

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH OFFICE**

PLAZA AUTO CENTER, INC.

and

Case 28-CA-22256

NICK AGUIRRE, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Charging Party Nick Aguirre just wanted the Respondent to obey the law. He knew that the law provided that he and the other salespeople should receive minimum wage as a draw against the commissions they would earn. But this legitimate desire, and Aguirre's actions in discussing this desire and other terms and conditions of employment with other employees, led the Respondent to believe that Aguirre was having a "negative effect" on the Respondent's other employees. In other words, Aguirre was a troublemaker or, as the Respondent's owner Tony Plaza put it, "He was a complainer. That he was complaining about everything all the time." (TR. 16) Aguirre discussed with other employees his concerns regarding the employees not receiving minimum wage when they did not earn commission; and contacted the Industrial Commission of Arizona when the Respondent forcefully stated that he was due nothing when he did not earn commission. The statements by the Respondent's managers that if Aguirre did not like the working conditions at the Respondent he was free to quit, reflect the Respondent's take-it-or-leave-it attitude toward employee concerns. In the end, Aguirre's discussion of terms and conditions of employment

with fellow employees led to Tony Plaza's belief that Aguirre was a "negative influence" which, in turn, led to Aguirre's discharge.

II. STATEMENT OF FACTS

Aguirre began working at the Respondent in August 2009 as a salesperson after managers Gustavo MacGrew and Juan Felix hired him. His first day of work was at the "tent sale" that the Respondent holds on certain weekends, from Friday through Sunday. While he was working at the tent sale, Aguirre met fellow salespeople, including Oscar Martinez and James Pagan. Aguirre asked the other employees how they were supposed to take restroom breaks, and they informed him that they used the restrooms in Sears or a in a nearby Circle K. Aguirre also discussed the Respondent's pay structure and was informed by employees that it was straight commission. (TR. 59-63) Aguirre asked Felix, in the presence of Martinez and Pagan, when the employees could take breaks. Felix responded by saying that they could not leave because it would leave one fewer person available. (TR. 69)

When Aguirre received his first paycheck, he was surprised at how low it was, as he received only \$132. (TR. 73) In a previous job as a salesman at Yuma Furniture, Aguirre received a draw of minimum wage against the commission that he would earn, and he understandably expected that he would receive the same draw at the Respondent. Aguirre questioned the failure to be given a draw against commission and he was told that he was working for commission only. Although Aguirre had signed an acknowledgement that he would be paid commissions only, he believed that he was due minimum wage as a draw against his commission. Aguirre discussed his belief that the Respondent's salespeople should receive minimum wage as a draw against commissions with other employees, including Francisco Felix, Pagan and Martinez. (TR. 75-75, 147, 149)

The Wednesday after he was hired, Aguirre attended a sales meeting held at the Respondent's facility. Plaza spoke at the meeting and mentioned that a vehicle had been damaged. Plaza said that the cost of the repair would come out of every salesman's pay if the person who damaged the car did not come forward. Aguirre looked around at the other salespeople and saw them shake their heads. Aguirre spoke up and, believing that he was speaking for all of the salespeople, said that this was unfair and that everyone who had contact with the car, and not just the salespeople, should be charged, also. (TR. 76-79) In the same meeting, Aguirre once again raised the issue of employee breaks. He asked if employees were entitled to a break and a meal. Juan Felix responded "You're always on a break, buddy. Look at you. You don't—You just wait for customers all day." Felix went on to say, if Aguirre did not like the way the company operated, he was welcome to leave at any time. (TR. 65-67)

After more discussions with employees about the pay issue, Aguirre went to the unemployment office in Yuma to ask about the Respondent's legal obligations. After that visit, Aguirre contacted the Industrial Commission's¹ office in Phoenix. Aguirre then told Martinez and Pagan what he had learned, that even when the pay structure is commission only, employees must not be paid less than the minimum wage. Aguirre said that he was going to speak with Barbara Montenegro, the Respondent's office manager, and tell her what he had learned. Both employees told Aguirre to let them know what occurred with Montenegro. (TR. 81-83)

