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Hard Hat Services, LLC and International Brotherhood of Electrical Workers, Local Union No. 98.
Case 04–CA–196783

June 12, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On December 27, 2017, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to offer Robert Weeks and Michael O'Leary reinstatement in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions. We shall further order the Respondent to make Robert Weeks and Michael O'Leary whole for any loss of earnings and other benefits suffered as a result of the discrimination 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). The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal*,

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall amend the judge's remedy, modify the judge's recommended Order, and substitute a new notice to conform with our findings here, our standard remedial language, and our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

349 NLRB 1348 (2007). We shall also order the Respondent to compensate Robert Weeks and Michael O'Leary for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, for a period of 60 consecutive days, we shall order the Respondent to include copies of the standard remedial notice with any advertisements pertaining to any future job postings that it issues either directly or through its agent, YourHR, whether in written or electronic form.³ Finally, because the Respondent's unlawful conduct involved YourHR, we shall order the Respondent to provide the Regional Director with signed copies of the remedial notice for posting by YourHR, if YourHR is willing, at all locations where notices to its employees are customarily posted. *Abbott Northwestern Hospital*, 343 NLRB 498 (2004).

ORDER

The National Labor Relations Board orders that the Respondent, Hard Hat Services, LLC, Norristown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union membership, activities, sympathies, and/or support.

(b) Refusing to hire or consider for hire employee-applicants because of their union affiliation.

(c) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer employment to Robert Weeks and Michael O'Leary in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

(b) Make Robert Weeks and Michael O'Leary whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Robert Weeks and Michael O'Leary for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the

³ No party filed exceptions to the judge's inclusion of this remedy.

amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days of the date of this Order, remove from Respondent's files any reference to the unlawful refusal to hire Robert Weeks and Michael O'Leary and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(e) 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 due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Norristown, Pennsylvania facility, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, 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, 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. If 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 February 27, 2017.

(g) For a period of 60 consecutive days, include a copy of the attached notice marked "Appendix" with any advertisements for future job openings, whether issued directly or through its agent, YourHR, and whether in written or electronic form.

(h) Within 14 days after service by the Region, sign and return to the Regional Director for Region 4 suffi-

cient copies of the notice for posting by YourHR, if YourHR is willing, at all locations where notices to its employees are customarily posted.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 4 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.

Dated, Washington, D.C. June 12, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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 coercively question you about your union membership, activities, sympathies, and/or support.

WE WILL NOT refuse to hire or consider for hire employee-applicants because of their union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Robert Weeks and Michael

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

O’Leary in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful refusal to hire Robert Weeks and Michael O’Leary, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

WE WILL make Robert Weeks and Michael O’Leary whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Robert Weeks and Michael O’Leary for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

HARD HAT SERVICES, LLC

The Board’s decision can be found at www.nlr.gov/case/04-CA-196783 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Edward J. Bonett, Esq., for the General Counsel.

Walter H. Flamm, Jr., Esq., for Respondent.

James E. Goodley, Esq., for Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on November 6, 2017. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about union sympathies, and Section 8(a)(3) and (1) of the Act by refusing and failing to hire employee applicants because of their affilia-

tion with, and activities on behalf of, the Charging Party Union (hereafter, the Union). Respondent denied the essential allegations in the complaint. After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.¹

Based on the filed brief and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania limited liability company with an office located in Norristown, Pennsylvania, is engaged as an electrical contractor in the construction industry. In conducting its business operations during a representative 12-month period, Respondent performed services valued in excess of \$50,000 outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also find, as the parties stipulated (Tr. 7) that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Background

Sharon Modestine is the president and owner of Respondent. Since January 2017, she has utilized a firm called Lott Resource Collaborative, which does business as YourHrDept or YourHr, to effectuate the hiring of her electrician employees. Tr. 104–105. YourHr, which has an office located at 31 South Shirley Street, Shillington, Pennsylvania, is operated by Stacey Atkinson, who is an admitted agent of Respondent for the purposes of this case. Tr. 6–7, 21, 49, 127–128.

