

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
BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. PRELIMINARY STATEMENT

Green Apple Supermarket of Jamaica, Inc. (“Respondent”), by and through their attorney, David Yan, Esq., respectfully submits this brief in support of their exception taken to the Decision (“Decision” or ALJD”) of Administrative Law Judge Kenneth W. Chu (“ALJ”), dated November 1, 2017. As set forth herein, Respondent respectfully submits that the ALJ made a clearly erroneous decision in finding that Respondent committed any of unfair labor practices, which the decision is arbitrary and capricious. Specifically, ALJ erred in finding that (i) Respondent discriminatorily disciplined and discharged Anthony Smith for his union and concerted activities in violation of Section 8(a)(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; (ii) Respondent discriminatorily disciplined and discharged Joel Tineo for his union and concerted activities in violation of Section 8(a)(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; (iii) 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(a)(3) and (1) of the Act; (iv) 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; (5) 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; and (6) The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent also respectfully submits that the ALJ made a clearly erroneous decision in issuing his *Bannon Mills* Sanction Order, where the General Counsel actually received the documents but failed to report to the ALJ, which the decision is arbitrary and capricious.

II. STATEMENT OF THE CASE AND FACTS

Respondent Green Apple Supermarket of Jamaica, Inc. operates a supermarket in Jamaica, New York. Respondent has a meat unit that has about 6 employees.

Joel Tineo admitted that he has been late to work frequently, sometimes two or three times per week. (ALJD 25:18-19) (TINEO Tr. 469:21-470-2). Actually Joel Tineo was late to the Court on his Court date on April 28, 2017 for more than 20 minutes. (TINEO Tr. 435; 439:4-6). ALJ failed to note on the record that Joel Tineo was late on the Court date without good cause when all parties were waiting for him since 9:30 a.m. on that date. (*Id.* at 439).

Anthony Smith was discharged in January 2016 absent his union activities although he was recalled to work about 1 or 2 months later. (SMITH Tr. 337:14-19).

Anthony Smith has been late to work often. (SMITH Tr. 401:1-402:5). Anthony Smith also failed to punch out twice during the lunch break, in violating the work rules and getting paid while not working. Nicholas Almarante Almengo observed that Anthony Smith came late to work since Nicholas Almarante Almengo started working there in 2015. (ALMENG0 Tr. 535:17-18). Nicholas Almarante Almengo complained to Eric Paltra about Joel Tineo and Anthony Smith being late to work. (ALMENG0 Tr. 542:24-543:9). Nicholas Almarante Almengo was called as the witness for the General Counsel's case in chief on May 2, 2017.

Actually, Anthony Smith and Joel Tineo were the only two employees who were constantly late to work. (Almengo Tr. 535:13-14).

Anthony Smith received and acknowledged the store policy and work schedule.

Joel Tineo received the store policy; but no signature in the Respondent's file about the store policy issued to Joel Tineo. Joel Tineo received and acknowledge his work schedule.

Anthony Smith is a friend to Eric Peralta. (PERALTA Tr. 627:10:12). Eric Peralta had given Anthony Smith advice about his personal life. (*Id.* at 641:16-17). Eric Peralta shared his “personal thoughts” about the union with Anthony Smith. (*Id.* at 629:24-630:21).

Joel Tineo was not present during the election on June 24, 2016. (ALMENGO Tr. 529:6-15) (GUO Tr. 769:12-15). It can be reasonably inferred that Joel Tineo did not vote for the Union so that he did not support the Union.

Although Joel Tineo was terminated by Respondent on July 20, 2016, Respondent reinstated Joel Tineo to work in his initial position. (Guo Tr. 809:7-14) (GC-10) (R-5) After the reinstatement, Respondent continued to work until he voluntarily quitted job on August 15, 2016. (Guo Tr. 812:2-815:8). Joel Tineo was not terminated by Respondent after he was reinstated. (*Id.*).

Other than Eric Peralta, no one from Respondent talked to Anthony Smith and/or Joel Tineo about Union.

Jesse did not speak English. Jesse did not speak to Eric Peralta about the union. Jesse did not speak to employees during the Captive Audience Meeting on June 24, 2016.

Despite the simple and straight forward facts, ALJ and the General Counsel tried to portrait Respondent as nasty antiunion employer engaging in unfair labor practices, although Respondent’s actions were motivated by their legitimate business purposes to manage the supermarket.

III. ISSUES PRESENTED

- A. Whether the ALJ failed to implicate dual motivation analysis and erred in finding Respondent disciplined and discharged Joel Tineo in violation of Act for the unfair labor practices, where Joel Tineo had been repeatedly and habitually late to work.

- B. Whether the ALJ erred in recommending remedy to Joel Tineo, where Joel Tineo was reinstated to work right after he was discharged; but quitted the job voluntarily on his own.
- C. Whether the ALJ failed to implicate dual motivation analysis and erred in finding Respondent disciplined and discharged Anthony Smith in violation of Act for the unfair labor practices, where Anthony Smith had been repeatedly and habitually late to work.
- D. Whether the ALJ erred in recommending remedy to Anthony Smith, where Anthony Smith failed to meet his burden of proof that he had ever tried to find a job after the discharge; but could not find a job and still had been unemployed.
- E. Whether the ALJ Erred in Issuing his *Bannon Mill* Sanction Order, where the General Counsel's Subpoena Was Overly Broad, Vague and Limited by the ALJ's Own Time Frame Limitation from January 1, 2016 through September 30, 2016.

IV. LEGAL ARGUMENT

- A. The ALJ Failed to Implicate Dual Motivation Analysis and Erred in Finding Respondent Disciplined and Discharged Joel Tineo in Violation of Act For The Unfair Labor Practices.

It is undisputed that Joel Tineo had been repeatedly and habitually late to work during his employment with Respondent.

“The lawfulness of [Joel Tineo]’s discharge implicates dual motivation analysis.” *NLRB v. Starbucks Corp.*, 679 F.3d 70, 80 (2d Cir. 2012). “Initially, the General Counsel must establish a prima facie case that protected conduct was a motivating factor in the employer’s decision to fire. The burden then shifts to the employer to show, as an affirmative defense, that the discharge would have occurred in any event and for valid reasons.” *Id.* (quoting *National Labor Relations Board v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988)) (internal quotation marks omitted); accord *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980), as clarified by *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276-78, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)).

In the instant case, Respondent submits to the Board that the General Counsel has not established a *prima facie* case that Respondent's discharge of Joel Tineo was substantially motivated by Gross's union activity. As noted, it is undisputed that Joel Tineo did not participate in the voting and did not vote for the Union. From this, it should have been reasonable to infer that Joel Tineo was not active in the Union activities and did not support the Union. Therefore, it should have been unreasonable for the ALJ to infer that Respondent possessed a general anti-union animus.

Furthermore, Respondent submits to the Board that the ALJ has misapplied the second step of the burden-shifting analysis. As noted, at that step the issue is whether Respondent would have fired Joel Tineo absent his union activity.

It has to be noted that plain English meaning of "late" as defined in Merriam-Webster is as follows:

- a (1) : coming or remaining after the due, usual, or proper time
- a *late* spring • was *late* for class (2) : of, relating to, or imposed because of tardiness • had to pay a *late* fee.

<<https://www.merriam-webster.com/dictionary/late>>.

Therefore, late is late. Although the General Counsel attempted to portrait that "late" might not be so "late", late is late. A reasonable trier of fact does not need any other reference, such as work schedule, to find whether one was late to work after the one admitted he was late to work.

Here, the substantial evidence in the record that Joel Tineo had been repeatedly and habitually late to work during his employment with Respondent reveals that Respondent would have discharged Joel Tineo anyway absent Joel Tineo's union activities.

B. The ALJ Erred in Recommending Remedy to Joel Tineo, where Joel Tineo was Reinstated to Work Right after He Was Discharged; but Quitted the Job Voluntarily on His Own.

