

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

EYM KING OF KANSAS, LLC	§	
D/B/A BURGER KING®,	§	
	§	Nos.: 14-CA-148915
AND	§	14-CA-150321
	§	14-CA-150794
WORKER’S ORGANIZING COMMITTEE—	§	
KANSAS CITY,	§	

EYM’S REPLY BRIEF TO THE UNION’S ANSWERING BRIEF

I.

**NOTHING IN THE ACT PROTECTS ORTIZ FROM BEING DISCIPLINED
BECAUSE, INSTEAD OF REPORTING FOR WORK, SHE DECIDED TO SIT
HOME ON HER BUTT.**

The ALJ affirmatively found, ALJ p. 22/10-11 (emphasis added): “Hayes *did not* receive a strike notice informing her that *Camilo, Humbert, and Ortiz* would be participating in a strike on April 15.”¹ Nevertheless, based on the fact that at 2:30 on April 15, Hayes admittedly (Tr. 355/1-

¹ Neither the GC nor the Union filed any exceptions or cross-exceptions to this finding. Accordingly, the Union’s contentions contrary to that finding, *e.g.*, *Brief*, pp. 16-17 (“Hayes was aware that these workers were not present at work on April 15, 2015, because Hayes was provided with a ‘strike notice’ in the morning of April 15th, signed by these workers, indicating the reasons they were absent from work.”), p. 40 (“Hayes was aware that these workers were not present at work on April 15, 2015, because Hayes was provided with a ‘strike notice’ in the morning of April 15th, signed by these workers, indicating why they were not present at work.”), pp. 44-45 (“credible testimony” establishes that Humbert, Camilo, and Ortiz provided a strike notice; “Against the testimony of Humbert, Thatch, and Ortiz, Hayes’s conflicting testimony wholly lacks credibility.”), have been waived and must be disregarded.

Worse, as support for its contrary assertions, the Union cites to the testimony of Humbert (Tr. 162-166) and Ortiz. Tr. 193-95. *Brief*, pp. 17, 40. In fact, *neither* witness testified to the delivery of any strike notice. *See* Tr. 172/9-19 (Humbert did not know what happened to the strike notice after he signed it); Tr. 181/14-18 (from the time Humbert signed the strike notice until he testified at the hearing, he’d never again seen the notice); Tr. 195/21-23 (Ortiz did not see the strike notice delivered); Tr. 206/12-24 (after signing the strike notice, Ortiz did not see the document again until the hearing). In fact, the ALJ sustained objections to attempts by the General Counsel to have Humbert and Ortiz state what had happened to the strike notice after they had

Footnote continued on next page

16) received a strike notice signed by *Frasier, Vaughn and Cooney*, the ALJ concluded (emphasis added): “I find that by April 15 at about 2:30 Hayes was aware that all six of the employees were not at work because they were on strike.” ALJD p. 22/28-30. Both the Union (*Brief*, pp. 37-45) and the GC (*Brief*, pp. 3-14) support this finding. However, the constructive knowledge regarding Humbert, Camilo, and Ortiz with which the ALJ charged Hayes *is demonstrably not true* and contrary to the record.

First, it *cannot* be true that as of 2:30 on April 15th Hayes was aware that “all six of the employees were not at work *because they were on strike*” because *Humbert’s shift didn’t start until 3:00, Vaughn’s not until 4:30 and Ortiz’ shift did not start until 7:00 p.m.* RE 21.

Second, the ALJ specifically found (ALJD p. 7/36-37): “The strike and activities associated with the strike lasted from about 4:00 a.m. to 6:00 p.m.” Additionally, Ortiz testified Tr. 203-205 (emphasis added):

Q. On April 15th, 2015 when you went on strike, when did you start the activities for that day, the strike activities?

. . . footnote continued from previous page:

signed it *precisely because they had no personal knowledge*. Thatch—the union agent who delivered the Vaughn-Cooney-Frazier notice (RE 25) at 2:30—testified *that* was the *only* strike notice he delivered. Tr. 259-268. As the ALJ found, Hayes never received the Humbert-Camilo-Ortiz strike notice (GCE 21). Tr. Tr. 354/20 to 355/18; Tr. 356/5-13 . The Union’s misrepresentations that “credible testimony” established that the Humbert-Camilo-Ortiz strike notice was delivered to Hayes “in the morning of April 15th signed by these workers” are patently unethical. *See Missouri Disciplinary Rule 4-3.3(a)(1): Candor Toward the Tribunal* (“(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;”). This and the other misrepresentations of the record by the Union should cast a pall over the credibility of the Union’s entire brief. *See, e.g., Cal Turner Extended Care Pavilion v. U.S. Dept. of Health & Human Servs.*, 501 F. App’x. 502, 504 (6th Cir. 2012) (“Moreover, the government’s appellate brief misstates the record, therefore undermining its arguments and conclusions. . . . Consequently, we are persuaded by Petitioner’s argument . . .”); *U.S. Ethernet Innovations, LLC v. Netgear, Inc.*, 2013 WL 4112601, at 2 (N.D. Cal. Aug. 12, 2013) (“[M]isstatements such as the ones made in their reply brief cast a pall upon their credibility as a whole *Chesapeake & Potomac Tel. Co.*, 287 NLRB 588, 599 (1987) (“This misstatement of the evidence does not enhance the persuasiveness of the Company’s brief.”)).

A. At 4:00 in the morning.

Q. And *when did you get home* after them?

A. *Like 6:00 in the afternoon.*

. . . Q. *You got back at approximately 6:00 p.m.?*

A. *Yes.*

. . . Q. In the afternoon at 6:00 p.m. You testified that the strike ended at 6:00 p.m. *At what location was the strike?*

A. I know it's—there's like a Michael Park. Well, it's not a park. It's like a field where there's like water fountains. It's like across the street of the university. I don't know the streets.

Q. *And that's fairly close to the Burger King you worked at?*

A. *Yes.*

Q. How far away?

A. Probably like, oh, *a couple miles away.*

Q. *So it wouldn't take long to get there from Burger King to the strike location?*

A *No.*

Q. *You could get there in less than half an hour?*

A. *Yes.*

Thus, the undisputed evidence—contrary to the ALJ's finding and constructive “knowledge” the ALJ imputed to Hayes—establishes that Ortiz did *not* fail to go to work for her 7:00 p.m. shift *because she was on strike*. She missed work simply because she chose to go *home* at the end of the day's activities and not report for work! Nothing in the Act shielded Ortiz from discipline for sitting home on her butt, rather than reporting for her shift.² Accordingly, as a matter of

² The Union makes no attempt whatsoever to even *address* Ortiz' failure to report for work. The GC, without any citation to supporting authority, merely summarily posits (*Brief*, p. 5) the absurd contention that “the conclusion must be drawn that [Ortiz] too was on strike” when she was sitting at home because “withholding services from an Employer is the essence of a strike.” To establish a violation of § 8(a)(1), “[t]here must be some evidence on the record . . . that the

Footnote continued on next page

law, Exception Nos. 42 and 46 (regarding Ortiz) must be sustained and the finding of a violation vis-à-vis Ortiz vacated.

II.

ABSENT KNOWLEDGE BY HAYES AT THE TIME SHE PREPARED THE DISCIPLINARY WRITE UPS THAT HUMBERT, CAMILO AND ORTIZ HAD MISSED WORK AND VIOLATED THE NO-CALL/NO-SHOW POLICY BECAUSE THEY WERE ENGAGED IN PROTECTED ACTIVITY, THERE CAN BE NO VIOLATION OF § 8(A)(1).

A. SECTION 8(A)(3) IS WHOLLY IRRELEVANT:

To support the contention that discipline of Humbert, Camilo, and Ortiz was unlawful, the Union spends several pages of its *Brief* relying on § 8(a)(3) cases and analysis. Union *Brief*, pp. 38, *et seq.* The GC does likewise. GC *Brief*, pp. 3, *et seq.* (“8(a)(1) and 8(a)(3) . . . no-call/no-show warnings to six strikers violated 8(a)(1) and (3)”). As a matter of law, those portions of the *Briefs* must be disregarded because no § 8(a)(3) claim was alleged³ and the ALJ’s only found violations under § 8(a)(1) regarding the discipline. ALJD p. 23/20-22.

B. ABSENT KNOWLEDGE BY HAYES THAT HUMBERT, CAMILO, AND ORTIZ MISSED WORK BECAUSE THEY WERE ENGAGED IN PROTECTED ACTIVITY, THERE CAN BE NO § 8(A)(1) VIOLATION:

Fundamental to a *prima facie* case of a § 8(a)(1) violation is proof the employer had knowledge of the employees’ protected activity. *E.g.*, *CGLM, Inc.*, 350 NLRB 974, 979 (2007) (“[A] respondent violates Section 8(a)(1) of the Act if, *having knowledge of an employee’s concerted activity*, it takes adverse employment action that is ‘motivated by the employee’s protected concerted activity.’” emphasis added), *rev. den., order enf’d sub nom., CGLM Inc. v. NLRB*,

. . . footnote continued from previous page:

activity engaged in was not only concerted but, more significantly, that it was . . . protected by Section 7 of the Act.” *Quantum Electric, Inc.*, 341 NLRB 1270, 1279 (2004), quoting *Scioto Coca-Cola Bottling Co.*, 251 NLRB 766 (1980). The GC fails to explain how Ortiz, sitting at home after conclusion of the strike activities, constituted *protected* or *concerted* activity.

³ See GC Ex. 1-EE ¶ 8.

280 Fed. App'x. 366 (5th Cir. 2008) (quoting *Meyers Industries*, 268 NLRB 493, 497 (1984); *Fortuna Enterprises*, 2008 WL 4735200, at 28 (N.L.R.B. Div. of Judges Oct. 21, 2008) (emphasis added: "I find that Respondent issued written warnings to [five employees] in violation of Section 8(a)(3) of the Act but in the absence of knowledge of their protected-concerted activity did not violate Section 8(a)(1) of the Act."), adopted as modified on other grounds, 354 NLRB 202 (2009); *Gold Kist, Inc.*, 245 NLRB 1095, 1097 (1979). Here, as a matter of law, the GC failed to establish this element.⁴

First, for the reasons previously stated, the ALJ's finding of "*constructive* knowledge" is demonstrably contrary to the record and the known facts, particularly regarding Ortiz.

Second, once again the Union patently misstates the record by claiming that Hayes admitted having *actual* knowledge Ortiz, Humbert, and Camilo had engaged in protected activity before disciplining them. *Brief*, p. 43 ("[Hayes] then claims that she did know that they were on strike before she disciplined them (Tr. 389-90) . . .").⁵ To the contrary, Hayes *never* made such an admission. In fact, Hayes testified that as of 2:30 p.m. on April 15th she knew "some" employees were on strike, and expressly *denied* knowing that "all of them" were on strike (Tr. 389/18-25 to 390/1; emphasis added):

Q. After 2:30 on April 15th.

A. 15th, yes, Ma'am.

⁴ Both the Union and the GC argue that employees need not give notice before going on strike. Union *Brief*, pp. 38, 41; GC *Brief*, pp. 5-6. The contention misses the point. Although no prior notice of a strike is necessary in order for a strike to constitute *protected activity*, that is an entirely different issue from whether an employer has notice or *knowledge* of the protected activity as part of a *prima facie* § 8(a)(1) case. Even the ALJ recognized that knowledge of protected activity is required in order to establish a § 8(a)(1) violation. ALJD p. 22/1-4 ("[T]he General Counsel must prove . . . the Respondent, through Hayes was aware of the protected concerted activity[.]"). Finally, the GC expressly alleged that the discipline was given *because* the employees had engaged in protected activity. GC Ex. 1-EE, ¶ 7(d). *A fortiori*, the GC could not prove that allegation without proving knowledge on the part of the employer.

⁵ The GC makes a similar contention, citing the same pages of the transcript. *See GC's Brief*, p. 4.

. . . Q. And you knew *some of them* were engaged in the strike?

A. Yes.

Q. *Didn't you know all of them were engaged in the strike?*

A. *No.*

Q. Do you recall which ones you knew were engaged in the strike?

A. *The ones that was [sic] on the list.*

The “list” was the Vaughn-Coney-Frazier strike notice (RE 25) Hayes had received at 2:30 p.m. Tr. 355/17-24 (Hayes never received a strike notice containing the names of Ortiz, Humbert, or Camillo); Tr. 356/5-13 (Hayes never received GCE 21 [the Humbert-Camilo-Ortiz notice]); Tr. 354/20 to 355/18 (the only strike notice Hayes received on April 15, 2015 was RE 25 [Vaughn-Coney-Frazier notice]).

III.

EYM'S EXCEPTIONS AND COMPREHENSIVE BRIEFING MORE THAN SATISFY THE REQUIREMENTS OF § 102.46.

Characterizing EYM's exceptions a “bare” ones, the Union contends they should be disregarded in their entirety. *Brief*, pp. 17-19. Conspicuously absent from the Union's *Brief* is any reference to R&R § 102.46(b)(1), which expressly *prohibits* citation of authority or argument in the exceptions when a brief in support is filed. As a matter of law, EYM's exceptions, supported by its briefing, are in substantial compliance with the requirements of § 102.46. *See Vigor Indus., LLC*, 363 NLRB No. 70 (2015); *Am. Water Works Co.*, 361 NLRB No. 3 (2014); *Wal-Mart Stores, Inc.*, 351 NLRB 130, 130 fn. 3 (2007).

IV.

THE GENERAL COUNSEL FAILED TO ESTABLISH THAT LAREDA HAYES' DECISION NOT TO HIRE WISE WAS UNLAWFUL.

A. NO EVIDENCE OF ANTI-UNION ANIMUS BY HAYES:

Both the Union and the GC repeatedly reference supposedly clearly and long-held anti-union animus by Hayes. *Union Brief*, pp. 38, 46, 49, 56, 59; *GC Brief*, p. 22. However, the GC

did not present *any* evidence whatsoever to establish *any* prior anti-union animus on the part of Hayes.

First, the Union and the GC have repeatedly sought to smear Hayes with “proof” of animus based on the fact that Wise and the Union filed a bevy of ULPs against Strategic. *E.g.*, Union *Brief*, p. 38 (“[H]er history of anti-union animus through having been named in several discrimination complaints before the NRLB is well documented.”). However, the GC did not present *any* substantive evidence of *any* prior unfair labor practice by Hayes or any other manager committed against Wise or any other employee when the East 47th Street restaurant was operated by Strategic. Additionally, it is undisputed that all of the prior unfair labor practice charges were resolved with Strategic by virtue of settlement agreements which contained a non-admission of liability clause. RE 73, 74, and 75. Thus, as a matter of law, there is absolutely no evidence of any prior unfair labor practices committed by Hayes or of any prior anti-union bias on her part. *E.g.*, *Beacon Sales Acquisition, Inc.*, 357 NLRB No. 75, n. 4 (2011); *Camaco Lorain Mfg.*, 356 NLRB No. 143 (2011) (“[T]he only type of settlement agreement that can be used to establish proclivity to violate the Act is a formal settlement, without a nonadmission clause.”); *Sheet Metal Workers Int’l Ass’n*, 323 NLRB 207 (1997) (such agreements have “no probative value in establishing that the Respondent violated the Act in the cases at issue.”).⁶

To the contrary, despite the fact Wise and numerous other Strategic employees who were active with the Union had worked with Hayes for many years, there was no evidence whatsoever of so much as a single anti-union statement or sentiment allegedly ever expressed by Hayes.

B. OTHER UNFOUNDED OR UNSUPPORTED CONTENTIONS:

First, like the ALJ, both the Union (*Brief*, pp. 51, 52: the “elusive” list and directive not produced) and the GC (*Brief*, p. 24) ask the Board to draw adverse inferences against Hayes because

⁶ The only proclivity shown by the prior ULPs is that of Wise and the Union to file them and of Strategic—a company bent on ridding itself of its restaurants—to quickly settle them to avoid the expense and hassle of litigation.

of a lack of documentation *from Strategic*. As a matter of law, there is no basis for drawing such an inference. “Generally, it is improper to draw an adverse inference if a satisfactory explanation is provided for the failure to produce the documents.” *Sb Tolleson Lodging, LLC*, 2015 WL 1539767 (N.L.R.B. Div. of Judges Apr. 7, 2015), *adopted*, 2015 WL 2395865 (May 19, 2015).

Second, the GC erroneously contends (*Brief*, pp. 21-22) that Hayes improperly relied on the prior disciplinary actions imposed when Wise was a Strategic employee because, under the settlement agreements *with Strategic* they were to be expunged. However: (a) EYM was not a party to those agreements, *see SW Reg'l Council of Carpenters*, 2011 WL 2158824, at 5 (N.L.R.B. June 1, 2011) (“a settlement agreement binds only the parties to the agreement, and does not affect the rights of non-parties”), and (b) none of the agreements contain any language purporting to bind successors. *Compare L.J. Logistics, Inc.*, 339 NLRB 729 (2003) (successor bound by settlement where successor *was a party* to the agreement and expressly *agreed* both that it was a successor and that it was bound by the agreement). Thus, Wise was *not* prohibited from considering the prior disciplinary actions in making her hiring decision. *See Cont'l Pet Tech.* 291 NLRB 290, 303 (1988) (“Respondent, as any employer would be, is entitled to rely on prior warnings issued [employee].”).

Third, both the Union (*Brief*, pp. 50, 55, 58) and the GC (*Brief*, pp. 24-25) attempt to discount Wise’s attempted theft of food while employed by Strategic by urging Wise’s account that he had permission to take the food. However, the ALJ expressly discredited and rejected Wise’s account and no exceptions have been taken to those findings. Accordingly, there is no credible evidence upon which for the Union or the GC to contend Wise had permission to take the food.

Fourth, in a similar vein, like the ALJ, the Union (*Brief*, p. 49) and the GC (*Brief*, p. 21) impermissibly attempt to substitute their business judgment regarding the seriousness of Wise’s misconduct for that of the employer.

Fifth, ironically, the Union and the GC somehow find an inference of discrimination from the fact that Wise was treated *more favorably* by being afforded the opportunity to apply for work with EYM than other Strategic employees who were not hired and not allowed to apply.

Given the propensity for Wise and the Union to file ULP is there any doubt that had Hayes not given Wise an application Wise and the Union would have claimed *that* was discriminatory? The fact is that the “final straw” which was a factor in Hayes’ decision not to hire Wise was the significant change in his availability which he admitted making on his application.⁷

Finally, the facts remain that:

- There is no evidence of a similarly situated former Strategic employee, *i.e.*, one with a similar history of, *e.g.*, tardiness, insubordination, attempted theft, *etc.*, who had *not* engaged in protected activity who was treated more favorably.
- The evidence is undisputed that Hayes hired numerous other former Strategic employees to work for EYM who, to Hayes’ knowledge, were similarly situated with Wise *vis-à-vis* having previously engaged in union and protected concerted activity.
- Hayes did *not* hire two former Strategic employees who had not, to Hayes’ knowledge, been involved in any union or protected activity.

In short, the ALJ’s finding that Hayes’ decision not to hire Wise was motivated by discriminatory animus is nothing more than suspicion, surmise, and conjecture, *see Cardinal Home Prods., Inc.*, 338 N.L.R.B. 1004, 1009 (2003), and the improper substitution of the ALJ’s judgment for the business judgment of EYM. “The mere fact that [Wise] was active in the union cannot alone support a finding of discriminatory [failure to hire] because there is here substantial evidence that the employer [refused to hire] him for cause.” *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 492-93 (8th Cir. 1946).

⁷ Like the ALJ, the GC erroneously alleges (*Brief*, p. 20) Wise was disparately treated regarding his availability because Cline and Williams had some limitations on their availability. As a matter of law, neither Cline nor Williams—both managers—were similarly situated with Wise. *See Eng. Comfort Sys., Inc.*, 346 NLRB 661, 662 (2006) (ALJ erred by improperly basing § 8(a)(3) violation on comparison with employees who were not similarly situated).

CONCLUSIONS AND REQUESTED RELIEF

For the reasons stated in EYM’s exceptions and related briefing, the *Complaint* should be, in all things, dismissed.

Respectfully submitted,

/s/ John L. Ross
JOHN L. ROSS⁸
Texas State Bar No. 17303020
THOMPSON, COE, COUSINS & IRONS, L.L.P.
700 North Pearl Street, Suite 2500
Dallas, Texas 75201
Telephone: (214) 871-8200
Facsimile: (214) 871-8209
Email: jross@thompsoncoe.com
Email: jweber@thompsoncoe.com
**ATTORNEYS FOR EYM KING OF
KANSAS, LLC**

CERTIFICATE OF SERVICE

I certify that on the 5th day of April, 2016, a copy of the foregoing document was served by email and by certified mail, return receipt requested, on:

Lynn R. Buckley
National Labor Relations Board
Fourteenth Region, Subregion 17
8600 Farley Street
Suite 100
Overland Park, Kansas 66212-4677

Fred Wickham
Wickham & Wood, LLC
4317 South River Blvd.
Independence, Missouri 64055-4586

/s/ John L. Ross
JOHN L. ROSS

⁸ Board Certified in Labor & Employment Law and Civil Trial Law by the Texas Board of Legal Specialization