

**THE UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AIM Royal Insulation, Inc., and  
Jacobson Staffing, L.C.

Employers,

and

Case Nos.     28-CA-22605  
                  28-CA-22714

International Association of Heat  
& Frost Insulators & Allied Workers,  
AFL-CIO, Local No. 73,

Union.

**BRIEF OF RESPONDENT JACOBSON STAFFING, L.C.**

The Respondent Jacobson Staffing, L.C. (hereafter “Jacobson”) by its Attorneys Krukowski & Costello, S.C., Kevin J. Kinney, submits this brief to Administrative Law Judge William G. Kocol.

**I       GENERAL BACKGROUND**

**A.     Jacobson’s Business Operations.**

The Respondent Jacobson is a traditional third party staffing agency.<sup>1</sup> (TR page 339.) It provides employees to other companies in need of temporary workers. The individuals referred by Jacobson to its clients are employees of Jacobson. They receive their paycheck directly from Jacobson and Jacobson provides the employee with workers compensation and unemployment compensation coverage. Jacobson invoices its customer based on the number of hours worked by the employee at the employee’s hourly rate plus a mark up. (TR pages 339, 340.) Sandy Chavez (“Chavez”) is the account manager for Jacobson at its Phoenix office. (TR page 337.) Chavez was the only Jacobson witness to testify at the hearing.

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<sup>1</sup> Citations to the Transcript are “TR page \_\_\_\_.”

**B. The Joint Employer Issue.**

In response to the “joint employer” allegation of Paragraph 2 (i) of the Complaint, the Parties stipulated that:

“Respondent Jacobson is a joint employer with Respondent AIM Royal with respect to those individuals that were Jacobson employees assigned to the AIM Royal workplace.” (TR page 357.)<sup>2</sup>

Jacobson does not have any onsite supervisory role for any employee assigned to a particular customer. The day-to-day supervision of the employee is exercised exclusively by the customer. (TR page 340.) If a customer is dissatisfied with a Jacobson employee or if the temporary assignment comes to conclusion, the customer will simply send the Jacobson employee back to Jacobson.

**C. How Jacobson Fills Orders.**

Jacobson’s staffing relationship with its customers generally occurs in one of three manners. Jacobson will send an employee to a customer and the employee will begin work or, Jacobson will send an employee to a customer who will then be interviewed by the customer or, the customer will send someone to Jacobson that they have already “hired” and have Jacobson place that individual in their employ. (TR pages 339, 340.) Jacobson’s relationship with the Respondent Aim Royal Insulation, Inc. (“Aim Royal”) occurred in the last two manners. That is, Jacobson would send its employees for an interview with Aim Royal (TR page 341) or Aim Royal would send a person they had already interviewed to be placed on the Jacobson payroll. (TR pages 340, 341.)

Jacobson could not send its employees to Aim Royal for an interview until they received a job order from Aim Royal. (TR page 341.) During the relevant period of the Complaint,

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<sup>2</sup> The four (4) individual employees covered by the Stipulation are Marcellino Trujillo, Imuris Garcia, Isidro Ortega and Claudio Rendon. (TR page 357.)

Jacobson received two (2) job orders from Aim Royal. The first occurred on June 29 or 30, 2009 and the second on July 14, 2009. (TR pages 342, 361.) Both were for two (2) employees although in the second instance Aim Royal had already “hired” one (1) of the employees and he was simply sent to Jacobson to be placed on their payroll. (TR page 362.)<sup>3</sup> These were the only job orders received by Jacobson from Aim Royal during the relevant period.

## **II. THE RESPONDENT JACOBSON DID NOT THREATEN OR INTERROGATE EMPLOYEES**

### **A. Sandy Chavez did not threaten Shawn McMillan with Loss of Employment Opportunities as Alleged in Paragraph 5 (a) of the Complaint.**

#### **1. The Testimony of Sandy Chavez**

Sandy Chavez (hereafter “Chavez”) testified that after receiving a job order from Aim Royal’s Superintendent Lazaro Campos (hereafter “Lazaro”) on either Monday, June 29<sup>th</sup> or Tuesday June 30<sup>th</sup>, she went on her home laptop and went to the Career Builders website. (TR page 398.)<sup>4</sup> That is how she found Marcellino Trujillo (hereafter “Trujillo”). (TR page 398.) Imuris Garcia (hereafter “Garcia”) just walked into the Jacobson office and stated that his uncle had an application there and that he would like to put in an application. (TR page 398.) Both Trujillo and Garcia came to the Jacobson office on July 1, 2009 and filled out an application. (Respondent Exhibit 1, applications of Trujillo and Garcia.)

Both of these individuals were interviewed and hired by Aim Royal on the same day (July 1) that they filled out the Jacobson application and commenced work the following day (July 2). (Respondent Jacobson Exhibit 1, time cards of Trujillo and Garcia.) While she was interviewing Imuris Garcia, Chavez asked him if he had any other friends that might have experience. (TR page 398.) That is how she got Shawn McMillan’s name. (TR page 398.)

