact, Wasserman repeated this assertion multiple times. (Tr 88, 93)

Regardless of the discrepancy in Wasserman's testimony, the evidence establishes and, in fact, the parties agree that after the suspension meeting Secunde was still employed. Yet later that same day, Wasserman sent Secunde a letter notifying him that Allied considered him to have quit. (GC 35) Secunde testified that he received the letter the day after he was suspended. (Tr 244-45) So, the question, overlooked by Judge Rosenstein, is what occurred between Secunde's suspension meeting and the issuance of the letter.

There was only one relevant event that occurred between Secunde leaving his suspension meeting and Wasserman sending the May 30, 2012 letter. That was Secunde's conversation with Rosado during which he told Rosado he intended to contact Tony Watroba. Specifically, Secunde was gathering tools preparing to leave the facility and serve his ten day suspension. Rosado was following him in order to escort him out. Secunde asked Rosado several times what was going on and why was this happening. Secunde then said "Jesus, you know I have to call Tony as soon as I get home." (Tr 239) And in fact, as detailed above, Secunde did contact union representative Tony Watroba immediately after leaving Allied's offices on May 30, 2012. (Tr

465-66) Counsel for Acting General Counsel asserts that it was Secunde's statement to Rosado, and no other event, that led to Secunde's termination.

Judge Rosenstein found that the record did not support that John Secunde engaged in union activity during his 2012 employment, citing that the only mention of the union occurred at Secunde's interview and that Secunde did not testify that he engaged in union activity. (ALJD, p.5) Judge Rosenstein did not address the role Secunde's statement that he intended to contact the Union played in his termination. Counsel for the Acting General Counsel made no argument that Secunde's termination was caused by on-going union activity. Rather, Counsel for the Acting General Counsel contends that Secunde's single statement that he intended to contact the Union was made at a time when Mark Wasserman was embroiled in conflict with the Union. Thus, the very announcement that Secunde was willing to seek the Union's assistance was, in Wasserman's mind, sufficient reason to terminate Secunde.

It is unlawful to terminate an employee in retaliation for his union activities. Seeking the assistance of one's union official is protected activity under Act. *See Tenn-Tom Constructors*, 279 NLRB 465 (1986). Secunde made known his intention to contact his union for assistance regarding his suspension.⁵ He clearly stated to supervisor Rosado that he intended to contact Tony Watroba for assistance. (Tr 239) Rosado knew Tony Watroba to be a union representative for International Union of Painters and Allied Trades, District Council 6 (Union), the union that represented the employees at Allied. (Tr. 187-88)

At the time Secunde made his ill-fated remarks, Wasserman was in the midst of conflict with the Union. He had met with the Union on April 24, 2013 and had been questioned

⁵ At Section 3.09, the parties' collective bargaining agreement contains a provision that employees may not be disciplined without just cause. (GC 5) This provision, as all provisions in the contract, is subject to the contract's grievance arbitration procedure. (GC 5, Sec 14.01) Thus, when Secunde made his statement, he was also invoking the provisions of collective bargaining agreement, which is protected activity under the Act. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984).

regarding his relationship to The Evolution Lighting Group, LLC (Evolution), which had opened in the fall of 2012 and was operating out of the same offices as Allied.⁶ (GC 64, Tr. 182, 207-09, 240-43, 294, 447) The Union had sent a letter dated May 23, 2013 requesting information regarding the relationship between the companies. (GC 21, Tr. 449) Allied was being sued by the Union's pension fund. In fact, the pension Complaint had been served on The Marleigh Group, Inc. on May 1, 2013. (GC 61) Wasserman had recently questioned employee Pete Sherer about visits to jobsites by union representatives Tony and Jim Watroba. (Tr 311) So, at this point in time, Wasserman had had quite enough of the Union's "meddling" in his affairs.