The Union is engaged in organizing and representing electrician employees in its territorial jurisdiction. One of its organizing methods is to conduct a salting campaign, whereby it applies to nonunion employers on behalf of its members who are seeking work. Those applicants are called salts. Union Organizer James Reppert heads those campaigns. Tr. 10–11, 18. Reppert has, in the past, answered ads posted by Respondent and sent both overt salts (applicants whose applications explicitly state the applicant’s affiliation with the Union) and covert salts (applicants whose applications make no mention of affiliation with the Union) to Respondent. He is thus familiar with Modestine—and she with him, or at least with the Union’s salting efforts. Tr. 28–29, 109–119, G.C. Exh. 11.

One of the Union’s earlier organizing efforts involved the employees of another electrical company in the area, Kiss Electric. The Union petitioned for an election in a unit of Kiss Electric employees some 3 years ago. Kiss opposed the Union and, in that connection, posted a batch of applications by union salts submitted to Respondent and sent to Kiss. Tr. 90–94, 72–77, 30–34. After an initial denial, hesitation and evasiveness on

¹ The Charging Party filed a submission that indicated it joined in the brief filed by the General Counsel.

the issue, Modestine admitted to sending the applications to Kiss. Tr. 117–118.

As part of Kiss’s election campaign against the Union, Modestine also gave a speech at a meeting of Kiss Electric employees at the Kiss facility urging the employees to reject the Union. Tr. 72–74. She identified herself as being with Respondent and said that voting for the Union might result in loss of work or in layoffs or discharges. Tr. 74–75.²

The above account of Modestine’s speech at Kiss is based on the credible testimony of employee Maurice Samuels, who was employed at the time by Kiss and attended the meeting at which Modestine spoke. At the time he was not open about his affiliation with the Union. Tr. 76. Samuels impressed me as a candid witness, whose testimony about Modestine’s speech was straightforward and specific. It was not directly put at issue on cross-examination, although counsel for Respondent attempted to impugn Samuels’s credibility by pointing out that his May 19, 2015 Board affidavit did not contain anything about the Modestine speech. But that was understandable because the affidavit was taken in connection with another salting case involving Samuels and Respondent that was ultimately settled. Tr. 83–89, R. Exh. 1, G.C. Exh. 9.

Indeed, Samuels’s testimony on cross-examination, which was supported by his affidavit and confirmed elsewhere in the record, enhanced his credibility. Much of that testimony was about a salting effort by the Union with Respondent in May of 2015 and Modestine’s calls to Samuels, who, at that time, was a union salt. Another union salt, Angelo Ercolino, confirmed that he was called by Modestine in connection with the May 2015 union salting effort. Tr. 96–98. And Modestine herself testified that she made frequent calls to applicants, who often hung up on her. Tr. 105–106. Moreover, Samuels testified that, after her speech at Kiss, Modestine approached him to remind him that he had applied for a job with Respondent earlier and to tell him she would have hired him. Tr. 75–76. Modestine, who testified after Samuels, did not contradict Samuels’s testimony on this point, thus further enhancing his credibility.

I do not credit Modestine’s testimony about the Kiss speech. Modestine admitted speaking against the Union in the speech at Kiss, but denied stating that employees would be laid off or fired if the employees voted for the Union. According to Modestine, she simply told the Kiss employees what happened at a former company of hers. Tr. 116. Her testimony about the speech was conclusory, without meaningful detail. And, as I indicated above with respect to Modestine providing the applications of union salts to Kiss, her testimony on this issue was hesitant and evasive, which reflects adversely on her reliability. In addition, in my view, all of her testimony was infected by the virulent union animus exhibited by her on the witness stand, as I point out later in this decision.

Applicants for Positions with Respondent

In February 2017, Union Organizer Reppert answered a blind ad for electricians that appeared on a website called Ziprecruiter. The ad was placed on the website by YourHR, which described itself as being “dedicated to helping employers

find a (sic) retain talented people in the construction industry.” The ad, which was ultimately for electricians who would work for Respondent, sought commercial service electricians, including helpers, technicians and foremen. Among the job qualifications were the ability to read blueprints and to diagnose electrical problems, and experience in commercial electrical work. G.C. Exh. 2.