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<sup>3</sup> That individual was Isidro Ortega. (TR page 362.)

<sup>4</sup> The Complaint allegations involving Jacobson all occurred between June 29 and July 15, 2009.

Chavez contacted Shawn McMillan (hereafter “McMillan”) the day that Garcia gave her his number. It was the same day that Imuris Garcia put in his application. (TR page 399.) McMillan did not know that Chavez would be calling him. (TR page 399.) Chavez asked McMillan if he was looking for a position. (TR page 399.) He said he didn’t have a job right now but was with the union so he was not able to work with anybody other than the union. (TR page 399.) She told him that if he changed his mind to give her a call. (TR page 399.) She made the call to McMillan the same day that Garcia filled out his application. (TR page 400.) Both Garcia and Trujillo filled out the application with Respondent Jacobson on July 1, 2009 and were hired by Aim Royal that same day. (Respondent Jacobson Exhibit 1, applications of Garcia and Trujillo.)

Although McMillan’s cell phone bill submitted by General Counsel as General Counsel Exhibit 27 does not show an incoming call from any Jacobson number (GC Exhibit 29) on or before July 1, 2009, it does show a call to Jacobson from McMillan’s cell phone on July 2, 2009 at 11:45 A.M. (GC Exhibit 27 at page 22 of 33 calling Jacobson number 602-233-9300 in Phoenix, Arizona at 11:45 A.M. on July 2, 2009.) This call record is consistent with Chavez’ testimony that McMillan did call her back the following day. (TR page 400.)

By the time that McMillan called Chavez back both Trujillo and Garcia had already commenced employment with Aim Royal. (See Respondent Jacobson Exhibit 1, time card of Garcia and Trujillo for week ending 7-4-09 signed and dated 7-3-09.) When McMillan called Chavez back he stated that he “needed a fucking job” and said that the union wasn’t giving him enough hours so he didn’t want to be with the union and he needed a job right now no matter what it paid. (TR page 401.) Chavez asked him to come in and fill out an application. (TR page 401.)

McMillan eventually showed up and was given an application. (TR page 403.) He had to leave before completing the application and when he returned, he had not yet filled out the application.<sup>5</sup> This was at approximately 1:00 or 1:30 in the afternoon. Chavez sent him to an office to fill out the application. (TR page 403.) Chavez then interviewed McMillan. (TR page 404.) By then she had already sent four (4) individuals to Aim Royal. (TR page 404.) At the end of her interview she told McMillan that she would like to send him out for an interview and that she would contact Lazaro because she had already sent out two (2) individuals that she hadn't let him know about and wanted to let him know that she did have a good candidate. (TR page 404.) Chavez called Lazaro to tell him that she was sending out McMillan. Lazaro stopped her right there and told her that he had hired the first two (2) individuals and had already sent the other two (2) individuals back. (TR page 404.) Chavez did not tell Lazaro McMillan's name, she just said that she had a good candidate with experience. (TR page 405.) Chavez then told McMillan that Lazaro had already hired the other two (2) guys. McMillan became upset, he was cussing a lot and saying the "f" word and slammed the front door on his way out. (TR page 405.) McMillan did not contact or call Chavez after that day in her office. (TR page 405.)

## **2. The Testimony of Shawn McMillan**

The Administrative Law Judge ("ALJ") will be able to review the dramatic divergence of McMillan's testimony between his direct examination by General Counsel and his cross-examination by Counsel for Respondent Jacobson and questions from the ALJ.

On direct examination McMillan testified that he received a phone call from Jacobson in July. (TR page 423.) The woman identified herself as Sandy and said she was with Jacobson Staffing Co. (TR page 424.) McMillan testified:

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<sup>5</sup> McMillan did not date his application. (G. C. Ex. 21.)

“She asked if I was looking for work. I said yes. She said do you have any experience. I also said yes. She said are you part of the union, and I said yes. And she said that’s all I can do for you right now, and she kind of hung up or kind of ended the phone call right away.” (TR page 424.)

McMillan’s testimony changed dramatically in response to a question from the Administrative Law Judge:

**Judge Kocol:** “What did she say in that regard? Call me?”

**The Witness:** “She told me that she would look for work and she’ll call me back because I told her at the time that I wasn’t really sure if I can join Jacobson Staffing Company or go through Aim Royal because of my union status, and she, oh, you’re part of the union, and then she kind of said I can’t really help you then, and hung up on me.” (TR page 432.)

McMillan testified that Chavez called him back four (4) or five (5) days later. (TR page 433.) McMillan testified that in response to this call from Chavez “I believe she was still was interested if I was still looking for work, and I said no at that time because I was still working on my union status.” (TR page 433.) McMillan testified that he told Chavez “I don’t want to work right now.” (TR page 433.)