Contrary to Judge Rosenstein's assertions, Counsel for the Acting General Counsel does not argue that events from 2010 should be relied on to establish the Respondents' animus towards Secunde's union activity. Rather, Counsel for the Acting General Counsel argues that Wasserman's on-going disputes with the Union and his own questioning of employees regarding union officials' visits to jobsites serve as evidence of animus. In fact, during the hearing, Wasserman was vocal regarding his dislike for the Union, testifying that the Union was constantly "sticking up" for employees who were doing the "wrong things." (Tr 123) Wasserman expressed frustration with the fact that the Union would not supply the company with labor and, when Tony Watroba did refer individuals, they were the "same repetitive criminals" and "all types of bad people." (Tr 124)

Wasserman knew Secunde was a member of the Union. (Tr 86) In fact, he considered Secunde to have "quite an affiliation with the Union." (Tr 95) He knew Secunde to be a person who would file grievances and commonly go to the Union with his problems. (Tr 503-08) In Wasserman's view, Secunde represented the Union and all the things he disliked about it. In late

⁶ In JD-59-13, Judge Rosenstein found that Allied and Evolution are single employers and/or alter egos (ALJD p. 11), and that on September 1, 2012 they unilaterally withdrew recognition from the International Union of Painters and Allied Trades, District Council 6 and repudiated the parties' collective bargaining agreement (ALJD p. 12).

May 2012, Wasserman's anger towards the Union was boiling over and Secunde's statement that he was going to the Union over his suspension was the last straw.

The above shows that Counsel for the Acting General Counsel has established a prima facie case. Respondents cannot meet their burden under Wright Line, 251 NLRB 1083 (1980) to establish that Secunde would have been fired in the absence of his union activity.

Wasserman now argues that Secunde quit. However, Wasserman had no recollection of Secunde stating he was quitting. (Tr 97-98) Secunde clocked out that day. His time card reflects he left at 7:42am, which comports with his account of that morning. (GC 70)

Wasserman testified that he considered Secunde to have quit when Secunde did not show up for work the day after his suspension meeting. (Tr 93) However, Wasserman admitted that employees do not come to work when they are suspended. (Tr 98) Wasserman testified that he suspended Secunde. (Tr 88) Thus, there was no reason Wasserman would have expected Secunde to come to work the day after receiving a ten day suspension. His claim to the contrary is contrived and evidences his unlawful motive.

Rosado's recollection of the events of May 30, 2013 was limited. (Tr 191-92) He could not remember when or where he and Wasserman met with Secunde. He recalled Secunde "throwing a fit." (Tr 192) However, Sherer, who had nothing to gain at hearing, did not describe Secunde in that manner. (Tr 313-14)

Both Sherer and Watroba testified that during their conversations with Secunde on May 30, 2012 Secunde reported he had been suspended, not that he quit. (Tr 313-14, 465-66)

In conclusion, the record establishes and Respondent admits that it did not terminate Secunde for the problems at North Point garage. Despite Respondent's present claim to the contrary, Secunde did not quit and did nothing that would have indicated he intended to do so.

There is no dispute, however, that some event occurring on May 30, 2012 led Respondent to sever its relationship with Secunde. The evidence overwhelmingly demonstrates that “event” was Secunde telling Rosado he was going to contact Tony Watroba, as this is the only event that occurred between the suspension meeting and his termination. Thus, Counsel for the Acting General Counsel respectfully requests that the Board find that Allied and Evolution, as single employers and alter egos⁷, violated Section 8(a)(1) and (3) by terminating Secunde in retaliation for him stating he could contact the Union for help regarding his suspension.

/s/ Kelly Freeman

Kelly Freeman
Counsel for the Acting General Counsel
National Labor Relations Board

⁷ See FN 6.

Proof of Service

I hereby assert that copies of the foregoing Exceptions of Counsel for the Acting General Counsel were served by electronic mail this 22nd day of October, 2013 to the following:

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After informing the party of the substance of the document by telephone, a copy of the foregoing Exceptions of Counsel for the Acting General Counsel was sent by overnight mail on October 22, 2013 to the following:

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/s/ Kelly Freeman
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