M & M Affordable Plumbing, Inc. *and* Jeffery Ceren.
Case 13–CA–121459

August 4, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On November 19, 2014, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, M & M Affordable Plumbing, Incorporated, Rockdale, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate Jeffery Ceren for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. 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 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent unlawfully discharged employee Jeffery Ceren, we do not rely on *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963), and the judge's statement that the Respondent's termination of Ceren because he was a union member was inherently destructive of Sec. 7 rights.

[2] We shall modify the judge's recommended Order to reflect the Board's tax compensation and Social Security Administration reporting remedies in language consistent with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall substitute a new notice to conform to the modified Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or other concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeffery Ceren full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeffery Ceren whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Jeffery Ceren for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jeffery Ceren, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

M & M AFFORDABLE PLUMBING, INC.

The Board's decision can be found at www.nlrb.gov/case/13–CA–121459 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Re-

lations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Brigid Garrity, Esq., for the General Counsel.
Joshua Feagans, Esq. and *Patrick M. Griffin, Esq*., for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Chicago, Illinois, on June 5, 2014. Jeffery Ceren, an Individual, filed the charge on January 29, 2014, and the General Counsel issued the complaint on March 28, 2014.[1] (GC Exh. 1(a), (b), (d).) The complaint alleges that M & M Affordable Plumbing, Inc., (Respondent) violated Section 8(a)(3) and (1) of the Act by discharging Charging Party Ceren and Section 8(a)(1) of the Act by threatening not to rehire Ceren because of his union or protected concerted activities. (GC Exh. 1(d).) Respondent timely filed an answer to the complaint denying the alleged violations of the Act and asserting six affirmative defenses. (GC Exh. 1(h).) The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a plumbing contractor providing service to both commercial and residential customers from its facility in Rockdale, Illinois, where it annually purchases and receives goods valued in excess of $50,000 from other enterprises located within the State of Illinois, each of which other enterprises had received these goods directly from points outside the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Chicago Journeymen Plumbers Local Union 130, U.A. (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent is a residential and commercial plumbing contractor. As of April 2014, Respondent employed seven union members (GC Exh. 7; Tr. 38–39, 41.) Michael Malak is Respondent's owner.[3] Respondent admits, and I find, that Malak is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

B. Respondent's Collective-Bargaining Relationship with the Union

The undisputed testimony of Kenneth Turnquist, the Union's financial secretary/treasurer, and the uncontroverted documentary evidence of record, establishes that Respondent is a member of PCA (Plumbing Contractor's Association) and PAMCANI (Plumbing and Mechanical Contractors of Northern Illinois) and has assigned these entities the authority to bargain on its behalf with the Union. (GC Exhs. 2, 5; Tr. 22–23; 31–32.) Through PCA and PAMCANI, Respondent has been signatory to several collective-bargaining agreements with the Union under Sec. 8(f) of the Act. Respondent has been signatory to an agreement with PCA since 1995. (Tr. 22.) Respondent was most recently signatory to an agreement with PCA in effect from June 1, 2010, through May 31, 2013. (GC Exhs. 2, 3.) This agreement was extended for 1 year on June 3, 2013. (GC Exh. 4; Tr. 30.) The most recent PAMCANI agreement was effective from June 1, 2012, through May 31, 2014. (GC Exh. 6; Tr. 33–34).

In January 2013, the Union merged with two other locals: Local 93 and Local 501. (Tr. 21.) Following the merger between the Union and Locals 93 and 501, Respondent became party to a collective-bargaining agreement negotiated jointly by PCA and PAMCANI and the Union, effective June 1, 2014, to May 31, 2017. (GC Exh. 27).

Since 2002, Respondent has been signatory to a participation agreement with the Union. (GC Exh. 16; Tr. 66–67.) This agreement authorizes Respondent to make payroll deductions for various union benefits for Malak. (Id.)

The Union is a local of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry in the United States and Canada, AFL–CIO, CLC (the "UA"). (GC Exhs. 9, 14.) The UA Constitution and Bylaws apply to all members and they contain the criteria for receiving an honorable withdrawal card. (GC Exh. 9, p. 106; Tr. 68.) A union member may seek an honorable withdrawal card if he wishes to go into business for himself or leaves the trade. (GC Exh. 9, p. 106.)

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's Brief; and "GC Br." for the General Counsel's Brief.

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[3] Malak did not testify at the hearing.

C. Jeffrey Ceren's Pre-employment Discussions with Mike Malak

Charging Party Jeffrey Ceren is a member of the Union. (Tr. 57, 88.) Ceren has worked in the plumbing industry since 1981. (Tr. 86.) He operated his own plumbing company from 1994 until 2009. (Tr. 87.)

Ceren heard about an opening for an estimator with Respondent through a friend. (Tr. 88.) Ceren called Malak to inquire about this position on July 31, 2013,[4] and left a message with Malak's secretary. (GC Exh. 24; Tr. 90.) Malak returned Ceren's call the next day. (GC Exh. 24; Tr. 91.) During their lengthy telephone conversation, Malak told Ceren that he was looking to expand his company and hire an estimator for residential and commercial plumbing work. (Tr. 91–92.) Malak and Ceren agreed to talk again in a few days. (Tr. 94.)

Malak and Ceren had another lengthy telephone conversation on August 3. (GC Exh. 24; Tr. 94–95.) They spoke more about the estimator's position. (Tr. 95.) Malak stated that union wages for a plumber were $150,000 per year and that he could not afford that amount. (Tr. 95.) Ceren indicated that he understood. (Tr. 95.)

At this point, the subject of Ceren's union membership arose. Ceren brought up working under a participation agreement, but Malak rejected this idea. (Tr. 97.) Ceren then raised the idea of withdrawing from the Union in order to work on a salary, at a rate less than union scale wages. (Tr. 98.) Ceren said he brought up the idea of withdrawal to, "protect me from the Union and to keep him [Malak] protected from the Union." (Tr. 98–99.) According to Ceren, Malak stated that he "would be okay with going that route."[5] (Tr. 99.) Ceren and Malak then agreed to meet in Chicago on August 12. (Tr. 100.) At that time, Ceren resided in Florida. (Tr. 90.)

D. Ceren's Employment with Respondent

On August 12, Malak and Ceren met in a grocery store parking lot, got in Malak's truck, and drove to two of Respondent's remodeling jobs. (Tr. 102.) Ceren took notes on the jobs and met the builders. (Id.) Malak and Ceren then returned to Malak's office. (Id.) At Respondent's office, Malak asked Ceren to prepare estimates (also called "take offs") for the two jobs they had visited that morning. (Tr. 102–103.) Malak also asked Ceren to return the next morning to look at blueprints. (Tr. 103.)

As requested, Ceren returned to Respondent's office the next day and prepared estimates. (GC Exhs. 17, 23; Tr. 104.) At the end of the day, Malak and Ceren had a conversation regarding Ceren's employment status with Respondent. (Tr. 105.) Ceren accepted Malak's offer to perform estimating work for Respondent. (Tr. 105.) Ceren agreed to a salary of $105,000 per year, with Ceren paying his own benefits and being allowed to leave work early on certain occasions. (Tr. 96, 109–110.) This agreement was never reduced to writing. (Tr. 110.)

Ceren and Malak further made arrangements for Ceren to be paid for his work on the previous 3 days. Ceren asked for $3000 for this work, but accepted Malak's offer of $2,500. (Tr. 107.) Ceren was paid in cash. (Id.)

Ceren was told by Malak to start work at 7 a.m. each day. (Tr. 110.) Ceren used his personal laptop and cell phone for his work with Respondent, but he used Respondent's office phone, fax machine, and copier. (Tr. 110, 111.) Ceren also emailed estimates he prepared to Malak's assistant to be printed on Respondent's printer. (Tr. 114.) Malak set the prices for labor and materials used by Ceren and told Ceren where to purchase supplies. (Tr. 118–120; 126.) Malak also signed all of Ceren's estimates. (GC Exhs. 17, 23; Tr. 123.) Ceren did not sign any contracts on behalf of Respondent. (Tr. 125.) Ceren did not have a company credit card or access to Respondent's payroll information.[6] (Tr. 126.)