Reppert, with the authorization of the applicants, answered the ad by posting the applications and profiles of union members Robert Weeks, Michael O’Leary, and Ryan Schillinger. All three were looking for work and had the qualifications mentioned for the electrician’s position being advertised. The applications of Weeks and O’Leary prominently mentioned their affiliation with the Union, making them overt salts. Schillinger’s application did not mention any union affiliation, making him a covert salt. Again with the permission of Weeks, O’Leary and Schillinger, Reppert set up email accounts that he and the applicants could each access in order to receive and answer communications about the applications. Tr. 11–16, 22–24, 35–39, 44–48, 64–69.³

Weeks’s application prominently mentioned that he had, for 15 years, worked for “Various Electrical Contractors Local Union 98 I.B.E.W.” It also mentioned that his latest employment, from 2013 to 2015, was as an electrician/technician with Broadband Express of Endicott, NY. The application listed specific qualifications that more than matched the qualifications in the ad. G.C. Exh. 3, Tr. 38. The application was filed on February 23 and first viewed by YourHR on February 24, 2017. On February 27, YourHR sent a reply to Weeks, through Ziprecruiter, stating that his “experience does not match our current needs.” YourHR later viewed Weeks’s application on March 9 and again on March 10. G.C. Exh. 4, Tr. 16–18. Weeks was neither contacted for an interview nor hired by Respondent. Tr. 65–66.

O’Leary’s application listed his experience with “Various Electrical Employers” in the last 2 years, but also listed Trinity Generator & Electrical, Inc. as his employer from December of 2014 to April of 2016, along with a specific description of electrician’s experience with that firm. He also listed another employer by name, although it was not an electrical contractor. The application provided details of his electrical technician training at the Kaplan Career Institute in Philadelphia. O’Leary’s experience clearly more than met the qualifications in the ad. Tr. 38. Finally, O’Leary specifically listed his affiliation with the Union. G.C. Exh. 7. His application was filed on March 17, 2017 at 11:09 am and viewed by YourHR 9 minutes later that same day. It was viewed again by YourHR on March 17, 20 and 27. G.C. Exh. 8. But O’Leary never received a response from YourHR and was not contacted for an interview or hired by Respondent. Tr. 37–38, 68–69.

³ On cross-examination of Reppert, counsel for Respondent suggested that Weeks and O’Leary were journeymen electricians and Schillinger was only a helper. But he conceded that the ad made no such distinction (Tr. 43). Moreover, Reppert testified that Weeks and O’Leary had done helpers’s work in the past and were qualified as helpers. Tr. 41–45. Weeks and O’Leary confirmed that testimony about their past work as helpers. Tr. 65, 68.

² The Union lost the election in the Kiss Electric unit. Tr. 76–77.

Schillinger's application listed his qualifications and his work experience for the last 7 or 8 months with JMA Communications as a technician/helper doing electrical work, as well as his earlier employment as a dishwasher and food preparation worker. G.C. Exh. 5. His qualifications met the qualifications in the ad, but he had less education than was listed on his application. Tr. 23, 38. His application was filed on March 1 and first viewed by YourHR on March 6, 2017. It was viewed again by YourHR on March 9 and on March 10. G.C. Exh. 6, Tr. 24–25.

