UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
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August 27, 2015

NATIONAL LABOR RELATIONS BOARD
Attn. Gary Shinners, Executive Secretary
1015 Half Street SE
Washington, DC 20570-0001

Re. Apogee Retail, NY, LLC d/b/a Unique Thrift Store
and Local 338, RWDSU/UFCW
Case Nos. 02-CA-133989, 02-CA-134059, 02-CA-137166

Dear Mr. Shinners,

Enclosed please find Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge and supporting Memorandum of Law in the above-referenced matter.

I have also enclosed an affidavit of service.

Thank you for your attention to this matter.

Very truly yours,

M Berger

Moriah Berger
Counsel for the General Counsel

Encl.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

APOGEE RETAIL, NY, LLC d/b/a UNIQUE THRIFT STORE

and

LOCAL 338, RWDSU/UFCW

Case Nos. **02-CA-133989**
02-CA-134059
02-CA-137166

GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, the General Counsel, through his attorney Moriah Berger, hereby excepts to the Decision and Recommended Order of Administrative Law Judge Raymond P. Green ("ALJD"). In his decision, Judge Green dismissed the Complaint in its entirety, finding, among other things, that Apogee Retail, NY, LLC ("Respondent") "simply" made "statement[s] of what is permissible under the [National Labor Relations] Act" ("the Act"); bargained in good faith with Local 338, RWDSU/UFCW ("the Union"); and therefore did not violate § 8(a)(1) or (5) of the Act. Counsel for the General Counsel respectfully files the following Exceptions to the significant errors in fact and law contained in the ALJD, to the unsupported legal conclusions to which those errors led, and to the consequent failure of Judge Green to provide an appropriate remedy.

EXCEPTIONS[1]

The General Counsel submits the Exceptions listed below to Judge Green's factual and legal findings on the following allegations: (1) Respondent, by Naomi Santana, beginning about mid-June 2014 through August 7, 2014, on several occasions, at Respondent's facility, told employees that employees had not received wage increases because they were represented by the Union, employees

[1]Citations to the transcript will appear as "Tr." followed by the corresponding page and line number(s). Citations to General Counsel and Respondent exhibits will appear as "GC Exh." and "R. Exh.," respectively, followed by the exhibit number. Citations to the Joint Exhibit will reference the specific document, and then "Joint Exh." Citations to Judge Green's decision will appear as "ALJD," followed by the corresponding page and line number(s).

would not receive wage increases so long as they were represented by the Union, and employees would have received wage increases if they were not represented by the Union (Complaint Paragraph 8(c)(i)-(iii)); (2) Respondent, by Naomi Santana, about August 7, 2014, at Respondent's facility, told employees that they had not received wage increases because they were represented by the Union and that they would receive wage increases and other benefits if employees rejected the Union as their bargaining representative. (Complaint Paragraph 8(e)); (3) By the conduct described in numbers (1) and (2), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act (Complaint Paragraph 12); and (4) The unfair labor practices of Respondent affect commerce within the meaning of § 2(6) and (7) of the Act (Complaint Paragraph 14).

1. Judge Green erred in failing to consider evidence supporting the General Counsel's contention, as alleged in the Complaint, that Naomi Santana,[2] Respondent's Supervisor/Manager of Production, is a supervisor within the meaning of § 2(11) of the Act, and in failing to find that Santana is a supervisor within the meaning of § 2(11) of the Act.

2. Judge Green erred in failing to consider explicit contradictions between Santana's sworn testimony on the witness stand and her sworn testimony in a Confidential Witness Affidavit (GC Exh. 17), and in his consequent conclusion that Santana testified truthfully regarding the statements she made to employees. (ALJD 10:47; 11:1-11).

3. Judge Green erred in his finding that "the only time production employees got raises was when the minimum wage was increased either at the Federal or State level" (ALJD 10:6-7) and in his finding that "almost all of the Company's employees, except for leads or persons labeled as supervisors, (such as Santana), received the minimum wage. To the

[2] Ms. Santana also goes by Naomi Nazario, her maiden name. (Tr. 922:3-12). She was incorrectly identified in the transcript as Naomi Mazario. (*Compare* Tr. 922:4-8 *with* GC Exh. 7).

extent that pay increases were given in the past, the evidence shows that such raises were given only when the minimum wage was increased." (ALJD 9:5-9).