During his tenure with Respondent, Ceren did not hire or fire any employees. (Tr. 125, 127.) Ceren did not evaluate the performance of Respondent's employees. (Tr. 127.) He did not set the hours of work for other employees. (Id.) Ceren did not authorize time off for other employees. (Id.) He did not train, assign work to, or direct Respondent's employees (Tr. 125, 127.)[7]

In an effort to avoid any obligation to the Union by employing Ceren, Ceren and Malak hatched a scheme by which Ceren was not paid directly by Respondent. Ceren's wife owns a travel agency called Travel Consultation and Mediation (TCM). At Ceren's invitation, Malak agreed to pay Ceren through TCM. (Tr. 150.) TCM issued invoices for cruises to Malak and Malak paid the invoices with Respondent's checks.[8] (GC Exh. 21; Tr. 151.) The amount owed for the "cruises" was in fact the amount owed to Ceren for his work for Respondent. (Tr. 151.) In addition to the fraudulent cruise invoices, Ceren was also paid in cash, tires, and an airline ticket. (GC Exh. 22; Tr. 107, 156, 157, 218.) Ceren was also allowed to obtain gasoline free of charge at Respondent's pump. (Tr. 160–161.) Ceren was never issued a W-2 or an IRS Form1099 for his income earned while employed by Respondent. (Tr. 150.)

E. Ceren's Efforts to Obtain an Honorable Withdrawal Card

On August 18, Ceren sent a letter to James Coyne, the Union's business manager, seeking an honorable withdrawal card.

[4] All dates contained herein are in 2013, unless otherwise indicated.

[5] I credit Ceren's testimony regarding this conversation based upon documentary evidence discussed elsewhere in this decision. (See GC Exhs. 10, 11, 15, 15, 18, 20, and 24.)

[6] I reject Respondent's affirmative defense that Ceren was not an employee of Respondent. Sec. 2(3) of the Act encompasses a broad definition of the word "employee", and the Supreme Court has found excluded from that definition only those explicitly so excluded in the language of the Act. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 192 (1941). In determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity. *Roadway Package Systems,* 326 NLRB 842, 850 (1998). Here Respondent offered no evidence to refute Ceren's status as an employee. Thus, I find that Ceren was Respondent's employee under Sec. 2(3) of the Act.

[7] Respondent, upon whom the burden rests to establish Ceren's alleged managerial or independent contractor status, offered no evidence to counter Ceren's recitation of his job duties and responsibilities.

[8] Malak never took these cruises. (Tr. 152.)

(GC Exh. 10; Tr. 128–129.) In this letter, Ceren stated he had been offered a position with a union contractor performing non-jurisdictional work, work which he described as "a management position in [e]stimating." (GC Exh. 10.) Ceren did not indicate that he was already working for Respondent. At trial, Ceren testified that his position was not managerial.

Ceren later sent a follow-up email message to Coyne. (GC Exh. 11; Tr. 131.) In his email message, Ceren stated that he had been trying to reach Coyne about, "a job offer as a manager/estimator with a union/signatory contractor." (GC Exh. 11.) Ceren indicated that he had accepted the position, but again did not indicate that he was already working for Respondent.

On September 9, Ceren received a letter from Hugh Arnold, the Union's attorney. (GC Exh. 12; Tr. 132–133.) Arnold sought further information from Ceren, including the name of Ceren's employer and a clear description of Ceren's work. (GC Exh. 12.) Ceren consulted with Malak, who agreed that Ceren could provide his [Malak's] name to the Union. (Tr. 134.)

On September 10, Ceren sent a response to Arnold. (GC Exh. 13; Tr. 135–136.) In his response, Ceren named Respondent as his employer and gave Malak's name as Respondent's owner. (GC Exh. 13.) Ceren also gave a lengthy description of his alleged job duties, in which he attempted to portray himself as a managerial employee of Respondent. (Id.)

Malak asked Ceren for a copy of all his correspondence with the Union to show to the Union's business agent. (GC Exh. 18; Tr. 186.) Ceren provided this information by way of an email message, to which he attached copies of all of his correspondence with the Union. (GC Exh. 18; Tr. 136–137.)

On September 24, Ceren received a letter from Coyne denying his request for an honorable withdrawal card. (GC Exh. 14; Tr. 139.) Coyne stated that much of the work described by Malak was work traditionally performed by union members. (GC Exh. 14.) Ceren showed Coyne's letter to Malak the same day. (Tr. 139.)

F. Respondent Discharges Ceren and Ceren Continues to Seek an Honorable Withdrawal Card

After being shown Coyne's letter, Malak discharged Ceren. (Tr. 139–140.) Malak stated that he could no longer keep Ceren employed because their agreement was that Ceren was to obtain an honorable withdrawal card in order to work for Respondent. (Tr. 139–140.)

On October 2, Ceren filed an appeal with the General President of the UA regarding the denial of his application for an honorable withdrawal card. (GC Exh. 15; Tr. 146.) Ceren sent Malak an email indicating that he had filed an appeal with the UA on October 9. (GC Exh. 20; Tr. 147–148.) As supported by Ceren's cell phone records, Malak and Ceren had a telephone conversation regarding Ceren's UA appeal on October 10. (GC Exh. 24; Tr. 148.)

According to Ceren, Malak became upset after learning of Ceren's appeal to the UA because of the "heat" that could be brought upon Respondent by the Union regarding Ceren's UA appeal. (Tr. 148–149.) Ceren initially testified that Malak said he "could no longer employ me--would no longer employ me." (Tr. 149.) A few minutes later, he said that Malak "would no longer put me on as an estimator" (Tr. 150.) Thus, on direct examination, Ceren never testified that Malak said he would not "rehire" Ceren, as alleged in the complaint. Ceren required considerable prompting from counsel for the General Counsel to recall any details regarding this conversation with Malak. Furthermore, I found his direct testimony regarding his conversation with Malak to be disjointed and inconsistent.

For the first time on cross examination, Ceren testified that Malak said he would never "rehire" Ceren. (Tr. 223.) Ceren only used the word "rehire" after counsel for Respondent used the word in one of his questions. Id.

G. Ceren's Actions After his Discharge by Respondent

Following the telephone conversation of October 10, Ceren continued to seek reinstatement by Respondent. Ceren's desperation for reinstatement caused him to file charges with the Board against the Union and Respondent prior to his filing of the charge in the instant case. (GC Exh. 1(a); R. Exhs. 1, 2; Tr. 178, 184, 225.) In one charge, Ceren averred that the Union "failed and refused to allow [him] to obtain a[n] Estimating/Management position at a company . . ." (R. Exh. 1.) In a later charge, Ceren averred that Respondent, "discharged [him] and thereby acquiesced in [the Union's] arbitrary, discriminatory, or bad faith refusal to allow [him] to withdraw from the Union." (R. Exh. 2.) Ceren's statements to the Board in these earlier charges were clearly false.

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

Only two witnesses testified at the hearing: Charging Party Ceren and Union Financial Secretary-Treasurer Kenneth Turnquist. The testimony of each witness did not contradict that of the other.

Most of Turnquist's testimony concerned the Union's territorial and occupational jurisdiction, the applicability of the UA Constitution and Bylaws, and the Union's collective-bargaining agreements; all topics which fall squarely within his sphere of knowledge as the Union's financial secretary/treasurer. The remainder of his testimony was devoted to establishing that the Union received correspondence from Ceren seeking an honorable withdrawal card and that the Union rejected Ceren's requests. I found Turnquist to be a credible witness. His testimony was consistent with the documentary evidence presented at the hearing. Turnquist testified in a direct and forthright

manner and his testimony did not waver on cross-examination. Therefore, I credit Turnquist's testimony.

This case is unusual, however, because Ceren, the General Counsel's primary witness, has admitted to engaging in dishonest behavior. In addition to Ceren's testimony that he has been untruthful to the Union, he admitted to two instances of making willfully false charges to the Board and that his affidavits in support of those charges contained false statements. (Tr. 238–240.) The difficulty with the case arises because Respondent offered no witnesses to contradict Ceren's testimony.

My analysis cannot end with Ceren's history of making false statements and I cannot completely discount Ceren's testimony because he has been untruthful in the past. The Board has found that it is insufficient for a judge to say that because a witness has been untruthful in the past, and regardless of any factors that may tend to support his testimony, he cannot be credited in a later proceeding. *Caesars Atlantic City*, 344 NLRB 984 at fn. 1 (2005), citing *Double D Construction Group*, 339 NLRB, 303, 306 (2003). Therefore, I have carefully considered all of Ceren's testimony and weighed it against the other evidence in this case. The documentary evidence in this case sustains Ceren's testimony in all material respects regarding his discharge. I have credited Ceren's testimony where it is supported by other evidence in this case or it is inherently probable and consistent with other evidence in this case. However, Ceren gave contradictory statements regarding what Malak said to him during their telephone conversation on October 10 and I do not credit his testimony regarding this conversation.

B. Respondent Unlawfully Terminates Ceren's Employment

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. *Nichols Aluminum*, 361 NLRB No. 22, slip op. at 3 (2014). A discharge is unlawful if it is in direct response to protected activity. *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1149 (2014); see also *UPS Supply Chain Solutions*, 357 NLRB 1295, 1297 (2011) (upholding judge's finding that discharge for protected activity violated the Act without need to make *Wright Line* analysis). No evidence has been adduced or argument made that Ceren was discharged for any sort of misconduct.

It is undisputed that Ceren engaged in protected union activity by maintaining union membership and later by requesting a withdrawal card and by appealing the Union's denial of his request. (GC Exhs. 10, 11, 13, 15.) Further, the documentary evidence supports my finding that Respondent, through Malak, was aware of this activity. (GC Exhs. 18, 20.) I have found that Ceren was discharged because he was unable to obtain a union withdrawal card and, therefore, because he was a union member. I have found no other reason for Ceren's discharge aside from his union membership. Respondent, for its part, has put forth no alternate reason for Ceren's discharge.

In a single-motive case, where there is no dispute as to the activity for which discipline was imposed, the dual-motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is not applicable or appropriate. See, e.g., *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000); *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (judge erred in applying dual-motive analysis where there was a causal connection between alleged protected activity and resulting discipline).

In this case, Respondent's actions were inherently destructive of employee rights. When specific evidence of a subjective intent to discriminate or discourage union membership is shown, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963). Such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding of that union membership will be discouraged. Id. The uncontroverted evidence in this case establishes that Ceren was discharged because he did not withdraw from union membership. Stated another way, Ceren was discharged because of his membership in the Union. Respondent has offered no business justification for its action in discharging Ceren. Under these circumstances, I conclude that Respondent's termination of Ceren because he is a union member is inherently destructive of employee Section 7 rights and, on its face, constitutes unlawful retaliation against him for his union membership in violation of Section 8(a)(3) and (1) of the Act. *Erie Resistor Corp.*, 373 U.S. at 227–228; *Phelps Dodge Corp v. NLRB*, 313 U.S. 177 (1941) ("It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations.").[9]

Respondent's discharge of Ceren because he did not withdraw from union membership also violates the plain language of the Act. Section 8(a)(3) of the Act prohibits an employer from discrimination that encourages or discourages union membership. 29 U.S.C. § 158(a)(3). The Board has long held that conditioning employment on promise to refrain from union membership or protected activity is unlawful. *Nichols Aluminum*, 361 NLRB No. 22 slip op. at 4 fn. 10 (2014), citing *Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002) (refusal to hire employees unless they renounced their union membership found violative); see also *Mastronardi Mason Materials*, 336 NLRB 1296, 1296 (2001) (finding violation where respondent conditioned employment of employees on withdrawal from union membership and acceptance of nonunion terms and conditions of employment). Refusing to hire an employee in order to avoid their union wage scale has also been held violative of the Act. *Sierra Realty*, 317 NLRB 832, 833 (1995). Respondent here terminated Ceren's employment because he could not withdraw from union membership. In the instant case, I find that Respondent's discharge of Ceren because of his union membership violates the language of Section 8(a)(3) and (1) of the Act.

In agreement with the General Counsel, I further find that conditioning Ceren's employment on withdrawal from the Un-

[9] Both the General Counsel and respondent analyzed the facts of this case using the burden shifting framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ion required him to enter into an unlawful yellow dog contract.[10] Since the enactment of the Norris-LaGuardia Act (29 U.S.C. §101 et seq.) in 1932, all variations of the yellow dog contract have been deemed invalid and unenforceable, including "[a]ny promise by a statutory employee to refrain from union activity." *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992). They were also a factor which Congress considered when passing the Wagner Act (the 1935 predecessor to the National Labor Relations Act). *First Legal Support Services*, 342 NLRB 350, 362 (2004). Section 7 of the Wagner Act for the first time gave employees the specific right to engage in union activity, making it an unfair labor practice to condition employment on the relinquishment of that right. Id. Thus, de facto in 1935, the yellow dog contract became and has remained illegal as a violation of Section 8(1), and as of 1947, Section 8(a)(1). Id. Similarly, insistence upon such a contract became a hire and tenure violation under Section 8(3), now Section 8(a)(3). *First Legal Support Services*, 342 NLRB at 362–363 (2004). In this case, Respondent required Ceren to enter into a yellow dog contract by conditioning Ceren's employment upon his withdrawal from union membership. When Ceren was unable to withdraw from union membership, Respondent discharged him. Respondent's requirement that Ceren enter into a yellow dog contract, and its discharge of Ceren for failing to do so, violate Sections 8(a)(3) and (1) of the Act.

> Moreover, even if I were to apply these facts to the burden shifting framework of *Wright Line* as the parties have done in their briefs, I would find that Respondent violated the Act. Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Nichols Aluminum*, 361 NLRB No. 22, slip op. at 3 (2014), citing *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). If the General Counsel meets his burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line*, 251 NLRB at 1089; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

With respect to the General Counsel's initial showing, it is undisputed that Ceren engaged in several forms of union activity: first and foremost by maintaining union membership, and then later by soliciting a withdrawal card and appealing the Union's denial of his solicitation. (GC Exhs. 10, 11, 13, 15.) Furthermore, the documentary evidence supports my finding that Respondent, through Malak, was aware of this activity. (GC Exhs. 18, 20.) At issue in this case is whether counsel for the General Counsel demonstrated that the Respondent harbored antiunion animus, thus meeting her initial burden. I find she has.

The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). Improper motivation may be inferred from several factors, including pretextual and shifting reasons given for an employee's discharge and the timing between an employee's protected activity and the discharge. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005).

The timing of Ceren's discharge supports a finding of improper motivation. Ceren received a letter from the Union indicating its refusal to grant the requested honorable withdrawal card on about September 24. (GC Exh. 14.) Ceren was terminated contemporaneously with his sharing of the Union's refusal to grant him an honorable withdrawal card with Malak. (GC Exh. 14; Tr. 139.) Animus can be inferred from the relatively close timing between an employee's protected concerted activities and his discipline. *K-Air Corp.*, 360 NLRB No. 30, slip op. at 2 (2014) (timing of discharge, within 1 day of learning of employee's union affiliation, provides evidence of animus); see also *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect). Thus, the timing of Ceren's discharge shows that it was motivated by his union activity.

Furthermore, Respondent's multiple and shifting justifications for its termination of Ceren provide strong evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). Respondent advanced a multitude of contradictory reasons for its actions in its answer to the complaint and brief. Respondent has asserted: Ceren was never hired, employed, or discharged by Respondent; Ceren was employed by another employer (TCM); Ceren was an independent contractor; Ceren's position was outside of the Union's occupational jurisdiction; Ceren's position was managerial; and, Respondent would have taken the same action against Ceren in the absence of any Union or protected activity on Ceren's part. Clearly Respondent's last defense, that it would have taken the same action against Ceren absent his union activity, is wholly inconsistent with its first affirmative defense that it never hired or employed Ceren. I find that Respondent's multiple and conflicting defenses provide evidence of its unlawful motive in terminating Ceren. Therefore, I find that the General Counsel has met his initial burden of persuasion under *Wright Line.*

[10] A yellow dog contract is a private agreement between an employee and employer, where the employee promises not to join, become, or remain a member of any labor organization. *First Legal Support Services*, 342 NLRB 350, 362 (2004).

As the General Counsel has made an initial showing of discrimination, the burden shifts to Respondent to show, as an affirmative defense, that it would have terminated Ceren in the absence of his union activities. Respondent has made no such showing. Respondent offered no evidence to rebut Ceren's testimony, as corroborated by his email messages, regarding Malak's knowledge of Ceren's union activity and Malak's reaction to Ceren's union activity. Thus, even under the burden shifting analysis of *Wright Line*, I find that Respondent violated Sections 8(a)(3) and (1) of the Act in discharging Ceren.

C. The General Counsel Did Not Establish by a Preponderance of the Evidence that Respondent Unlawfully Threatened Not to Rehire Ceren

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its actions is irrelevant); *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007). The General Counsel bears the burden of proving unlawful threats by a preponderance of the evidence. *Blue Flash Express*, 109 NLRB 591, 591–592 (1954).

It cannot be disputed that Ceren had a telephone conversation with Malak on October 10. (GC Exh. 24.) However, I cannot credit Ceren's disjointed and inconsistent testimony regarding the content of his conversation with Malak. Ceren testified on direct examination that Malak said that he could not employ Ceren, or that he would not employ Ceren, or that he would not put him [Ceren] on as an estimator. He made these three divergent statements within the course of a few minutes. He also required considerable prompting by counsel for the General Counsel to give any details about this conversation. Thus, I do not credit Ceren's testimony regarding what was said by Malak during their conversation on October 10.

The complaint states that Respondent violated the Act by threatening not to "rehire" Ceren. In fact, Ceren did not testify that Malak threatened not to "rehire" him until cross-examination, and then only in response to a question by Respondent's counsel that used the word "rehire." Because I cannot credit Ceren's testimony regarding this conversation, I cannot find that the General Counsel met it's burden to establish by a preponderance of the evidence that Respondent threatened "not to rehire" Ceren. Accordingly, I recommend that complaint paragraph V be dismissed.

D. Respondent's Affirmative Defenses

In making my findings of fact above, I have rejected Respondent's claim that it never hired, employed or discharged Ceren. I have also rejected Respondent's assertion that Ceren was not an employee under the Act.

Respondent asserts that Ceren's position was managerial in nature or that Ceren was an independent contractor. Both of these defenses are rejected. It is well-settled that the party asserting managerial status has the burden of proving it. *George Mee Memorial Hospital*, 348 NLRB 327, 333 (2006). The definition of managerial employee has been construed narrowly because, as with supervisory status those employees, who fall within that category, are denied substantial statutory rights. *Curtis Industries*, 218 NLRB 1447, 1448 (1975). Similarly, the burden of proof as to independent contractor status lies with the party asserting it. *Community Bus Lines*, 341 NLRB 474 (2004); *BKN, Inc.*, 333 NLRB 143 (2001). The Board applies the common-law agency principles set forth in the Restatement 2d, *Agency* §220(2) in determining independent contractor status. *Roadway Package Systems*, 326 NLRB 842, 850 (1998).

Applying these principles to the instant case, I conclude that Respondent has failed to meet its burden of proof that Ceren's position was managerial or, alternatively, that Ceren was an independent contractor. The burden to establish managerial or independent contractor status rests with the party asserting it. *George Mee Memorial Hospital*, 348 NLRB 327, 333 (2006); *Community Bus Lines*, 341 NLRB 474 (2004). Although, as Respondent states in its brief, Ceren repeatedly advised the Union that his position with Respondent was managerial in nature, these statements do not make it so. Ceren admitted that he described his position as managerial in order to obtain an honorable withdrawal card from the Union. His description of his actual duties at the hearing did not satisfy Respondent's burden in establishing that Ceren's position was managerial.[11] The burden is not on the General Counsel to establish that Ceren was *not* an independent contractor or that Ceren's position was *not* managerial; the burden rests squarely on Respondent to affirmatively establish that Ceren was either an independent contractor or manager. Respondent has failed to do so.

I further reject Respondent's claim that Ceren was an employee of TCM. Ceren's uncontroverted testimony, supported by the cruise invoices produced at trial, establishes that Ceren's wife issued the cruise invoices to Respondent as a subterfuge for Malak to pay Ceren using Respondent's business checks. Ceren testified against his pecuniary interest, and that of his wife, by admitting that this arrangement was a sham meant to hide Ceren's wages from the Union. Ceren further testified against his pecuniary interest that he never received tax forms related to these payments. Respondent could have easily refuted the evidence concerning the cruise invoices and company checks. However, Respondent chose to present no evidence to support this affirmative defense and I find that it has no merit.

Additionally, I reject Respondent's defense that Ceren's position was outside of the occupational jurisdiction of the collec-

[11] I do not accept Respondent's argument that Ceren's failure to list his experience with Respondent on his LinkedIn page establishes that Ceren was not an employee of Respondent. (R Exh. 3.) Rather, I find it more plausible that Ceren did not list his experience with Respondent given that it seems unlikely that Malak would provide Ceren with a positive reference.

tive-bargaining agreement. A great deal of testimony was adduced at the hearing concerning whether an estimator's position was within the bargaining units contained in Respondent's collective-bargaining agreements with PCA and PAMCANI. However, in reviewing the record, I find that this has no bearing on whether or not Respondent committed an unfair labor practice. As I have found, Ceren was engaged in protected activity by maintaining his union membership. In addition, I have found that Respondent discharged Ceren because of his union membership. Whether or not Ceren's work for Respondent was bargaining unit work is not material to my findings. Instead, the fact that Ceren's discharge was a direct result of his status as a union member is what is relevant here. Therefore, I reject this affirmative defense.

Additionally, Respondent's defense that it would have taken the same action against Ceren in the absence of any protected activity is both contrary to its other defenses and has no merit. Respondent has presented no evidence as to why it took its action discharging Ceren. As such, Respondent has failed to establish that it would have taken the same action against Ceren in the absence of his protected concerted activity.

While I do not condone the untruthfulness of Ceren in dealing with the Union and the Board, I also cannot condone the actions of Malak. The credible evidence in this case clearly demonstrates that Malak was a willing participant in Ceren's design. Malak participated in a joint scheme, avoiding his obligations to the Union and to the government, by paying Ceren through TCM and through various other untraceable means. Furthermore, although Ceren initially agreed to withdraw from the Union, it was Malak who fired him when he failed to do so. Respondent should not be rewarded for this behavior. Furthermore, the Board has held that the equitable unclean hands doctrine does not operate against a charging party because Board proceedings are not conducted for the vindication of private rights, but are brought in the public interest and to effect statutory policy. *California Gas Transport,* 347 NLRB 1314, 1326 fn. 36 (2006).

In sum, none of Respondent's affirmative defenses has merit under the facts as I have found them. Therefore, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ceren because of his union and protected activity.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Chicago Journeymen Plumbers Local Union 130, U.A. (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Ceren.

4. Respondent did not otherwise violate the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Jeffrey Ceren, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Jeffrey Ceren for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

Further, Respondent shall be required to remove from the personnel file of Jeffery Ceren any reference to his unlawful termination, and advise him in writing that this has been done. In addition, Respondent shall be required to cease and desist from engaging in unlawful discriminatory conduct and to post an appropriate notice, attached hereto as an "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, M & M Affordable Plumbing, Inc., Rockdale, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in union or other protected, concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jeffery Ceren full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jeffery Ceren whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Jeffery Ceren, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment rec-

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ords, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Rockdale, Illinois copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."