Schillinger's Interview and Hire

Schillinger alone of the three salts was given an interview for the ad placed by Respondent. He testified that he was contacted by Atkinson of YourHR asking him to come in to its offices on March 16, 2017, which he did. Tr. 48–49. Atkinson had him fill out a formal application then introduced him to a woman who identified herself as "Susan." That was not her real name. It was Sharon Modestine, who actually conducted the interview. Tr. 49, 50, 53. Modestine asked Schillinger several preliminary questions about his experience. Then she asked whether his father was in the electrician's union. Schillinger answered, untruthfully, that he was not, that he was a carpenter. In fact, Schillinger's father is a member of the Union. Then, Modestine asked whether his father was in the Carpenter's union; Schillinger again answered untruthfully, that his father was not. He answered untruthfully to these questions because he felt uncomfortable. Tr. 49–50. Modestine continued asking questions about whether he was in any apprentice program and about the family name of his girlfriend. Modestine also asked about whether the employer named on his application, JMA, was an open or closed shop employer. When Schillinger responded that he was not familiar with the term, Modestine explained that those terms meant union or nonunion. Schillinger then answered that JMA was nonunion. Tr. 50–51. Modestine also asked whether Schillinger was familiar with the term, "prevailing wage," which she described as referring to jobs where a union sets the prevailing wage for a particular area. Throughout the interview, Modestine mentioned that her company was nonunion. The interview ended when Modestine told Schillinger that he would receive a call if he was hired. Tr. 51–52.⁴

Modestine admitted that Schillinger was hired. Tr. 125. Atkinson called him a couple of days after the interview to offer him a job with the Respondent at \$12 per hour and to fill out the final paper work with someone in Atkinson's office. Tr. 52. He thereafter reported the interview and his job offer to Reppert, who showed him a picture of Modestine, and that is when Schillinger identified Modestine as the person who called herself Susan in the interview. Schillinger thereafter received an

⁴ On cross-examination, Schillinger admitted that two items on his application were untrue: that he attended North Montco Tech Center and his job duties at his last job. Tr. 56–57. But his uncontradicted testimony is that Modestine never asked questions about those matters, and, when she asked about his experience as an electrician, he said he had "minor experience." Tr. 57–58. There is no evidence on this record that Respondent contacted the Tech Center or the employers listed on his application to verify the accuracy of his representations.

email directing him to report for work at one of Respondent's jobs. He felt uncomfortable doing so and thus was a no-call, no-show. Tr. 52–55. His discomfort regarding the experience with Respondent did not preclude him from later taking other nonunion jobs. Tr. 54–55.

Sharon Modestine denied that she "interrogate[d]" Schillinger about his "union sympathies" during the interview Tr. 103. She repeated that on cross-examination, although she admitted she may have, in the past, asked whether someone was union or nonunion. Tr. 108–109. But, in many respects, her testimony supported that of Schillinger, although she gave hers a different slant. Modestine did, for example, acknowledge bringing up Schillinger's father and asking what he did and whether he worked for an open shop. She also testified that she told Schillinger that her company was an open shop and she explained the difference "between open shop and union," as well as how "prevailing wage" works. Tr. 101–103. She did not deny asking Schillinger if his former employer, JMA, was a union shop; instead she testified that she did "not recall" asking that question. Tr. 106–107. Modestine further testified that she asked about Schillinger's girl friend's father. Tr. 101. She also acknowledged, on cross-examination, that she identified herself as "Susan" during the interview, as Schillinger testified. Tr. 105.

Stacey Atkinson also testified about the interview, insofar as she could hear what happened from where she was "at the desk next door," adjoining space separated by a partial barrier she called a half wall or a "demi-wall." She was doing other work on her computer while the interview took place. Tr. 135–136. She denied hearing Modestine ask Schillinger any questions about his union affiliation. Tr. 136. She did recount what she heard in a general but seemingly rehearsed way. She corroborated some parts of Modestine's testimony, but not others. Tr. 136–139.

With respect to the interview, I credit the testimony of Schillinger, who impressed me as an honest and forthright witness, and whose testimony on this issue, as elsewhere in his testimony, was direct and detailed. As indicated, Schillinger's testimony was, in some respects, corroborated by Modestine, confirming its reliability. I do not credit the testimony of Modestine and Atkinson to the extent that it differs from his. Their testimony did not mesh in an understandable way and I found Atkinson's testimony not reliable. I doubt that, in the circumstances, Atkinson could overhear all of the interview conversation, especially given her physical separation and her admission that she was doing other work at the time. Nor, in these circumstances, is it likely she would remember it as precisely as she asserted when testifying. At one point she testified she could remember "bits and pieces" of the interview. Tr. 138. Modestine's testimony on this matter was not as clear and direct as Schillinger's. Moreover, I have discussed Modestine's unreliability as a witness in my earlier discussion of her testimony concerning her activity with respect to Kiss Electric. I found her testimony about the interview similarly unreliable.