Before he spoke with Montenegro about the pay issue, Aguirre asked Felix at a tent sale in October how he, Aguirre, could find out the cost of a vehicle to the Respondent so that

¹ Aguirre continually referred to the "Labor Commission" or "Labor Department" but the proper name is the Industrial Commission of Arizona.

he could ensure that he would be getting the proper commission. Felix told him that if Aguirre did not trust the company that he was more than welcome to go elsewhere. (TR. 83-87)

On October 28, Aguirre went to Montenegro's office and asked her if she was sure that the Respondent's failure to pay minimum wage to salespeople when their commission was below minimum wage was proper. Montenegro said that she was sure and that if Aguirre wanted a minimum wage job, the job with the Respondent was not for him. (TR. 88-90)

After the conversation with Montenegro, Aguirre and Pagan were ordered to go and pick up another employee who had delivered a car. When the two arrived back at the Respondent's facility, Aguirre saw Plaza and said that he thought he was in trouble. In the facility, he was greeted by Felix, who told him that Plaza wanted to speak with him in Felix's office. (TR. 90-92)

Aguirre entered Felix' office and noticed that Plaza and MacGrew also were present. Plaza began by sitting down, shaking his head, and said, "Nick, you know, you're asking too many questions." (TR. 92-93) (Plaza also testified that he began the meeting as follows: "As I started to talk about his negative attitude and influence to the rest of my employees. " (GCX 3; TR. 134)) Plaza elucidated and said that Aguirre was asking about the price of vehicles and about the minimum wage and that Aguirre was being negative by telling other employees what he had learned about the minimum wage. Plaza went on and told Aguirre that Aguirre was not meeting the Respondent's criteria. Aguirre retorted that he had treated the customers with respect and moved the Respondent's cars back and forth. Plaza repeated that Aguirre did not meet the Respondent's criteria and told Aguirre that he was terminated. Aguirre asked how Plaza could do that to someone who had just had a baby. At this point,

and not before, Aguirre swore at Plaza, calling him a crook, among other things. Aguirre told Plaza that if he was being fired that Plaza should pay him. Plaza replied that he had three days to pay him. Aguirre left Felix's office and departed the facility. (TR. 93-99, 184)

III. ARGUMENT

A. The Unlawful Statements Made by the Respondent's Managers

For the most part, Aguirre's testimony is either corroborated by the Respondent's agents or stands un rebutted. Where there is a variation in testimony, the Respondent's witnesses have clearly shaded the truth in order to render their unlawful statements less glaringly so.

Aguirre testified that on or about September 3, 2008, during the first sales meeting that he attended, in response to Aguirre inquiry regarding whether employees would be afford breaks, including a meal break, Felix reiterated that employees were always on break and no formal breaks would be permitted. Felix told him that if he did not like the way the company operates, he was free to leave at any time. (TR. 67) Felix does not deny that he made this statement at the first sales meeting attended by Aguirre. This failure to deny making the statement strongly suggest that Felix did, in fact, make the statement. But even more telling and strongly suggestive that the first statement was made by Felix is his admission that he made a substantially equivalent statement in October 2003.

At trial, Felix, after being confronted with his affidavit, was asked the following question and gave the following answer:

Q Okay. The beginning of the fifth line on the -- on Page 3. Do you see *I told Aguirre that, if he did not trust the company, that he should not work for the company*, I told him that he should not work for the company if he did not believe in it? Isn't that what it says in this affidavit?

A Yes.

(TR. 183; emphasis added) On redirect examination, Felix also acknowledged that he had told Aguirre: “if he didn’t trust the company, that he should not work for the company.” (TR. 190; see also TR. 182)

The Respondent’s propensity to greet employee’s concerted questioning of its personnel policies with an invitation to them to quit is further evidenced by Aguirre’s encounter with Montenegro. Aguirre testified, without contradiction, that after he asked Montenegro if salespeople were entitled to minimum wage as a “safety net,” that Montenegro said: “If you want a minimum wage job, this is not the job for you.” (TR. 89, 108)

Based on Felix’ admission of the October statement, his failure to deny the September statement, and the uncontroverted testimony that Montenegro echoed Felix’s statements, the trustworthiness of Aguirre’s testimony seems clear. The ALJ should credit Aguirre and find that Felix’ and Montenegro’s statements violate Section 8(a)(1) of the Act.

Complaint allegation 4(e) alleges:

- 4(e) On or about October 28, 2008, the Respondent, by Tony Plaza, herein called Plaza, at the Respondent’s facility:
 - (1) threatened its employees with unspecified reprisals; and
 - (2) threatened employees by inviting them to quit their employment.

In the meeting with Plaza, MacGrew and Felix on October 28, Aguirre testified, Plaza “sat down, was settling in, took a pause, and looked at me, bit his lip, shook his head in a form of disappointment, put his head down, nodded, and just said, Nick, you know, you’re asking too many questions.” (TR. 93) By the verbal statement alone – “you’re asking too many

questions” – Plaza threatened Aguirre with unspecified reprisals if the employee persisted in asking questions; and Plaza’s non-verbal gestures served to emphasize the threat. Plaza continued and told Aguirre the employee was being “negative” about the pay he was receiving and that the cost of the vehicles was “for his eyes and his eyes only and, if [Aguirre] didn’t like it, [Aguirre] was more than welcome to leave or to quit.” (TR. 94) At trial, Plaza admitted telling Aguirre that “if he did not *trust* the company, he did not need to work there.” (The ALJ should note that Plaza’s statement is carefully engineered to mimic that of Felix. This is a strong sign that Plaza and Felix conspired to conform their testimony to a less flagrant invitation to Aguirre to quit his job if he refused to stop concertedly complaining about terms and conditions of employment.) (TR. 52; see also TR. 19, GCX 2) MacGrew also testified that Plaza told Aguirre that if he did not trust the company, he did not have to work there. (TR. 206)

The unlawful statements by the Respondent’s managers and owner not only reflect their attitude toward Aguirre’s activities but also constitute violations of Section 8(a)(1). The Board has held that employer comments similar to the several invitations to quit proffered by Felix, Montenegro and Plaza were violative of the Act. Most recently, in *Ridgeview Industries*, 353 NLRB No. 119, slip op. at 25 (2009), the administrative law judge, affirmed by the Board, held:

I agree with the General Counsel that Nykamp’s invitation to Smith, a prime union activist, to the effect that if he wasn’t happy there, he should find another job, constituted a threat of discharge, and I agree that in the context of the protected activities discussed above, the threat was directed at those activities.

See also *Wal-Mart Stores*, 350 NLRB 879, 879 (2007) (“Regarding the allegations of unfair labor practices at South Rainbow, we (1) affirm the judge’s finding that the Respondent

violated Section 8(a)(1) on June 17, 2000, by disparaging employee Avis Hammond's union activity and inviting him to quit. "); *Bell Burglar Alarms, Inc.*, 245 NLRB 990, 990 (1979) ("Thus, we find that Baizer's invitations to Gundaker to quit constitute an implied threat of discharge for engaging in protected activity. As there is no other explanation for the statement, little else can be inferred from such invitation.")

The law regarding statements such as those made by the Respondent's agents is clear; and the ALJ should find that all of the Respondent's statements alleged in the Complaint constitute threats of discharge in violation of Section 8(a)(1) of the Act.

B. The Unlawful Discharge of Nick Aguirre

The law regarding adverse action for engaging in protected concerted activity is based in *Meyers Industries*, 281 NLRB 882 (1986) ("*Meyers II*"). There, the Board, pursuant to a court remand, analyzed its departure from *Alleluia Cushion Co.*, 221 NLRB 999 (1975), that it originally announced in *Meyers Industries*, 268 NLRB 493 (1984) ("*Meyers I*"). In both of the *Meyers* decisions, the Board held that a charging party must show not only that the conduct for which he or she was discharged would benefit other employees, and thereby satisfy the requirement in Section 7 that the conduct be "for mutual aid and protection" of other employees; but also that the conduct constitute protected concerted activity. In the present case, there appears to be no dispute that Aguirre's action in going to the Arizona Industrial Commission satisfied the first prong of the *Meyers II* test: It is clear that his action would benefit other employees. The Respondent, however, appears to dispute that Aguirre's conduct was "concerted" inasmuch as the Respondent called Pagan to testify that he never requested nor authorized Aguirre to act on Pagan's behalf or speak for Pagan.

The law, however, does not require such a request or authorization. Instead, the Board has held that: “our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers II*, 268 NLRB at 887. As discussed below, by this definition, Aguirre’s actions were concerted and protected.

Aguirre testified without contradiction that he discussed the subject of minimum wage with other employees (notably Oscar Martinez and James Pagan); that he spoke to management about minimum wage in the presence of other employees; and that employees requested that Aguirre tell them what transpired when he spoke with Montenegro regarding pay.² (TR. 68-69, 81-83) Aguirre also spoke with other employees about the lack of breaks during tent sales, a subject Martinez also brought up at a sales meeting. (TR-75-76, 78) Further, MacGrew agreed with the statement in his affidavit that: “I could [sic] hear from other salespeople that Aguirre was not happy with some company’s policies.” (TR. 204) All of this evidence establishes that Aguirre sought to prepare for group action by bringing up the subjects of minimum wage and breaks with employees and that the Respondent (through at the very least MacGrew) knew that Aguirre was discussing the Respondent’s policies with other employees.

The evidence also establishes that the Respondent, despite Plaza’s attempts to say otherwise, was aware of the discussions that Aguirre had with other employees. In addition to

² Pagan testified that he did not ask Aguirre to speak for him. (TR. 144) This does not contradict Aguirre’s testimony. Pagan also confirmed that Aguirre spoke to employees about the minimum wage issue and that Aguirre told employees he was “looking into” the issue. (TR. 145) In any event, Aguirre should be credited with regard to any difference in testimony because of his creditable demeanor. As CGC noted on the record (followed by admonishment by the ALJ), Pagan was very antagonistic toward the CGC and his questions. (TR. 148)

MacGrew's testimony cited above, the file note Plaza wrote on October 28, after he terminated Aguirre, Plaza said that he had concerns about Aguirre's attitude and "negative influence" on other employees. (GCX 2; TR. 16) Plaza admitted that he had heard from his managers that Aguirre had been speaking about working conditions with other employees:

Q All right. Now isn't it true where you say at the end of the second line and into the third that *you had concerns about his attitude and negative influence that that was based upon your knowledge whether directly or from your managers that Mr. Aguirre had been speaking about working conditions with other employees?*

A *I got informed that same day about that, that's correct.*

(TR. 16-17; emphasis added) Plaza similarly referred to Aguirre's purported "negative attitude and influence" in his letter to the Board dated December 5. (GCX 3; TR. 48-49) Finally, Plaza acknowledged that he stated in his affidavit that "I told him that this was having a negative impact on the whole sales force." (TR. 136)³

The Respondent's primary defense appears to be that it discharged Aguirre because he used abusive and obscene language with Plaza. At the outset, one must wonder why a man who just added a new baby to his family and whose wife did not work outside of the house would do so such thing to jeopardize his job. The Respondent's evidence at trial was unconvincing, especially in light of the testimony the Respondent's agents gave in affidavits to the Board. Thus, while the Respondent's managers parroted the same essential story at trial, *i.e.*, that Aguirre did not give Plaza a chance to speak before Aguirre launched into obscenities, on cross-examination the same managers acknowledged in their affidavit testimony to the effect that Plaza started the meeting. (TR. 183-84, 206)

Felix's testimony reflects the Respondent's improbable story:

³ Plaza attempted to avoid the effect of his affidavit by stating that the Board agent did not write the statement above correctly. However, Plaza also acknowledged that although he made many corrections to his affidavit, he did not correct this supposed mistake. (TR. 136-37)



A He inform [sic] Aguirre that he was already tell [sic] by me and by Barbara Montenegro that he want to speak to him and, before we start the meeting, he has to know that our store, like any other company, has policies and procedures that we have to follow.

Q And what else did Mr. Plaza say?

A That's it.

Q Okay. So Mr. Plaza didn't say that he wanted to speak to Mr. Aguirre about concerns Mr. Plaza had?

A Mr. Aguirre didn't even give him a chance to do that. After that, he start telling -- calling Mr. Plaza fuck you, stupid, asshole.

Q And, as he was doing that, he would intersperse six or seven times are you going to fire me?

A He was -- he was asking Mr. Plaza?

Q *That he was asking Mr. Plaza six or seven times are you going to fire me.*

A *Yes.*

Q Okay. Is it your testimony that it went like F you, you're F'ing stupid, are you going to fire me? You're an F'ing asshole, whatever, are you going to fire me? Is that how it went?

A Not really like that, but every time that he make a question, he ask Mr. Plaza he's going to be fired, he told Mr. Plaza he know that he going to get fired. He told Mr. Plaza if he was -- he asked Mr. Plaza he was the kind of boss who fire people for no reason. (TR. 176-771 emphasis added)

Similarly, MacGrew testified that Aguirre asked "two, three or four times" whether he was going to be terminated and Plaza said no each time. (TR. 198) Tellingly, Plaza does not engage in this obvious exaggeration and fabrication in his testimony.

The most telling testimony, however, was the shortest. Montenegro testified that she could not hear what was said in Felix's office, which was next to hers. She testified that she heard Aguirre's voice rise, but it was towards the end of the meeting. (TR. 221) This



testimony comports with Aguirre's that he did not yell at Plaza until the owner terminated him, and is in contrast to the trial testimony of the other manager's that Aguirre began yelling at Plaza from the beginning of the meeting. The ALJ should find, based on Montenegro's trial testimony as well as Aguirre's, that the employee did not curse at Plaza until Plaza terminated him and, therefore, Aguirre's conduct in the meeting could not have been the reason for his termination.

In his testimony, Plaza contends that he meant the "negative impact" Aguirre *would have* on employees and not the negative impact Aguirre already had on employees. (TR. 136) The ALJ should not credit this contention. Plaza's assertion is belied by his contemporaneous file note and his letter to the Board. Is further belied by the fact that although Plaza made several corrections to his affidavit and added information, he did not correct the part where he stated that Aguirre's past negative influence was the cause of the discharge. (TR. 136-37)

The evidence is very clear from Plaza's October 28 file note (GCX 2) and his December 5 letter (GCX 3) that the "negative influence" Aguirre purportedly had on other employees, *i.e.* discussing the minimum wage requirement and other terms and conditions of employment, such as breaks and how the damage to the car would be paid, was the only reason that the Respondent terminated Aguirre. The ALJ should find that the Respondent discharged Aguirre because of the employee's protected concerted activity and thereby violated Section 8(a)(1) of the Act.

IV. CONCLUSION

For all the reasons set forth above, the ALJ should find that all of the statements alleged as unlawful in the Complaint violated Section 8(a)(1) of the Act; and that the Respondent's discharge of Nick Aguirre was motivated by his protected concerted activity

and thereby also violated Section 8(a)(1) of the Act. The ALJ should order the Respondent to cease and desist from such conduct and to post the proposed Notice to Employee attached hereto. CGC requests that the ALJ grant all other relief that just and proper.

Dated at Las Vegas, Nevada, this 9th day of June 2009.

Respectfully submitted,

/s/ Joel C. Schochet _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in PLAZA AUTO CENTER, INC. Case 28-CA-22256, was served via E-Gov, E-Filing, and by regular mail, on the 9th day of June 2009, on the following parties:

Via E-Gov, E-Filing:

Honorable Mary Cracraft, Chief Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Via Regular Mail:

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/s/ Katherine Stanley

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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 do anything that interferes with these rights. More particularly:

WE WILL NOT threaten to discharge you for engaging in protected concerted activities including threatening you by inviting you to quit your employment with us.

WE WILL NOT discharge you for engaging in protected concerted activities.

WE WILL NOT in any similar way frustrate the exercise of any of the rights stated above.

WE WILL offer Nick Aguirre reinstatement to his former position or, if that position is not available, to a substantially equivalent position.

WE WILL make Nick Aguirre whole for the wages and benefits that he lost as a result of being terminated by us; and **WE WILL** remove from our files any reference to his termination.

PLAZA AUTO CENTER, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

