

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREEN APPLE SUPERMARKET OF  
JAMAICA, INC.

and

LOCAL 342, UNITED FOOD &  
COMMERCIAL WORKERS

Cases 29-CA-183238  
29-CA-188130

**RESPONDENT GREEN APPLE SUPERMARKET OF JAMAICA, INC.'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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*Attorney for Respondent*

Respondent Green Apple Supermarket of Jamaica, Inc. (“Respondent”) hereby takes exception to November 1, 2017 decision (“Decision” or ALJD”) of Administrative Law Judge Kenneth W. Chu (“ALJ”), as follows:

With regard to the ALJ’s “Alleged Unfair Labor Practices” in the “Findings of Fact” (ALJD 4:16-17:43):

1. Respondent begs leave to refer the original trial exhibits of the parties and transcripts to the Court for an interpretation of their true import and meaning. Some of the ALJ’s summations are not the facts. For example, ALJ found that, “Almengo was also aware that Tineo and Smith would arrive late to work, but believed that Smith was disciplined only after the Union came in.” (ALJD 11:12-13). Actually, Almengo testified to the following:

Q. Which employees have you observed being late?

A. Joel [Tineo] and Anthony [Smith].

(Tr. 535:13-14).

“Would arrive late to work” means different from “being late” to work in the instant matter.

2. Respondent also objects to the ALJD’s findings of fact that contains hearsay, double hearsay, the statements made by the General Counsel’s witnesses who had no personal knowledge to the events, and speculations.

With regard to the ALJ’s “Discussion and Analysis” (ALJD 17:45-36:26):

3. The ALJ’s finding that “David, Wang, and Perez are supervisors under 2(11) of the Act . . . and Jesse, Yeung and Perez are agents of the Respondent under 2(13) of the Act” (ALJD 20:49-50).
4. The ALJ’s finding that “the General Counsel has made a prima facie showing that the union and concerted activity of Smith and Tineo was a motivating factor in the Respondent’s decision to discipline and discharge them” (ALJD 22:12-14).
5. The ALJ’s finding that “the General Counsel has shown the existence of activity protected by the Act. Second, the General Counsel has proven that the Respondent was aware that the employees engaged in such activity. The General Counsel has also shown that the alleged discriminatees suffered an adverse employment action because of the Respondent’s animus” (ALJD 22:17-20).

6. The ALJ's finding that "Tineo engaged in activity in support of the Union's organizing campaign at the Jamaica facility and that both engaged in concerted activity with other unit workers regarding their discussions on the benefits of joining the Union" (ALJD 22:22-38).
7. The ALJ's finding the "Knowledge" (ALJD 22:40-23:8).
8. The ALJ's rejection that "totally without merit the Respondent's argument that employer knowledge is not established when it thought but did not know for certain that union activity occurred" (ALJD 23:3-5).
9. The ALJ's finding that "The Board and the courts have long held that when the General Counsel proves an employer suspects alleged discrimmatees of union activities, the knowledge requirement is satisfied." (ALJD 23:5-7).
10. The ALJ's reliance on the standard set forth in *Turnbull Cone Baking Co. of Tennessee v. NLRB*, 778 F.2d 292, 296 (6th Cir 1985). (ALJD 23:7-8).
11. The ALJ's finding that "the alleged nondiscriminatory reason for the discipline and discharge of Smith and Tineo as clearly baseless." (ALJD 23:41-42).
12. The ALJ's finding that "Under my *Bannon Mills* saction order, I agreed with the General Counsel that the Respondent failed to provide in paragraph 4(c) of the subpoena. . . ." (ALJD 24:5-13).
13. To the extent that Respondent has provided documents, the ALJ's finding that "Respondent did not provide any documents responsive to paragraphs 4(c) and 6(b) of the subpoena" (ALJD 24:16-17).
14. The ALJ's finding that "a close review of the company policy does not support the 'three strikes and out' policy as it applied to them" (ALJD 24:27-29).
15. The ALJ's finding that, "With regard to Smith, the Respondent did not provide credible evidence to document the incident that caused his discharge or that Smith had a work history of unsatisfactory performance" (ALJD 24:47-49).
16. The ALJ's finding that, "With regard to Tineo, there is clearly no store policy that three tardiness violations would result in his discharge" (ALJD 25:17-18).
17. The ALJ's finding that Tineo was creditable that he was permitted to being late to work. (ALJD 25:20-28).
18. The ALJ's finding that Guo was not creditable with regarding to events cited. (ALJD 25:30-26:1).
19. The ALJ's finding that Tineo's "three warnings and the July 20 discharge notice was simply manufactured as a pretext to discharge Tineo for his union and concerted activity" (ALJD 26:2-3).

20. The ALJ's reliance on the standard set forth in *Publishers Printing Co., Inc.*, 317 NLRB 933, 938 (1995), *enfd.* 106 F.3d 401 (6th Cir. 1996). (ALJD 26:5-9).
21. The ALJ's finding "that the timing of the discharges, shortly after Smith and Tineo voiced their support for the Union and the Board's certification of the Union as the exclusive collective-bargaining representative of the meat department unit also supports an inference that the Respondent's disciplines and discharges were motivated by their support for the Union" (ALJD 26:13-16).
22. The ALJ's finding that "Tineo discussed supporting the Union with Smith and other workers on the work floor" (ALJD 26:22-23).
23. The ALJ's finding that "In response to their union activities, Smith and Tineo were fired less than 2 months after the June 24 election" (ALJD 26:23-24).
24. The ALJ's finding that "[t]he timing of the two discharges just weeks after the union election shows discriminatory antiunion animus" (ALJD 26:29-31).
25. The ALJ's finding that "[t]he timing and the simultaneous issuance of three disciplinary warnings on the same day as their discharge represents significant evidence of unlawful motivation" (ALJD 26:33-34).
26. The ALJ's reliance on the standard set forth in *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1084) (ALJD 26:38-39).
27. The ALJ's finding that "[t]he timing and the simultaneous issuance of three disciplinary warnings on the same day as their discharge represents significant evidence of unlawful motivation" (ALJD 26:33-34).
28. The ALJ's finding that "antiunion animus was demonstrated by Perez's comments to Smith and the unit workers. As noted above, Perez had a one-on-one conversation with Smith about the Union about June 8. Perez related to Smith that he did not care for being a union member after a different union he belonged had fraudulently taken money from its members. Perez told Smith that David (store manager) threatened to fire the meat department employees if they join the union. Perez stated 'David did not want the Union and that anyone who did vote would get fired' (Tr. 630-633). **On this point, I credit Perez's testimony** that David, the store manager, had threatened to discharge any workers who voted for the Union because the Respondent never rebutted this testimony and indeed, Perez's statement is an admission that clearly shows the Respondent's antiunion animus. Perez was also present on the morning of the election when he translated into Spanish a message from Jesse during a captive audience meeting with the unit employees that the Respondent will close the store if the workers voted for the Union" (ALJD 26:46-27:5) (emphasis added).
29. The ALJ's finding that "Respondent demonstrated antiunion animus in violation of Section 8(a)(3) and (1) . . . that the disciplines and discharge of Smith and Tineo was motivated by their union support and activity for the Union, and that

the Respondent had not met their burden of persuasion to demonstrate the same action would have taken place even in the absence of the protected conduct” (ALJD 27:7-11).

30. The ALJ’s finding that “Respondent violated Section 8(a)(3) and (1) when it applied a more strict enforcement of work rules to Smith, Tineo and the unit employees” (ALJD 28:47-48).
31. The ALJ’s finding that “Respondent, by the name of Jesse . . . during a captive audience meeting, made a threat of plant closure to employees in violation of Section 8(a)(1) of the Act” (ALJD 29:9-12).
32. The ALJ’s finding about “The Respondent’s June 8 Threats” (ALJD 29:25-36).
33. The ALJ’s finding about “The Respondent’s August 10 Threats” (ALJD 29:38-30:4).
34. The ALJ’s finding about “The Respondent’s Captive Audience Meeting by Owner Jesse” (ALJD 30:6-31:21).
35. The ALJ’s finding that “The Respondent violated Section 8(a)(5) and (1) of the Act when it refused and failed to provide the relevant information requested” (ALJD 31:23-35:17).

With regard to the ALJ’s “Conclusions of Law” (ALJD 36:28-37:21):

36. The ALJ’s conclusion that “Jason F. Wang and Erick Peralta Perez are supervisors within the meaning of Section 2(11) of the Act and agents within Section 2(13) of the Act. Wendy Yeung and Jesse are agents within Section 2(13) of the Act.” (ALJD 36:33-35).
37. The ALJ’s conclusion that “The Respondent discriminatorily disciplined and discharged Anthony Smith for his union and concerted activities in violation of Section 8(3) and (1) of the Act and interfered with, restrained, and coerced Anthony Smith in the exercise of his rights guaranteed in Section 7 of the Act.” (ALJD 36:47-50).
38. The ALJ’s conclusion that “The Respondent discriminatorily disciplined and discharged Joel Tineo for his union and concerted activities in violation of Section 8(3) and (1) of the Act and interfered with, restrained, and coerced Joel Tineo in the exercise of his rights guaranteed in Section 7 of the Act.” (ALJD 37:1-4).
39. 7. The Respondent threatened unit employees with termination and plant closure for their support of the Union and enforced stricter work rules on the unit employees in violation of Section 8(3) and (1) of the Act. ” (ALJD 37:6-8).

40. The ALJ's conclusion that "The Respondent failed to notify and bargain with the Union regarding the unilateral implementation of written work schedules for the unit employees in violation of Section (5) and (1) of the Act." (ALJD 37:10-12).
41. The ALJ's conclusion that "The Respondent refused and failed to timely provide the information requested by the Union that is necessary and relevant to perform its duties as the exclusive collective bargaining representative of the unit employees." (ALJD 37:14-16).
42. The ALJ's conclusion that "The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act." (ALJD 37:18-19).

With regard to the ALJ's "Remedy" (ALJD 37:23-39:20):

43. The ALJ's issued remedy that Respondent "be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act" (ALJD 37:26-27).
44. The ALJ's issued remedy to "order the Respondent to offer Smith and Tineo full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010)" (ALJD 37:28-35).
45. The ALJ's issued remedy to order "Respondent to compensate Smith and Tineo for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years." (ALJD 37:38-42).
46. The ALJ's issued remedy to order "Respondent [to] compensate Smith and Tineo for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings" (ALJD 37:44-46).
47. The ALJ's issued remedy to order "Respondent [to] expunge all references to the disciplines dated August 8, 9, and 10, 2016 issued to Anthony Smith, including said 'Employee Warning Notices' from their files and notify him in writing that it has done so and that the warnings will not be used against him in any way" (ALJD 38:5-9).
48. The ALJ's issued remedy to order "Respondent [to] expunge all references to the disciplines dated July 4, 18 and 20, 2016, issued to Joel Tineo, including said

'Employee Warning Notices' from their files and notify him in writing that it has done so and that the warnings will not be used against him in any way" (ALJD 38:11-15).

49. The ALJ's issued remedy to order "Respondent [to] immediately rescind the unilateral implementation of the written work schedules for the unit employees and, upon request, bargain with the Union on the work schedules of the unit employees" (ALJD 38:17-19).
50. The ALJ's issued remedy to order "Respondent [to] immediately, upon request of the Union, provide the relevant information in its request to the Respondent about September 8, 2016" (ALJD 38:21-22).
51. The ALJ's issued remedy to order "the attached notice to [be] read publicly by the Respondent's representative or by a Board agent in the presence of the Respondent's representative in the English and Spanish languages" (ALJD 39:18-20).

With regard to the ALJ's Order (ALJD 39:22-41:9):

52. The ALJ's order that Respondent cease and desist from "(a) Discharging, disciplining, threatening or otherwise discriminating against employees because they engaged in protected union and concerted activities. (b) Failing and refusing to timely provide Local 342, United Food & Commercial Workers, AFL-CIO with relevant information in its role as the exclusive collective-bargaining representative of the unit employees. (c) Failing to bargain with Local 342, United Food & Commercial Workers, AFL-CIO regarding changes to the written work schedules provided to the bargaining unit employees.(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." (ALJD 39:30-40:2).
53. The ALJ's order that Respondent take the following affirmative action to "(a) Make Anthony Smith and Joel Tineo whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, suffered as a result of the unlawful warnings and discharge, as set forth in the remedy section of this decision. (b) Compensate Anthony Smith and Joel Tineo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. (c) Immediately offer full reinstatement to Anthony Smith and Joel Tineo and if the offers are accepted, reinstate them to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. (d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Anthony Smith and Joel Tineo, including their warnings and thereafter notify

them in writing that this has been done and that the discipline will not be used against them anyway. (e) Provide to the Union, upon request, the information request made upon the Respondent on or about September 8, 2016. (f) Bargain with the Union, upon request, regarding changes to the written work schedules provided to the bargaining unit employees. (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order. (i) Within 14 days after service by the Region, post at its existing property at the Jamaica facility, Queens, New York, a copy of the attached notice marked "Appendix"21 in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 24, 2016. (j) Mail a copy of said notice to Anthony Smith and Joel Tineo at their last known addresses. (k) Within 21 days after service by the Region, file with the Regional Director for Region 29, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply." (ALJD 40:4-41:9).

**With regard to the ALJ's *Bannon Mill Sanction* (ALJD Appendix 1): Exception in its entirety.**

Respectfully submitted this 4<sup>th</sup> day of December, 2017.

/s/ David Yan

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**CERTIFICATE OF SERVICE**

I certify that the foregoing *Respondent Green Apple Supermarket of Jamaica, Inc.'s Exceptions to the Decision of the Administrative Law Judge* was electronically filed on December 4, 2017, through the Board's website, is available for viewing and downloading from the Board's website, and will be sent by means allowed under the Board's rules and Regulations to the following parties:

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