Credibility With Respect to Respondent's Hiring Decisions

I also find that the testimony of both Modestine and Atkinson was not credible to the extent that it attempted to show lack

of discrimination in the handling of the applications of Weeks, O’Leary and Schillinger.

Atkinson testified that she did not view the applications of Weeks and O’Leary at the time they were received by YourHR. Tr. 131. She did speculate that they were screened by her assistant at the time who is no longer employed, and “disqualified off the top.” Tr. 128–131. According to Atkinson, her assistant or whoever does the initial screening of the applications follows certain written criteria. But, even though such written criteria exist, Respondent did not provide them in this case. Tr. 131–134. Nor was the assistant or whoever initially screened the applications called to testify in this proceeding. Atkinson did testify that, once she first saw the Weeks and O’Leary applications—after the charges were filed in this case, she immediately saw why they were disqualified.⁵ She testified that the mention of “various electrical contractors” in the applications of Weeks and O’Leary was a problem because she would not know who to call to check the applicant’s work history. Tr. 131–133, 143–145, 158–159.

I reject Atkinson’s testimony. In the first place, Atkinson’s after-the-fact speculation is suspect because Respondent never provided either the witness who initially handled the applications or the written criteria governing how the applications were to be handled. Moreover, in context, Atkinson’s testimony virtually admits that union considerations entered into the decision to disqualify the two applications of the overt union salts. Weeks’s application, which was viewed first, clearly tied the term “various electrical contractors” with the Union since it was immediately followed by the name of the Union. When O’Leary’s application came in several weeks later, the term “various electrical contractors” had the same connotation, which was confirmed by his specific mention of his union affiliation later in the application. Nor, to the extent it was intended as a benign reason for the disqualification, was Atkinson’s explanation about her assessment of the term “various electrical contractors” believable. As shown above, the applications of Weeks and O’Leary did list the specific names of employers, as did Schillinger’s application. Indeed, there is nothing in the record to show that Respondent even called the employers listed by Schillinger, thus refuting any notion that mention of the names of employers in the application was crucial either for an interview or even hiring. In addition, documentary evidence shows that the applications of Weeks and O’Leary were viewed by YourHR several different times, casting doubt on Atkinson’s testimony that those applications were disqualifying on their face. Finally, as an objective matter, the applications clearly show that Weeks and O’Leary met the qualifications set forth in the ad to which they were responding. Indeed, they were more qualified, certainly in terms of experience, than was Schillinger, who was hired. All of this, together with Atkinson’s unreliable testimony about the interview, leads me to reject her testimony with respect to her treatment of the salt applications as not credible.

I have already discredited Modestine’s testimony as it relates to the Kiss Electric speech and the interview with Schillinger,

⁵ The charge in this case was filed on April 13, 2017. G.C. Exh. 1(a).

also citing her hesitancy and evasiveness at another point in her testimony. In addition, Modestine’s testimony revealed a deep-seated animus against the Union, which I find infected her entire testimony in this matter. This not only rendered her testimony generally unreliable, but also bore on her motive in making hiring decisions. When asked initially on cross-examination what she thought of the Union, Modestine answered “I think they’re great.” Tr. 108. But, after being shown a website article from Philly.com/business, dated November 11, 2016 and titled, “Electricians union’s tactic for organizing suburbs,” documenting her opinion of the Union, she soon changed her view. In lengthy and rambling testimony that can only be described as a tirade against the Union, she acknowledged the accuracy of several unflattering statements she made in the article about the Union and its method of sending salts to organize companies like hers. For example, in the article, she called the salting program a “scam,” whereby “[y]ou might have one opening and they flush you with six applicants. If you hire one, they’ll file charges on the other five.” She stood by that statement on the witness stand, displaying a deep knowledge about how salting works, obviously from previous experience. Tr. 109–112. She also called the Union a “cartel” that eliminated competition. Tr. 113–115. See also G.C. Exh. 11.⁶