The ALJ has ignored and misplaced fact that Joel Tineo was reinstated to work right after he was discharged; but quitted the job voluntarily on his own. Because Joel Tineo was reinstated to work right after he was discharged but quitted the job voluntarily on his own, the substantial evidence in record does not support the ALJ's recommendation for remedy to Joel Tineo. After the reinstatement, any violation of the Joel Tineo's rights under the Act is harmless.

C. The ALJ Failed to Implicate Dual Motivation Analysis and Erred in Finding Respondent Disciplined and Discharged Anthony Smith in Violation of Act For The Unfair Labor Practices.

It is undisputed that Anthony Smith had been repeatedly and habitually late to work during his employment with Respondent.

By the same analysis under Section A regarding Joel Tineo, Respondent submits to the Board that the ALJ has misapplied the second step of the burden-shifting analysis. As noted, at that step the issue is whether Respondent would have fired Anthony Smith absent his union activity. Here, the substantial evidence in the record that Anthony Smith had been repeatedly and habitually late to work during his employment with Respondent reveals that Respondent would have discharged Anthony Smith anyway absent Anthony Smith's union activities.

It has to be noted that Anthony Smith in the history was discharged once in January 2016 absent his union activities although he was later recalled to work about 1 or 2 months later. Therefore, Respondent discharged Anthony Smith out of their legitimate business purposes to effectively manage their work.

- D. The ALJ Erred in Recommending Remedy to Joel Tineo and Anthony Smith, Where Joel Tineo and Anthony Smith failed to Meet Their Burden of Proof that They Had Ever Tried to Find a Job After the Discharge; but Could not Find a Job and Still Had Been Unemployed.

The ALJ misplaced facts and erroneously recommend remedy where Joel Tineo and Anthony Smith had failed to mitigate the damage by their attempt to find a suitable job.

Neither Joel Tineo nor Anthony Smith presented any evidence that either of them ever tried to find a job equivalent or similar to the job that they had with Respondent. The substantial evidence in record reveals that Anthony Smith basically just sat there doing nothing without any attempt to work somewhere. The evidence was silent about the Joel Tineo's attempt to find a job after he voluntarily quitted job with Respondent. Given the fact that Anthony Smith was paid minimum wage when he worked with Respondent, he should not have any trouble to find a suitable job anywhere else. Therefore, Anthony Smith has failed to meet his burden of proof that he had ever tried to find a job after the discharge; but could not find a job and still had been unemployed. Likewise, Joel Tineo would also fail to meet his burden to mitigate damages.

Had the ALJ's analysis holds water, the discharged employee would have hoped the litigation against Respondent goes on for years so that the discharged employee could rest at home to take big payments years later without paying any income taxes because the ALJ would have recommended the Respondent to pay income taxes on the top of the big payments. (ALJD 37:38-42). The public policy for mitigating damages does not support the ALJ's decision, which is arbitrary and capricious.

- E. The ALJ Erred in Issuing his *Bannon Mill* Sanction Order, where the General Counsel's Subpoena Was Overly Broad, Vague and Limited by the ALJ's Own Time Frame Limitation from January 1, 2016 through September 30, 2016.

The ALJ acknowledged that the General Counsel's subpoena is too far reaching for any General Counsel's subpoena. (Guo Tr. 807:17-25). The General Counsel's motion for *Bannon*

Mill Saction did not truly and accurately report that the General Counsel received production of the store policy and work schedule and entire records of time sheet (or time cards) prior to the extended due day, except missing Nicholas Almarante Almengo's documents after he quitted the job in the Respondent's store voluntarily. The ALJ acted on the inaccurate report of the General Counsel regarding the production of the documents in issuing the *Bannon Mill* Sanction Order and caused the prejudice to the defense of Respondent. Respondent was prevented to present certain information, documents, and witnesses in their defense due to the *Bannon Mill* Sanction.

V. CONCLUSION

For all of the above reasons, the Board should reverse the ALJ's findings and conclusions of law, and dismiss the allegations.

Dated: Flushing, New York
December 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing *Respondent Green Apple Supermarket of Jamaica, Inc.’s Brief in Support of the Exceptions to the Decision of the Administrative Law Judge* was electronically filed on December 5, 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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