

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19**

LIVIN' SPOONFUL, INC.,

Respondent

and

Case No. 19-CA-084278

PORTLAND INDUSTRIAL WORKERS OF
THE WORLD GENERAL MEMBERSHIP
BRANCH.

Charging Party

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO CHARGING PARTY'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Livin' Spoonful ("LS" or "Respondent") submits this Answering Brief to the Charging Party's Exceptions to the Decision of the Administrative Law Judge. Respondent respectfully requests the Decision and Order of Administrative Law Judge Eleanor Laws ("ALJ") be affirmed. The allegation that LS violated National Labor Relations Act ("NLRA") §8(1) should be dismissed¹.

I. STATEMENT OF THE CASE

This matter involves a challenge to Respondent's termination of Adam Kohut ("Kohut" or "Charging Party"). On July 7, 2012, Kohut filed an unfair labor practice charge and alleged that his termination was because of his union and protected concerted activity and to discourage

¹ "Tr." refers to the hearing transcript. "AGC. Ex." refers to the Acting General Counsel's exhibit. "R. Ex." refers to Livin' Spoonful's exhibits. "CP. Brief" refers to the Charging Party's exceptions to the ALJ's Decision and Order. "ALJ Decision" refers to the Decision and Order issued by the ALJ.

such activity. On December 13, 2012, the Regional Director filed a complaint and alleged Respondent's termination of Kohut was in violation of the National Labor Relations Act ("NLRA") §8(a)(1). This case was tried before ALJ Laws in Portland, Oregon on April 16-17, 2013. ALJ Laws dismissed the complaint on August 26, 2013.

In an attempt to find fault with the ALJ's Decision and Order, Kohut filed exceptions on September 30, 2013, in which he argues the ALJ misunderstood the evidence presented. As shown below, Kohut's arguments lack merit and they are without any legal authority.

II. ARGUMENT

A. Charging Party's Exceptions Should Be Dismissed For Failure to Conform to the Regulations

In order to merit consideration by the National Labor Relations Board ("Board"), exceptions to an ALJ's decision must comply with minimum requirements set forth in Section 102.46 of the Board's Rules and Regulations. *James Troutman & Associates*, 299 NLRB 120 (1990) In this case, the Charging Party's exception must (1) specifically set forth the question of procedure, fact, law, or policy to which exception is taken; (2) identify the portion of the judge's decision in dispute; (3) cite precisely pages in the record supporting the excepting party's exception; and (4) concisely state the grounds for exception. *Id.*

The Charging Party's exceptions fail to meet these minimum requirements because the exceptions fail to allege with any degree of particularity errors or mistakes the ALJ committed. The exceptions do not specify on what grounds the AJL's findings should be overturned, nor do they include citation to any authority beyond the Acting General Counsel's post hearing brief. Instead, the exceptions submitted include a narrative of what the Charging Party did not like

about the ALJ's decision, and he provided a "table of contents" with enumerated exceptions.

But, he fails to concisely state the question of fact, law, or policy to which he takes exceptions and he fails to concisely state the grounds for exception.

Based on these deficiencies, Charging Party's exceptions are insufficient to put in issue any finding of the ALJ, and the exceptions should be rejected. *Aitoo Painting Corp.*, 238 NLRB 366 (1978) (rejecting an excepting party's exception because it would require the Board to "engage in a fishing expedition to determine what, if any, problems, irregularities, or manifest error ensued")

B. Charging Party's Exceptions Challenges to the Administrative Law Judge's Findings of Fact

Respondent is left to address the exceptions listed in the "Table of Contents" to provide a substantive response to the Charging Party's exceptions. The Charging Party challenges many of the judge's credibility findings. Throughout the Charging Party's exceptions, he "contest[s] the factuality of the portions of the ALJ's 'Findings of Fact,'" (CP. Brief, 1) Specifically, Exception 8 states, "The ALJ erred in her reliance on respondents (sic) assertion that he began to keep lists of mistakes and contributions on all employees in August of 2011." (CP. Brief 16), and Exception 12 states, "The ALJ wrongly finds that Brousseau's offer of mediation was genuine." (CP. Brief 17)

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950). On the issue of credibility, the administrative law judge has the advantage of observing the demeanor of the witnesses while

they testified, which is a factor in resolving issues of credibility. *Id.*

In this case, the ALJ Findings of Fact was based “on the entire record, including my observation of the demeanor of the witnesses.” (ALJ Decision, 1) The Charging Party’s exceptions should be dismissed in as much as they challenge the credibility findings of the ALJ.

C. Kohut’s Speech Regarding Marxist Political Theory Was Not Protected Activity

The Charging Party is mistaken in his argument that his speech regarding Marxists political theory was protected activity under the NLRA §7. The Charging Party’s first four Exceptions reflect this argument.

The ALJ correctly found that Kohut’s political views do not constitute protected concerted activity. Kohut’s speech regarding Marxists political theory is not protected because there is no evidence it was for the purpose of “mutual aid or protection.” *See Joanna Cotton Mills Co. v NLRB*, 176 F.2d 749, 752 (4th Cir. 1949) (holding, the words “concerted activities” are limited in meaning by the words with which they are associated) In the Charging Party’s exceptions he argues that he engaged in “worker education” to induce others to take collective action. (CP Brief 3); however, there is no evidence in the record this was Kohut’s purpose for his speech on Marxism. Kohut’s speech about Marxism was not concerted activity as defined by the NLRA.

D. Respondent Did Not Demonstrate Animus Towards Concerted Activity

Charging Party’s Exception 5, 6, 10, and 11 alleged the ALJ erred in finding Respondent did not act with animus.

Exception 5 challenges the ALJ’s finding of no animus when Respondent’s owner, Brosseau, turned off a radio in the workplace in early March 2012 to prevent his 9-year old daughter from hearing “the good juicy part about why the administration thought they could kill

people.” (AJL Decision, 14:33-34). The ALJ’s finding of no animus was also based on the fact that “there was no evidence, however, that she [the daughter] was on the verge of hearing an explanation of targeted killings” before the incident in early March 2012. The Charging Party mischaracterizes the record for his argument there talk of “war and violence” on the radio prior to the incident in early March 2012. (CP Brief, 4) The testimony cited by the Charging Party does not include a timeframe of when the “war and violence” on the radio occurred. The finding of the ALJ is well supported by the record in this case.

Exception 6 alleges the ALJ erred in finding the Respondent’s actions generally do not support a showing of animus. The Charging Party’s ground for this exception appears to be a challenge the ALJ’s findings regarding credibility. (CP Brief, 5) (Charging Party’s claim that Respondent’s “offer of mediation to Kohut was suspect”) As set forth above, the ALJ’s findings regarding credibility are supported by the record and the record does not include any evidence to reverse such findings.

Exception 10 alleges the ALJ erred in finding the Respondent’s response to the “seed incident” was not a result of unlawful animus. However, the Charging Party fails to make any connection between any concerted activity and the Respondent’s response to May 25, 2012 “seed incident.” The Charging Party fails to state how Respondent’s response shows animus toward any concerted activity. The only reference to concerted activity in this exception is to concerted activity that occurred nearly two weeks *after* the “seed incident,” letter of June 4, 2012.

In Exception 11, Charging Party alleges the ALJ erred by not finding animus toward the employee’s protected activity on June 4, 2012. On June 4, 2012, one of Respondent’s employees, Renee Manly, handed Brosseau a letter. (Tr. 225:6-7). After Manly handed the letter

to Brosseau, the ALJ found there was a “heated discussion” about the letter involving several of Respondent’s employees (Manly, Annie Menninger, Stephanie Phillips, and Kohut) and Brosseau. (ALJ Decision, 17:42-43) During the heated discussion, Brosseau made a comment that he, as the owner, and the employees were not equals in relation to the business, but that we are equals as human beings. (Tr. 227:17-20). At one point, Menninger, Manly and Phillips indicated they did not feel safe, and Brosseau then offered to hire a mediator, at his own expense, to help resolve things. (ALJ Decision, 17:43-44) The Charging Party fails to cite any authority that a discussion where a business owner says we are not equals and agrees to hire a mediator constitutes animus.

All of the Charging Party’s Exceptions to the ALJ’s findings of no animus are without merit. The evidence in the record establishes that Respondent thoughtfully and thoroughly engaged the employees with respect to request about working conditions. (Tr. 198:3-4) Respondent’s efforts demonstrate good employee relations, and animus is not to be lightly inferred onto such an employer. *Asarco, Inc. v NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996).

E. Livin’ Spoonful Would Have Terminated Kohut Regardless of Any Concerted Activity

Notably, the Charging Party does not challenge the AJL’s finding that “the Respondent has proven Kohut would have been terminated even had he not engaged in protected conduct.” (ALJ Decision, 15:40-42).

It is well settled that employers “may and should apply their usual rules and disciplinary standards to a union activist just as they would to any other employee.” *N.L.R.B. v. Wright Line*, 662 F.2d 899, 901 (1st Cir. 1981). The ALJ found that Kohut’s termination was based on a “combination his performance problems and communications barriers stemming from the

breakdown in their [Brosseau and Kohut] personal relationship.” (ALJ Decision, 15:42-16:2). This finding is clearly supported by the record. There is sufficient evidence that Kohut’s mistakes were increasing in frequency and severity, and, at the same time, Kohut would not agree to mediate the personal relationship problems with Brosseau. (Tr. 105:9-10; 166:19-20).

The Charging Party argues the ALJ erred in finding there was no pretext in the decision to terminate Kohut. In Exception 7 the Charging Party alleges the “ALJ erred in her view that the employees’ logs did not show disparate treatment and are clear pretext.” In Exception 9 the Charging Party alleges the “ALJ wrongly finds that the employees (sic) review system was not pretext.” It appears the Charging Party’s basis for these exceptions is that there was “clear differential treatment between the Charging Party and the other employees,” specifically Manly and Phillips. (CP. Brief, 6). Kohut argues he was disciplined for misconduct, but Manly and Phillips committed the same misconduct and were not disciplined; however, he fails to allege any illegal ground for the differential treatment. The ALJ found “all three employees [Manly, Phillips, and Kohut] engaged in the protected concerted activity at issue.” (ALJ Decision, 15:15-20). Additionally, the ALJ found “there is no evidence establishing Brosseau knew about [misconduct of Manly or Phillips].” (ALJ Decision, 16:13-14) The Charging Party fails to concisely state the grounds for these exceptions, and they should be dismissed.

V. CONCLUSION

Charging Party failed to comply with Section 102.46 of the Board's Rule and Regulations regarding exceptions, and the Charging Party failed to present any meritorious factual or legal challenges to the AJL's decision. Therefore, the Charging Party's Exceptions should be dismissed in their entirety.

DATED this 27th day of November, 2013.

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By _____

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **ANSWERING BRIEF OF RESPONDENT LIVIN' SPOONFUL** on the following party at the following address:

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by the following indicated method or methods on the date set forth below:

- b Email**
- First-class mail, postage prepaid**
- Hand-delivery**
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DATED this 27th day of November, 2013.



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