B. Discussion and Analysis

The Section 8(a)(1) Violation

In determining whether an employer’s questioning of employees about union activity violates Section 8(a)(1) of the Act, the Board considers whether, in all the circumstances, the questioning would reasonably tend to restrain, coerce or interfere with Section 7 rights, which include the right of employees to engage in or refrain from engaging in union activities. *Scheid Electric*, 355 NLRB 160 (2010), and cases there cited. The leading court case in this area (*Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)) lists the following relevant factors to be considered in determining whether the questioning is coercive:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g. did the interrogation appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss’s office? Was there an atmosphere of “unnatural formality?”
- (5) Truthfulness of the reply.

Also among the factors considered is whether the employee is an open union supporter. *Scheid Electric*, cited above, 355 NLRB at 160. Questioning about union matters in the context of a job interview, particularly in the face of an employer’s union animus, is considered coercive. See *Zarcon, Inc.*, 340

⁶ In the article, Modestine was identified as Sharon Ponticello, the owner of Hard Hat. She acknowledged that Ponticello was her married name and she is presently divorced. Tr. 103.

NLRB 1222 (2003), enfd. 118 F. Appx. 113 (8th Cir. 2005); and *Facchina Construction Co.*, 343 NLRB 886 (2004), enfd. 180 Fed. Appx. 178 (D.C. Cir. 2006). See also *Sproule Construction Co.*, 350 NLRB 774, fn. 2 (2007) (specifically mentioning as a crucial factor that the applicant was seeking to conceal his union support or affiliation).

Applying the above principles to the facts set forth in my credited findings, I find that the circumstances of the Schillinger interview clearly show coercive interrogation. The setting of the questioning was an employment interview in the offices of the hiring entity and the questioning was done by Respondent's owner. The applicant was not a known or open union supporter; indeed, he wanted to conceal his union views. Moreover, the questioning went beyond the legitimate bounds of a normal interview, the applicant's experience and qualifications, and probed into union-related matters, as it did when Modestine brought up whether Schillinger's father was in the electrician's union or any union, whether his former employer was an open shop or a union shop, and whether he knew about the term "prevailing wage," which she explained as essentially union wages. Such questioning clearly implied that union considerations would indeed enter into the hiring decision if answered in a certain way. Schillinger rightly felt uncomfortable with the union-related questions and answered some untruthfully lest he ruin his chances of being hired—a significant factor showing the coercive nature of the questioning. Finally, the questioning must be assessed in the context of Modestine's past dealings with the Union, her knowledge of its salting program, and her manifest hostility against the Union. Viewed in that context, I find that Modestine tailored her questions in an attempt to ferret out covert union salts. In these circumstances, the questioning was coercive and violative of Section 8(a)(1) of the Act.⁷

The Section 8(a)(3) and (1) Violations

Employee applicants have Section 7 rights under the Act, even though they are sponsored by unions and even though they may be salts. They cannot therefore be discriminated against in hiring because of their union affiliation and an employer who engages in such discrimination violates Section 8(a)(3) and (1) of the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). See also *Tradesmen International, Inc.*, 351 NLRB 579 (2007).

In *FES*, 331 NLRB 9, 12 (2000), supplemental decision 333

⁷ This case is distinguishable from *Oil Capital Sheet Metal*, 349 NLRB 1348, 1355 fn. 31 (2007), in which a Board majority found no unlawful interrogation where the respondent asked an applicant "in passing" if the applicant's former employer was union and the applicant answered truthfully. Here, on the other hand, Modestine's questioning about union matters was systematic, and Schillinger answered some questions untruthfully, fearing a truthful answer would jeopardize his chances of being hired. Nor was there, in *Oil Capital*, the strong evidence of union animus and the history of dealing with the Union and its salting program that is present here. