

5. On April 6th, an unexpected emergency arose on another legal matter being handled by Counsel which required Counsel's immediate attention, and which diverted counsel's time and attention for most of the business day on April 6th. As a consequence, Counsel was not able to file the Exceptions and Brief prior to the close of business, as was originally intended.

6. Further, due to a previous family commitment,¹ Counsel was not able to remain at the office after regular business hours to complete the filing, but instead brought the case file home for completion that evening after attending to various family matters.

7. Despite not being able to complete the exceptions and brief during business hours, Counsel reasonably believed he would be able to complete *and file* the exceptions and brief on or before the applicable 11:59 p.m. deadline. However, working from home, Counsel experienced intermittent difficulty establishing an internet connection from his home computer. As a result, accessing the necessary case materials to finalize the documents for filing, and completing the filing itself, proved significantly more time-consuming than Counsel anticipated.

8. Ultimately, although counsel completed the Exceptions and Brief prior to 11:59 a.m. (Chicago Time), Counsel was unable to effectuate the electronic filing until approximately 12:23 a.m. (Chicago Time). Immediately thereafter, Counsel separately served counsel for the General Counsel as well as Mr. Ceren via email at approximately 11:27 a.m. (Chicago Time).

9. Section 102.2(d)(1) of the National Labor Relations Board's Rules and Regulations provides that exceptions and briefs in support thereof "may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and

¹ Counsel has four (4) school-age children and his wife was on a previously scheduled 5-day trip out of the country from April 5th through April 9th.

when no undue prejudice would result.”

10. Although Counsel properly calendared the filing deadline and commenced an analysis of the Decision well in advance of the deadline, the unexpected legal emergency on April 6th, combined with counsel’s inability to remain in the office past regular business hours, and also combined with Counsel’s difficulty achieving internet connectivity and access to necessary case materials connectivity from his home ultimately culminated in Counsel filing the Exceptions and Brief late. Counsel regrets that he neglected to better plan for the potential convergence of these unexpected contingencies.

11. On Monday, April 9th, Counsel reached out to counsel for the General Counsel to inquire whether the General Counsel would object to a requested late filing and was advised that General Counsel does object to this request.

12. This Motion is not interposed for the purpose of delay or harassment, but rather to cure Counsel’s inadvertent late-filing in accordance with the Board’s rules and to preserve Respondent’s good faith exceptions to the Decision.

13. Counsel attaches hereto as Exhibit A an Affidavit in Support of this Motion.

14. Counsel attaches hereto as Exhibit B a complete and accurate copy of Respondent’s Exceptions and Brief previously filed as referenced herein.

WHEREFORE, for the reasons set forth above, Respondent respectfully request that:

A. The Board find that the facts set forth in support of Respondent’s request for late-filing constitute good cause based on excusable neglect as contemplated by Section 102.2(d);

B. The Board find that the late filing, if granted, would satisfy the “reasonable time” requirement as contemplated by Section 102.2(d); and

C. The Board find that no undue prejudice would result if the requested late-filing is granted.

Respectfully Submitted,

M & M AFFORDABLE PLUMBING, INC.

By: /s/ Patrick M. Griffin
One of Its Attorneys

Patrick M. Griffin
Joshua M. Feagans
Griffin | Williams LLP
501 W. State Street, Suite 203
Geneva, IL 60134
(630) 524-2563

CERTIFICATE OF SERVICE

I, PATRICK M. GRIFFIN, HEREBY CERTIFY THAT ON April 10, 2018, I electronically filed a copy of Respondent's Motion for Leave to File Exceptions and Supporting Brief with the Office of the Executive Secretary, and, on that same day, copies were electronically served on the following individuals by email.

Helen Gutierrez^[SEP] Counsel for the General Counsel National Labor Relations Board
Region 13^[SEP] 219 S. Dearborn, Room 808 Chicago, Illinois 60604
Helen.gutierrez@nlrb.org

Jeffrey Ceren^[SEP] 855 Bayway Blvd., Unit 406 Clearwater Beach, FL 33767
Jaceren01@gmail.com.

/s/ Patrick M. Griffin

and Brief prior to the close of business, as I had originally intended.

7. Further, due to a previous family commitment,¹ I was not able to remain at the office after regular business hours to complete the filing. Instead, I brought the case file home for completion that evening after attending to various family matters.

8. Despite not being able to complete the exceptions and brief during business hours, I reasonably believed that I would be able to complete *and file* the exceptions and brief on or before the applicable 11:59 p.m. deadline. However, working from home, I experienced intermittent difficulty establishing an internet connection from my home computer. As a result, accessing the necessary case materials to finalize the documents for filing, and completing the filing itself, proved significantly more time-consuming than I had anticipated.

9. Ultimately, although I completed the Exceptions and Brief prior to 11:59 a.m. (Chicago Time), I was unable to effectuate the electronic filing until approximately 12:23 a.m. (Chicago Time). Immediately thereafter, I separately served counsel for the General Counsel as well as Mr. Ceren via email at approximately 11:27 a.m. (Chicago Time).

10. I regret that I neglected to better plan for the potential convergence of these unexpected contingencies.

11. On Monday, April 9th, I reached out to counsel for the General Counsel to inquire whether the General Counsel would object to a requested late filing and was advised that General Counsel does object to this request.

12. This Motion is not interposed for the purpose of delay or harassment, but rather to

¹ I have four (4) school-age children and my wife was on a previously scheduled 5-day trip out of the country from April 5th through April 9th.

cure Counsel's inadvertent late-filing in accordance with the Board's rules and to preserve Respondent's good faith exceptions to the Decision.

FURTHER AFFIANT SAYETH NOT.



Patrick M. Griffin

SUBSCRIBED AND SWORN TO
before me this day 10 of April, 2018.



NOTARY PUBLIC

establishing that there were substantially equivalent jobs available in the relevant geographical area. (SD 12:1-3).

5. MM excepts to the ALJ's determination that Ceren search for work was reasonable. (SD 12:5-12).

6. MM excepts to the ALJ's determination that "Ceren plausibly and credibly explained that his job search was primarily conducted online, and that he did not always print out copies of online applications" and further that Ceren's testimony "stands uncontradicted." (SD 13:19-25).

7. MM excepts to the ALJ's determination that Ceren's number listing on the Union's out-of-work lists relative to other members on the out-of-work list is germane to his prospect of employment relative to other members. (SD 14:18-40).

8. MM excepts to the ALJ's determination that Ceren is owed 216,757 in back-pay. (SD 14:41-42).

RELIEF REQUESTED

For all the reasons set forth above and in its supporting brief filed herewith, Respondent, M & M Affordable Plumbing, Inc. respectfully request that the Board deny Ceren's back-pay award in its entirety.

Respectfully Submitted,

M & M AFFORDABLE PLUMBING, INC.

By: /s/ Patrick M. Griffin
One of Its Attorneys

Patrick M. Griffin
Joshua M. Feagans
Griffin | Williams LLP
21 N. 4th St.
Geneva, IL 60134
(630) 524-2566

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

M & M AFFORDABLE PLUMBING, INC.)	
)	
and)	Case 13-CA-121459
)	
JEFFREY CEREN, an Individual.)	

**RESPONDENT’S BRIEF IS SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE’S SUPPLEMENTAL DECISION**

Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Respondent, M & M AFFORDABLE PLUMBING, INC., by and through its attorneys GRIFFIN | WILLIAMS LLP, hereby submits this Brief in Support of its Exceptions to the Administrative Law Judge’s Supplemental Decision dated March 9, 2018.

STATEMENT OF THE CASE

When the Board determines an employee has been unlawfully discharged, it must then determine whether the employee has properly mitigated his damages during the back-pay period. In order to properly mitigate damages, an employee must make reasonable exertions to minimize loss of income. *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420 (1968). In that regard, the employee must make an effort to find new employment which is *substantially equivalent to the position lost, and which is suitable to the employee’s background and experience*. *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (1985). The duty to mitigate requires an honest, good faith effort. *NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 108 (7th Cir. 1974).

The reasonableness of an employee’s efforts to secure substantially equivalent employment is determined by, among other factors, the economic climate in which worker finds himself, as well as the worker’s skills and qualifications. *Lundy Packing Co. v. N.L.R.B.*, 856 F.2d 627, 630 (1988).

Also relevant to the question is the *availability or lack of availability of work in the employee's chosen profession*. *N.L.R.B. v. Madison Courier, Inc.*, 505 F.2d 391 (1974). Where an employee accepts a lower paying job too soon, and without making an adequate search, the employee will be held to have incurred a willful loss of income by accepting an unsuitable position. *Id.* The law also recognizes certain situations where an employee may “lower his sights” while seeking employment. Under the “lower the sights” doctrine, if an employee has demonstrated *good faith efforts over a reasonable amount of time* to locate substantially equivalent employment, but has been unable to secure such employment, the employee is permitted to “lower his sights” and consider accepting other suitable employment, even at a lower rate of pay than the job from which he was discharged. *Madison Courier, Inc.*, 505 F.2d at 396.

Where, as here, an employer challenges the sufficiency and reasonableness of an employee's search, an employer need not prove that the discharged employee could have found suitable employment prior to when the employee lowered his sights. Rather, the employer need only show that the discharged employee failed make reasonable exertions before doing so. *NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375 (1979). Against these standards, Ceren's efforts to find substantially equivalent employment were wholly inadequate, and the Administrator's decision to the contrary cannot be upheld.

EXCEPTIONS AND ARGUMENT

EXCEPTION 1. M & M Affordable Plumbing, Inc. (“MM” or “Respondent”) excepts to the ALJ's determination that “Credibility of the witnesses is not generally at issue in this case, as there was little variation between the testimony and the evidence.” (SD: 10:28-30).

ARGUMENT

Respectfully, the ALJ's determination that the credibility of the witnesses is "generally not at issue in this case" wholly ignores the record, which is replete with Mr. Ceren testifying to matters that are clearly contradicted by the documentary evidence. Indeed, despite the statement that credibility was not at issue, the ALJ nevertheless cites to *Double D Construction Group*, 339 NLRB 303, 305 (2003) for the specific purpose of addressing the question of credibility. Notably, in *Double D*, the Board noted that in addressing the credibility issue, the judge must "take into account all of the factors that bear on the credibility of the witness *at the time of his testimony*." *Id.* at 305-06.

Here, there are ample examples of Ceren flatly misstating the truth. For example, Ceren testified that he made legitimate efforts with Local 130 to obtain employment, however the Union testified that "Local Union 130 does not have any written correspondence from Mr. Ceren . . . seeking employment assistance through Local 130 for the years 2013, 2014, 2015, 2016 or 2017." JE 1, para. H. Even more compelling, the stipulated Union testimony was that "On or about December 2015, the Union contacted members that had been on the out of work list that had not contacted the Union and/or responded to prior efforts to contact them to determine whether they wished to remain on the Out of Work list. Mr. Ceren was contacted by now retired Union secretary Cathy Wotring on December 23, 2015. A notation by Ms. Wotring (CW) on Mr. Ceren's membership file, Respondent's R. 14, shows that Mr. Ceren's file was annotated with the following: '12-23-2015 member requested to be placed on the inactive list – current on plumbing license.'" That testimony, as indicated, was backed up by the business record of the Union identified as RX 14.

Suffice it to say, Mr. Ceren's credibility is squarely at issue and the record simply does not support his conclusory statements of efforts to find employment.

EXCEPTION 2. MM excepts to the ALJ's determination that Jeffrey Ceren ("Ceren") testified "in a forthright and sure manner." (SD: 10:33).

ARGUMENT

Respondent adopts the argument in Exception 1 above.

EXCEPTION 3. MM excepts to the ALJ's determination that Respondent's owner Mike Malak's testimony regarding the availability of work in the Chicago area was "vague and self-serving" and that Malak "provided no support for his testimony other than his anecdotal assertions." (SD 10:40-41; 11:1-2).

ARGUMENT

Respondent's owner, Mike Malak testified that the Chicago Union plumbing market was healthy and improving from 2013 to 2017. As a basis for his testimony, Malak testified that he has owned M&M Affordable Plumbing for 23 years, that he is affiliated with Local 130, that he has maintained a plumbing license (like that of Mr. Ceren's) for 33 years and has additionally maintained a contractor's license for 23 years. Tr. 94-95. Malak described the union plumbing market in Chicago in 2013 as strong and getting better. Tr. 95. He also testified that from 2013 to 2017, his company revenues grew each year and the market generally has seen significant growth. Tr. 96. As corroboration, he offered documentary evidence that the number of individuals appearing on the Union's Out of Work list shrunk during that time frame from 953 in October, 2013 (the time of Ceren's discharge), to 889 in January 2014, to 590 in January 2015, to 375 in January 2016, to 220 in January 2017. JE 1, para. 4. And Mr. Ceren conceded that during that same time frame he retained all the skills he previously had, as outlined on his resume. Significantly, all of Malak's testimony was not only corroborated, but was also completely uncontradicted by Ceren.

EXCEPTION 4. MM excepts to the ALJ's determination that Respondent did not meet its initial burden of establishing that there were substantially equivalent jobs available in the relevant geographical area. (SD 12:1-3).

ARGUMENT

Respondent adopts the arguments in Exception 3 above.

EXCEPTION 5. MM excepts to the ALJ's determination that Ceren search for work was reasonable. (SD 12:5-12).

ARGUMENT

Ceren testified that he began searching for employment within a couple of weeks after his September 24, 2013 date of discharge. Tr. 24-25. He testified that his searches included Career Builders, Indeed, LinkedIn and Craigslist. Tr. 25. Ceren testified that he searched for employment in both Florida and Illinois. Specifically, Ceren testified that he sought out employment in Illinois with Hogan Plumbing in Warrenville, Illinois in November of 2013 by faxing them a resume, Tr. 26, however he could provide no documentary evidence of any such efforts. Similarly, Ceren testified that he sought employment with MJM Plumbing in Woodridge, Illinois in November, 2013, this time by calling them, Tr. 27, but again he had no documentary evidence to substantiate that alleged effort.

Finally, Ceren testified that he sought employment with an unnamed company in DuPage County, Illinois through Craigslist. And although Ceren was actually able to document this effort through GCX 14, that document illustrates that the effort failed because the solicitation was for a union member with a contractor's license (a #055 license) whereas Ceren only maintains a plumbing license (a #058 license).

Ceren testified to a number of other efforts he made to obtain employment, but not a single one of those efforts made during the 3-month period from September 24, 2013 through January of 2015 was for the substantially equivalent position of a union plumber in Illinois. In fact, Ceren was unable to provide a single item of documentary evidence in relation to an application for a position in Illinois for which he was qualified. Every one of the actually documented applications (See GCXs 12, 13, and 15-20) were for non-union positions with Florida companies.

He also failed to make any reasonable efforts with Local 130. At the time of Ceren's stated discharge, he was a member of Local 130. Tr. 67. At the hearing, Ceren testified that among the benefits he could receive as a member of Local 130 was employment opportunities through access to the Union's websites and "jobs available." Tr. 68. Notwithstanding those benefits, Ceren acknowledged that he had not worked as a Union Plumber since his date of discharge and could provide no documentation demonstrating any efforts to obtain such employment for a qualified position. In fact, in response to questions relating to the subpoena request for "All documents relating to any attempts by Jeffrey Ceren to obtain a union plumber position since October 1, 2013," Ceren responded as follows:

Q. And you would agree that during that same time frame you had not attempted to obtain any kind of position as a union plumber . . . is that correct?

A. No, I have checked the website list, I talked to the business agent like you are supposed to call in once in a while. But I don't have documentation.

Q. You don't have any evidence other than your testimony here today?

A. Yes, you are right. Tr. 71-72.

Q. And in response to paragraph 9 when we requested all the documents relating to any attempts by Jeffrey Ceren to obtain a union plumber position since October 1, 2013, you responded “none;” isn’t that correct? A. Yes, I did.

Q. And those were truthful answers, correct? A. Yes, sir. Q. You made them under oath? A. Yes. Tr. 73

Q. So is it fair to say today your testimony is that you had three companies that you might have contacted in Illinois sometime in late 2013, and then not quite a couple of years later in February of 2015 you made one other call to a company, is that right?

A. Yes.

Q. No other efforts during the calendar year 2014 related to Illinois?

A. No sir.

Q. And nothing since that February 11, 2015 inquiry; is that right?

A. Correct. Tr. 79.

EXCEPTION 6. MM excepts to the ALJ’s determination that “Ceren plausibly and credibly explained that his job search was primarily conducted online, and that he did not always print out copies of online applications” and further that Ceren’s testimony “stands uncontradicted.” (SD

13:19-25).

ARGUMENT

Here, the ALJ simply attributes testimony to Ceren that does not exist in the record. In fact, the language cited by the ALJ is not that of Ceren, but rather the exact language from the case cited by the ALJ in support of the corroboration standard, namely *The Lorge School*, 355 NLRB 558, 561 (2010).

EXCEPTION 7. MM excepts to the ALJ's determination that Ceren's number listing on the Union's out-of-work lists relative to other members on the out-of-work list is germane to his prospect of employment relative to other members. (SD 14:18-40).

ARGUMENT

Here again, the ALJ's decision simply assumes facts not in evidence. There was no testimony whatsoever that the number listings on the out-of-work lists suggested relative chances of employment of the members on the list. This was simply offered up by the ALJ with no support in the record.

EXCEPTION 8. MM excepts to the ALJ's determination that Ceren is owed 216,757 in back-pay. (SD 14:41-42).

ARGUMENT

Respondent adopts the arguments above for the proposition that Ceren failed to meet his mitigation burden, and is therefore owed no back-pay.

RELIEF REQUESTED

For all the reasons set forth above and in its supporting brief filed herewith, Respondent, M

& M Affordable Plumbing, Inc. respectfully request that the Board deny Ceren's back-pay award in its entirety.

Respectfully Submitted,

M & M AFFORDABLE PLUMBING, INC.

By: /s/ Patrick M. Griffin
One of Its Attorneys

Patrick M. Griffin
Joshua M. Feagans
Griffin | Williams LLP
21 N. 4th St.
Geneva, IL 60134
(630) 524-2566

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON April 6, 2018, I electronically filed a copy of Respondent's Exceptions and Brief in Support of Exceptions with the Office of the Executive Secretary, and, on that same day, copies were electronically served on the following individuals by email.

Helen Gutierrez Counsel for the General Counsel National Labor Relations Board Region
13 219 S. Dearborn, Room 808 Chicago, Illinois 60604 Helen.gutierrez@nlrb.org

Jeffrey Ceren 855 Bayway Blvd., Unit 406 Clearwater Beach, FL 33767
Jaceren01@gmail.com.