4. Judge Green erred in concluding that "an alleged statement that the Company gave raises every three months, is inaccurate," (ALJD 10:8-9) and in his resulting finding that it was therefore not "probable" that Santana made the alleged unlawful statements attributed to her. (ALJD 11:7-11).

5. Judge Green erred in finding that employee witness Abiel Ventura "could not recall when [a conversation he had with Santana] occurred" and in apparently concluding that the General Counsel failed to establish that the conversation was encompassed by the Complaint. (ALJD 9:43-44).

6. Judge Green erred in concluding that Respondent, by Santana, stated "simply what is permissible under the Act and as such [did not] violate Section 8(a)(1) of the Act." (ALJD 11:18-19).

7. Judge Green erred in failing to consider General Counsel's argument that, even if Respondent told employees only that wages are in negotiations, Respondent nonetheless interfered with employees' § 7 rights, in light of its failure to negotiate in good faith.

8. Judge Green erred in failing to recommend a traditional notice-posting remedy.

The General Counsel also submits the Exceptions listed below to Judge Green's factual and legal findings on the following allegations: (1) During the period from July 9, 2014 through August 4, 2014, Respondent sought to avoid reaching agreement on a collective-bargaining agreement by failing and refusing to explain to the Union the reasons it would not agree to the Union's proposals that the contract include a union security clause and a dues check-off clause, and failing and refusing to respond to the Union's proposal of July 24, 2014 (Complaint Paragraph 11(b)); (2) By its overall conduct, including the conduct just described, Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit (Complaint Paragraph 11(c)); (3) By the

conduct described in numbers (1) and (2), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of § 8(a)(1) and (5) of the Act (Complaint Paragraph 13); and (4) The unfair labor practices of Respondent affect commerce within the meaning of § 2(6) and (7) of the Act (Complaint Paragraph 14).

9. Judge Green erred in failing to consider documentary and other evidence regarding the substance of the parties' discussion, on May 1, 2014, of the Union's union security and dues check-off proposals, and thereby made factual findings regarding the May 1 bargaining meeting that are unsupported by the record evidence. (*See* ALJD 2:47-3:4).

10. Judge Green erred in failing to consider documentary and other evidence inconsistent with his conclusion that, "during the June 26 meeting, [Respondent Chief Executive Officer] Mr. Kloeber questioned [Union Director] Gonzalvo as to what exactly a union security clause would require" (ALJD 3:30-31); thus, his factual conclusion that Respondent "raise[d] business reasons for refusing to accede to the proposed union security/dues checkoff provisions" (ALJD 15:33-34) is based on an incomplete review of the record.

11. Judge Green erred in his finding that, "the unrebutted testimony was that Gonzalvo replied that these were great questions and that he would get back to them." (ALJD 3:40-4:2).

12. Judge Green erred in failing to consider documentary and other evidence inconsistent with his conclusion that Gonzalvo failed to respond to questions allegedly posed by Respondent regarding union security and dues check-off (ALJD 4:2), and thereby reached a factual conclusion unsupported by the record evidence.

13. Judge Green erred in his finding that, "as of the June 26 meeting, the parties had agreed to a 24 cent per hour raise for [the] first year of a contract." (ALJD 3 fn. 3).

14. Judge Green erred in finding that Board law does not require an opponent to a proposal on a mandatory subject of bargaining to "justify or offer a reason for its opposition." (ALJD 13:50-14:1).

15. Judge Green erred in concluding, with regard to Respondent, that "the evidence in this case shows that the parties bargained in good faith." (ALJD 15:42).

16. Judge Green erred in failing to consider documentary and other evidence that shows that, even if Respondent posed questions about union security and dues check-off, its overall conduct evinced an attempt to frustrate the collective-bargaining process, and is indicative of a refusal to bargain in good faith.

17. Judge Green erred in failing to recommend as the appropriate remedy that Respondent bargain in good faith with the Union.

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AFFIDAVIT OF SERVICE OF: General Counsel's Exceptions to the Decision of the Administrative Law Judge, and Brief in Support of Exceptions

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated below, I served the above-entitled documents upon the following persons, in the manner indicated:

By E-File
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8/27/15

JOANE SI IAN WONG
Notary Public, State of New York
No. 02WO6257241
Qualified in New York County
Commission Expires March 12, 2016

Moriah Berger