He (McMillan) had told Chavez multiple times that he was concerned about his union status and didn’t know if he could work. (TR page 433.) Regardless, Chavez still keeps asking McMillan to come in and fill out an application. (TR pages 433, 434.) McMillan testified that despite his statements Chavez kept pursuing him to come in and fill out an application. (TR pages 433, 434.)

When he did finally come in he was given an application, he was interviewed, told he was a good candidate, shown the safety video, took a quiz and was told that he would be sent for an interview. (TR pages 435, 436.) (General Counsel Exhibit 21.)

### **3. The Testimony of Mark Waters**

General Counsel called Mark Waters in an apparent attempt to bolster the credibility of McMillan. Mark Waters (hereafter “Waters”) testified that he overheard a conversation where someone said “they could not hire Shawn due to the fact that he was a union, or non-union member.” (TR page 946.)

On cross-examination from Respondent Jacobson’s Counsel, Waters placed this call in January of 2009. (TR page 947.) When asked if he heard “McMillan say that he didn’t even know if he could work at this company because he was in the union,” Waters responded that “that may have crossed the board, but I’m not 100 percent – like I said, its been a few months.” (TR page 948.) Later, in the same examination, Waters testified that both McMillan and the other person said he could not get this job due to the fact that he was a union member or non-union member. (TR page 950.)

After further examination by the ALJ, Waters stated there were two or three calls. (TR page 950.) On cross-examination, Waters explained for the first time that McMillan had been calling two (2) different companies. (TR page 953.) It was on one (1) of those conversations where both people on the phone said that you can’t work here because you are union or something like that. (TR page 953.)

### **4. Legal Analysis**

The ALJ does have a credibility issue to resolve regarding McMillan’s testimony. Should the ALJ credit McMillan’s direct testimony (TR page 424), or his answer to the ALJ’s question (TR page 432), or his answer on cross? (TR page 433.) His answer to the ALJ’s question is consistent with Chavez’s testimony (TR page 399) and even the second version of the testimony of Waters. (TR page 950.) After McMillan changed his testimony in response to the

question from the ALJ, General Counsel did not go back and attempt to rehabilitate that answer. The weight of the evidence clearly establishes that McMillan, on his own, brought up his union status. That is not an interrogation under the Act.

For more than 25 years, the Board has expressly rejected the notion that all alleged interrogations are a per se violation of the Act. See Rossmore House, 269 NLRB 1176, 1177 (1984). Rather, an interrogation violates the Act if, and only if, “under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” Id., 269 NLRB at 1177.

The relevant factors to be considered under the totality of circumstances test include, “whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation.” Stevens Creek Chrysler Jeep Dodge, Inc., 353 NLRB 132 (April 20, 2009), *quoting* Bloomfield Healthcare Center, 352 NLRB 252 (2008).

In the case of applicants for a job, the Board has repeatedly held that where an applicant has engaged in conduct or worn insignia that indicates the applicant is affiliated with a union, the employer does not violate the Act by merely asking the applicant if they are with a union or how long they have been with a union. See Cheney Construction, Inc., 344 NLRB 238, 239 (2005) (where a group of applicants wore shirts and hats with union insignia, it was not an unlawful interrogation for the employer to ask “You guys all with the Laborer’s Union? Carpenters?”); Boydston Electric, Inc., 331 NLRB 1450, fn. 5 (2000) (where an applicant displayed an insignia demonstrating his union affiliation, the employer asking the applicant how long he had been in the union was not coercive in violation of Section 8(a)(1) of the Act); Tradesmen International, Inc., 351 NLRB 579, 585 (2007) (where an applicant sat in the employer’s waiting room holding

a hard hat with a union insignia, the employer's agent asking the applicant whether he was a member of a union did not violate Section 8(a)(1) because the applicant had already conveyed his support for a union and the applicant was not subjected to any other coercion).

If the ALJ credits McMillan's answer to the ALJ's question, which is consistent with the testimony of Chavez, Waters and his own telephone records, then the conclusion is that McMillan brought up his union status first on a voluntary, unsolicited basis. Additionally, McMillan testified that even in subsequent telephone calls, he expressly resisted even applying at Jacobson because of his union status. (TR page 433.) Had McMillan not volunteered his union status, Chavez would not even have known of it. Even then, as McMillan testified, Chavez aggressively continued to pursue him. (TR page 433.) There is no credible evidence that any interrogation, let alone an unlawful interrogation, occurred.

**B. Sandy Chavez Did Not Interrogate or Threaten Employee Applicants on July 14, 2009 as Alleged in Paragraph 5 (c ) (1) and (2) of the Complaint.**

**1. The Events of July 14, 2009.**

On July 14, 2009 Chavez received a telephone call from Lazaro at Aim Royal requesting two (2) individuals. (TR page 362.) He told her that he was sending her one (1) of the individuals, Isidro Ortega, and that she should hire him.<sup>6</sup> (TR page 362.) Chavez testified that she had another employee who had just finished one of the Jacobson jobs at Flavorite. (TR page 364.) Claudio Rendon (hereafter "Rendon") happened to be sitting in Chavez' office at the time that she received the call from Lazaro. (TR page 407.) Lazaro told Chavez to send him (Rendon) for an interview. (TR page 407.) Isidro Ortega (hereafter "Ortega") filled out the Jacobson application on July 14, 2009 and started work at Aim Royal the next day, on July 15, 2009, at 5:00 a.m. (Respondent Jacobson Exhibit 1, application of Isidro Ortega.) Rendon did

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<sup>6</sup> Lazaro testified that Ortega was a family friend. (TR page 230.)

not need to fill out an application. He was already a Jacobson employee and had completed his application almost a year earlier on August 28, 2008. (Respondent Exhibit 1, applications of Ortega and Rendon and, time cards of Ortega and Rendon.) Rendon also commenced work on July 15, 2009 at 5:00 a.m. (Respondent Jacobson Ex. 1, time card of Rendon.)

Later that morning, after Rendon had already been sent to Aim Royal for his interview, Gustavo Gonzalez (hereafter "Gonzalez") came to the Jacobson office. (TR page 366.) Chavez told him that she had an opening for insulation work. (TR page 367.) She told him to fill out an application. (TR page 367.) She gave him an application and he filled it out. (TR page 367.) While Gonzalez was filling out his application Luis Bolanos (hereafter "Bolanos") came into the Jacobson office. (TR page 367.) It appeared to Chavez that they (Gonzalez and Bolanos) knew each other. (TR page 367.) Bolanos was also given an application. When they both finished filling out the application Chavez decided to bring them into her office and interview them together. (TR page 368.) Chavez interviewed Gonzalez and Bolanos together. (TR page 368.)

Chavez testified that after she interviewed Gonzalez and Bolanos she wanted to send them for an interview at Aim Royal. (TR page 408.) Chavez testified that they both had good work history. (TR page 408.) Chavez called Lazaro and told him that she had two (2) candidates that were great and that they had what the Company (Aim Royal) was looking for. (TR page 409.) Lazaro told her (Chavez) that he had already hired the first two (2.) (TR page 409.) The first two (2) were Ortega and Rendon. (TR page 409, Respondent Exhibit 1, time cards of Rendon and Ortega.)

When Chavez called Lazaro to set up the interview for Gonzalez and Bolanos they were actually sitting in her office in front of her desk. (TR page 409.) Chavez testified that after she hung up with Lazaro, in Spanish, Gonzales and Bolanos told each other that because they were

from the union that Lazaro did not want to interview them. (TR page 410.) In response to the Administrative Law Judge's question, Chavez testified that "they said to each other probably because we're from the union they don't want to interview us." (TR page 410.) Until Chavez heard this statement from Gonzalez and Bolanos she had no idea that they were from the union. (TR page 410.) Chavez testified that she told them that she had never mentioned the union to him (Lazaro) or their names and that she didn't believe that was why Lazaro didn't want to interview them. The union wasn't mentioned in her conversation with Lazaro. (TR page 411.)

Chavez told them that they both had great work history and that she told one (1) of them that had mentioned prior demolition experience that a couple of weeks ago she had a demolition job and that she would place them in the system and that they should call her three (3) times a week and let her know if they're still looking for work and are available. (TR page 411.) She gave them a card for them to contact her. (TR page 411.) Chavez testified that she wrote the word "union" on their application because she considered it to be a good thing, they had great work history and that she thought that everyone from the union all had good work history and that it was a good thing for her and that it would remind her that they had a good work history. (TR page 412.)

Chavez testified that when she was interviewing Gonzalez and Bolanos she asked them if either of them had any potential business contacts for her. One of them handed her a card for Argus. (TR page 1045.) The card appears on the back page of General Counsel Exhibit 21.<sup>7</sup> That was the only card she was shown. (TR page 1045.) She was not given or shown a business card from Angel Aizu. (TR page 1045.) Chavez testified that she had never seen the Angel Aizu business card (General Counsel Exhibit 25) until it was shown to her at the hearing. (TR page 1045.)

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<sup>7</sup> The card appears here because it was copied sequentially by Respondent Jacobson's law firm. (TR page 1047.)

## 2. Legal Analysis

All three witnesses, Bolanos, Gonzales and Chavez, testified that it was not until Chavez hung up with Lazaro that the union was mentioned. As Bolanos testified:

20 Q Okay. And then, Mr. Bolanos, you said to Sandy that maybe  
21 it was because we had worked for the union.  
22 A No, for companies that are union.  
23 Q Okay. I'm going to ask the question again. Did you tell  
24 Sandy that, "It seems to me that maybe it was because we had  
25 worked for the union?"

1 A With the union, um hum.  
2 Q That's what you asked Sandy?  
3 A I said to her that maybe because of that, maybe that's why  
4 they don't want us.  
5 Q And what did she say after you said maybe that was why?  
6 A She didn't say anything. She said that she was upset  
7 because of the fact that she had to look for more people.

(TR pages 499, 500.) It is difficult to imagine or even construct a theory whereby this exchange could constitute an illegal interrogation under the Act. Bolanos brought up his union status to Chavez after being informed that he wasn't going to be interviewed by Aim Royal. Even then, Chavez did not ask any follow-up questions. She did not ask which union, how long or any other question. Under the Board's standard, this conversation is neither an interrogation or illegal.

Although unclear from the Complaint, it may be that this allegation refers to testimony from Gonzalez. Gonzalez testified that while on the phone with Aim Royal, Chavez asked him who sent him for the job. (TR page 464.) He testified that he gave Angel Aizu's card to the lady and she read it to the person on the phone. (TR page 467.) Chavez's testimony directly contradicts this allegation. (TR at 1045.) However, the alleged question, even if asked, does not constitute an unlawful interrogation. In Wayne J. Griffin Electric, Inc., 335 NLRB 1362 (2001), the Board affirmed the ALJ's dismissal of unlawful interrogation allegations where questions posed by the employer included union-neutral subjects such as prior employment, prior wage

rates, prior benefits received, training completed and, once union affiliation was revealed, questions were asked regarding the applicant's completion of apprenticeship training and the applicant's relative position on the union's "out-of-work" list. See id., 335 NLRB at 1370. In dismissing the interrogation allegations, the ALJ stated as follows:

The questions here, however, did not directly seek disclosure of union membership or sentiments. Rather, it is claimed that the Respondent sought to gauge the membership status of these applicants in a roundabout way.

To hold that a prospective employer cannot ask an applicant such questions without committing an unfair labor practices would essentially put the Union in charge of the hiring process. Under the General Counsel's theory, a prospective employer would have to accept whatever an applicant revealed on the application and could not probe into such important areas as the nature of his training, the type of prior work experience, or the anticipated duration of employment of an applicant.

Id. at 1371. In similar fashion, Chavez is alleged to have asked a neutral question regarding how Gonzales learned about the job. It is a neutral question that any employer might ask to determine the effectiveness of various job advertising and referral networking resources, and there is no reason for an applicant to believe that the question is designed to elicit the applicant's union affiliation. The mere fact that an applicant claims to have volunteered information regarding union affiliation in response to the neutral question does not render the neutral question unlawful. See id. Even if this question was asked exactly as described by Gonzales, it is not violative of the Act.

**C. Sandy Chavez Did Not Interrogate an Employee on July 15, 2009 Regarding His Union Membership as Alleged in Paragraph 5 (d) of the Complaint.**

**1. The Testimony of Angel Aizu**

Angel Aizu, also known as Angel Garcia (hereafter "Aizu"), is employed by Local 73 as an organizer. (TR page 699.) He has long been involved in the effort to organize Aim Royal.

(TR page 700.) He has picketed Aim Royal. (TR page 703; G.C. Ex. 33.) He has hand-billed many Aim Royal jobsites. (TR page 704; G.C. Ex. 44.) He has appeared at the Aim Royal office and filled out an application. (TR page 705; G.C. Ex. 45.)

Aizu testified that on July 14, 2009 at approximately 2:15 P.M. he went to the Jacobson office. He asked for an application, met with a girl named Sandy who gave him an application and told him to take it home and bring it back the following day. (TR page 721.) Aizu returned the next day and spoke to Sandy and gave her the application. (TR page 721.) After Aizu gave Sandy the application she told him to follow her. As they were walking she asked him if he belonged to the union. He responded “no.” They sat down and he asked her if it matters and she answered “no, it is just because the union had more experience.” (TR page 721.) Aizu said that he had a good discussion with Sandy. (TR page 725.) She told him that she liked his background and qualifications. (TR page 725.) She told him that she didn’t have any jobs right then. (TR page 726.) After she told him that she liked his backgrounds and skills, she told him to call her three (3) times a week. (TR page 726.) Aizu did not call her after that date. (TR page 726.) Aizu did show up again at Jacobson’s office about two weeks later, under a different name, asking to fill out another job application. (TR page 383.) This time he was accompanied by six or seven people wearing orange union shirts. (TR page 383.) Chavez could not figure out why Aizu was trying to fill out another application when he was already in her system. (TR page 381.)

## **2. Legal Analysis**

Aizu is a longtime member/organizer for Local 73. He is an open and obvious supporter and representative of the Union. Under the Board’s test, the casual question asked of him by Chavez as they were walking down the hall to the office, is not an illegal interrogation. When

her question, particularly in light of her response to Aizu's follow-up question, is analyzed, it is clear the legal standard has not been met. Mr. Aizu simply was not, and could not have been coerced or intimidated when all the circumstances of that conversation are considered.

Aizu was immediately given express assurances that, even if he had acknowledged his union affiliation, that he would not face any reprisals in the hiring process, and that Jacobson did not view this as a negative thing and would, in fact, consider it evidence of greater work experience. This assurance weighs against any alleged coercive or intimidating effect of the conversation. See Adco Elec. Inc., 307 NLRB 1113, 1117 (1992); GM Electrics, 323 NLRB 125, 127 (1997); Modern Electric, Co., 327 NLRB 92, 96 (1998).

**III. THE RESPONDENT JACOBSON BY SANDY CHAVEZ NEVER FAILED TO CONSIDER OR TO REFER A CANDIDATE FOR EMPLOYMENT.**

**A. Sandy Chavez Did Not Refuse to Consider Shawn McMillan For Hire on or About July 1, 2009 as Alleged in Paragraph 6 (h) of the Complaint.**

The timing of Sandy Chavez' contact with McMillan is uncontroverted in so far as it did not occur until both Trujillo and Garcia had already filled out applications, interviewed, been hired and commenced work at Aim Royal. If McMillan's timeline is credited, he did not even come to Jacobson's office until four (4) or five (5) days later. (TR page 433.)

As Chavez testified on June 29 or June 30, 2009, she received a telephone call from Aim Royal's Superintendent Lazaro Campos requesting two (2) individuals with insulation experience. (TR page 342.) That night Chavez went on her home computer and did a search on careerbuilder.com. (TR page 345.) She found the name of Marcellino Trujillo, contacted him, introduced herself, told him that she was looking for a person with insulation experience and asked him to come in and fill out an application. (TR page 345.) The following day, July 1, 2009 Trujillo arrived at the Jacobson office. (TR page 345.) Chavez had him fill out an

application, she interviewed him, and then sent him to Aim Royal for an interview with Campos. (TR page 345.) Shortly thereafter Garcia arrived, unsolicited, at the Jacobson office, Chavez gave him an application, interviewed him, and also sent him for an interview with Campos at Aim Royal's office. (TR page 399.) During her interview with Garcia, Chavez asked him (Garcia) if he knew of anyone else with insulation experience that might be looking for work. (TR page 398.) Garcia gave Chavez the name and telephone number of McMillan. (TR page 398.)

After sending Garcia for his interview at Aim Royal, Chavez called McMillan. (TR page 399.) She introduced herself and told him she got his and number from Imuris Garcia. (TR page 399.) He told her he could only work for the union. (TR page 399.) McMillan called back the following day and she asked him to come in and fill out an application. (TR page 401.) He was given an application, he left, he returned and completed the application. (TR page 403.) Chavez interviewed him. (TR page 404.) She told him she would like to send him out for an interview. (TR page 404.) She called Lazaro to set up the interview. He told her he had already hired the first two (2) and had sent two (2) others back. (TR page 405.) McMillan left the office swearing and slamming the door. (TR page 405.) McMillan did not contact Chavez after this date. (TR page 405.)

### **1. Legal Analysis**

This is not a failure or refusal to hire case. The Complaint against the Respondent Jacobson alleges a failure to consider.<sup>8</sup> The Board has set forth the legal standard for analyzing a failure to consider allegation in FES.<sup>9</sup> In FES I, the Board addressed the “refusal-to-consider”

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<sup>8</sup> The record is conclusive that Jacobson could only refer candidates to Aim Royal. Aim royal made the ultimate hiring decision. (TR page 341.)

<sup>9</sup> FES (A Division of Thermo Power), 331 NLRB 66 (2000) remanded, 333 NLRB No. 20, enfd. sub nom NLRB v. FES, 301 F.3d 83 (3<sup>rd</sup> Cir. 2002).

theory of liability. Applying a Wright Line<sup>10</sup> analysis, the Board held that General Counsel bears the burden to establish that (1) the respondent excluded applicants from a hiring process; and (2) that anti-union animus contributed to the decision not to consider the applicants for employment. Only then does the burden shift to a respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. FES at 15. The Board continues to apply the FES standard in refusal-to-consider cases. See Allstate Power Vac, Inc., 354 NLRB No. 111 (Nov. 30, 2009).

This is not a refusal-to-hire” case as it relates to Jacobson. The record is clear that all hiring decisions were made by Respondent Aim Royal. (TR page 340.) After receiving a job order, Jacobson referred candidates to Aim Royal. (TR page 340.)

Chavez testified as to the Jacobson application process. This testimony is unrefuted. A candidate will either be solicited (i.e., Trujillo, McMillan) (TR pages 344, 345), or they walk in unsolicited (i.e., Garcia, Gonzales, Bolanos, Aizu). (TR pages 344, 366, 368 and 383.) The candidate is given an application. (TR page 367.) The candidate fills the application and paperwork out. (TR page 367.) Once the candidate has completed the paperwork, they are interviewed by Chavez. (TR page 368.) If Chavez has an open job order, she will then send the candidate for an interview. (TR page 402.) When Chavez called Aim Royal to send McMillan, Gonzales and Bolanos for their interview, Aim Royal had already filled the positions. (TR pages 404, 409; Resp. Jacobson Ex. 1.) By the time Aizu had finished the application process, Chavez had filled both positions the previous day. (TR page 726.)

The testimony of all witnesses establishes that Jacobson’s application process was identical for every candidate and that no person was excluded from the process. General Counsel has failed to carry his burden under the first prong of the FES analysis. The ALJ

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<sup>10</sup> Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

technically does not need to reach the second prong as there is no evidence of exclusion. Nonetheless, General Counsel has failed to offer any evidence of any anti-union animus by Respondent Jacobson, and specifically Chavez. General Counsel's own witnesses testified to a complete lack of animus. McMillan testified that Chavez relentlessly pursued him even after he announced his union affiliation. (TR page 423.) She told Gonzales she liked his background. (TR page 472.) She told Bolanos that she thought he was a perfect candidate for the job. (TR page 498.) She told Aizu that the Union people had more experience. (TR page 721.) In short, there is no evidence of any animus involving Chavez.

Finally, the burden will only shift to the respondent once the General Counsel has satisfied both prongs of the FES test. A respondent can defeat a claim by showing that it would not have considered a candidate even in the absence of union activity or affiliation. Here, all candidates were considered. But the record equally establishes that by the time McMillan, Gonzales, Bolanos and Aizu even started the application process, all job orders from Aim Royal (two orders, both for two employees), had been filled. (Resp. Jacobson Ex. 1.) Aim Royal told Chavez not to send these candidates because there were no openings.

Because General Counsel has failed to prove either prong of the FES test, and the Respondent Jacobson would carry the day on its defense, even if a *prima facie* case had been made, all allegations alleging a refusal-to-consider must be dismissed as to Respondent Jacobson.<sup>11</sup>

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<sup>11</sup> At the hearing, General Counsel clarified the Complaint by stating that paragraphs 6(e), 6(f), 6(g), 6(i) and 6(j) were directed only at Respondent Aim Royal. As such, none of these allegations are addressed by Respondent Jacobson in this Brief. (See generally TR page 1051.)

**B. Jacobson Did Not Refuse to Consider McMillan, Bolanos, and Gonzalez For Hire on or About July 14, 2009 as Alleged in Paragraph 6(k) of the Complaint.**

On July 14, 2009, Chavez received a call from Campos at Aim Royal for two (2) individuals for general labor positions. (TR page 361.) Campos told Chavez that he already hired one (1) of the individuals, Isidro Ortega (hereafter "Ortega"), and that he was sending Ortega over to Jacobson to fill out an application. (TR page 362.) When Chavez got the call from Campos a current Jacobson employee, Claudio Rendon (hereafter "Rendon"), was actually sitting in her office across from her desk. (TR page 407.) Rendon had just been laid off from his position from another Jacobson client, Flavorite. (TR page 364.) Chavez told Campos that she had an individual in her office that had just been laid off from his position at Flavorite, that he was a good worker and was available. (TR page 364.) Campos told Chavez to send him over for an interview. (TR page 364.) Rendon went directly for his interview at Aim Royal. Rendon and Ortega had been sent to Aim Royal before Gonzalez showed up. (TR page 408.)

Later that morning, at approximately 11:30 A.M., Gustavo Gonzalez (hereafter "Gonzalez") appeared at the Jacobson office. He told Chavez that he was looking for work and that he had insulation experience. She had him fill out an application. (TR page 366.) While Gonzalez was filling out his application another individual Luis Bolanos (hereafter "Bolanos") showed up at the Jacobson office. Chavez spoke to Bolanos. He also told her that he had insulation experience and she gave him an application to fill out. (TR page 367.) Because it appeared to Chavez that Gonzalez and Bolanos knew each other, she decided to interview them together. (TR page 368.) Chavez told them that she was impressed with their background and thought that they would be candidates for Aim Royal. (TR page 369.) Chavez told them that

she wanted to send them for an interview at 1:30 P.M. at Aim Royal. (TR page 369.) Chavez called Campos and told him that she had two (2) more candidates that she would like to send for an interview. (TR page 409.) Campos told Chavez that he had already hired the first two (2) employees (Ortega and Rendon). (TR page 409.)

Both Rendon and Ortega commenced work for Aim Royal the following day, July 15, 2009 at 5:00 A.M. (Respondent Exhibit 1 – time card of Claudio Rendon week ending July 18, 2009 and time card of Isidro Ortega week ending July 18, 2009.)

### **1. Legal Analysis**

This allegation is also a “refusal-to-consider” claim. As such, it is governed by the same FES standard previously discussed. The record here is absolutely clear, both individuals were given applications (TR pages 366, 367), both candidates completed the application (TR page 368), both were interviewed (TR page 368), both were viewed as good candidates (TR page 369), and Chavez attempted to send them to Aim Royal for an interview. (TR page 369.)

It is also clear that the job order from Aim Royal for two (2) employees had already been filled even before Gonzales and Bolanos appeared at the Jacobson office. (TR page 409.) Gonzales testified that he was told the jobs were filled even before his interview. (TR page 472.) There is no evidence to support even a *prima facie* case under FES. This allegation must be dismissed.

### **C. The Respondent Jacobson Did Not Refuse to Consider For Hire or Hire Angel Aizu on July 15, 2009 as Alleged in Paragraph 6 (l) of the Complaint.**

On the afternoon of July 14, 2009 Angel Aizu (hereafter “Aizu”) went to the Jacobson office. (TR page 720.) He met Chavez, requested an application, she gave him an application and asked him to fill it out and bring it back. (TR page 721.) Aizu testified that he returned the

following day. (TR page 721.) They were walking to back to Chavez' office for his interview when she asked him if he was with the union to which he responded "no." (TR page 721.) He then asked her "does it matter?" Chavez responded "NO. It is just because the union had more experience." (TR page 721.) Chavez interviewed Aizu and told him that she did not have anything available but would keep his application on file and that he should call. (TR page 726.) He never called. (TR page 726.)

The job order that Chavez had received from Aim Royal the previous day had already been filled and in fact, Rendon and Ortega had already completed their first full day of work before Chavez even interviewed Aizu. (TR page 408.)

### **1. Legal Analysis**

By the time Chavez had met with and interviewed Aizu, Rendon and Ortega had not only been hired by Aim Royal, they had actually completed their first day of work. Chavez did not even have an open job order from Aim Royal. (Resp. Jacobson Ex. 1; TR page 726.)

Nonetheless, she took Aizu's application (TR page 721), interviewed him (TR page 721), and entered him in her computer system. (TR page 381.) She told him to call. (TR page 726.) He did not. (TR page 726.) Under the Board standard of FES, there is no evidence of a failure to consider. This allegation should be dismissed.

### **D. There is no Evidence That the Respondent Jacobson Ever Refused to Consider Any Individual, Including Individuals With Union Affiliation, For Employment.**

The record evidence is clear that every individual that sought to apply for work through Jacobson was afforded the same opportunity, regardless of union affiliation. It is equally clear that Chavez believed that all of the union affiliated applicants were qualified. It was only when she attempted to send McMillan, Gonzalez and Bolanos for an interview did the process stop. It

stopped not because Chavez did not want these individuals to get hired, but because candidates she had sent earlier had already been hired. In the case of Aizu, she told him up-front that she did not have any openings. By the time Aizu appeared for his interview, two other Jacobson employees were already completing their first day of work at Aim Royal.

A stipulation was entered on the record that Respondent Jacobson was a joint employer with Aim Royal, but only for the Jacobson employees actually working for Aim Royal.<sup>12</sup> Any decision by Aim Royal not to interview a candidate, for whatever reason, is solely an Aim Royal decision.

The Board has made clear that in FES style refusal-to-consider cases the General Counsel must first establish both exclusionary treatment and antiunion animus. Both elements are missing from General Counsel's proof as to Jacobson. No candidate was ever excluded from the application and interview process. Not only were they considered, but, according to each of General Counsel's witnesses, Chavez attempted to refer them for interview with the sole exception of Aizu. Chavez knew, even before she interviewed Aizu, that she had no openings.

As to animus, no witness testified to any statement by Chavez indicating any animus. To the contrary, all witnesses testified as to how impressed Chavez was with their background. Even Aizu testified that Chavez was impressed with the work history of the union members. In fact, her comment to Aizu was made after he told her that he was not a union member. (TR page 721.)

The ALJ also had the opportunity to observe Chavez on three separate days of testimony. She was nervous, but candid in her testimony. She was also a dramatically unrehearsed witness. The vast majority of her testimony came in General Counsel's 6(11)(c) examination. Her direct

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<sup>12</sup> The stipulation covers Trujillo, Garcia, Rendon and Ortega. (TR page 357.)

examination from Jacobson's counsel largely consisted of filling in additional details that were restricted by General Counsel's examination.

Frankly, she demonstrated an almost profound lack of understanding both as to unions and to union organizing tactics such as salting. The ALJ may wish to review Chavez's testimony at Transcript pages 381 to 386. These pages offer great insight into Chavez's lack of understanding and lack of animus to union activities and union affiliation.

The record is clear that no conduct engaged in by Chavez violated the Act. The remaining allegations directed against the Respondent Jacobson should be dismissed.

#### **IV. CONCLUSION**

As no allegation directed to the Respondent Jacobson Staffing, L.C., has been established, the Complaint, as to Jacobson, should be dismissed.

Dated at Milwaukee, Wisconsin, this 24th day of March, 2010.

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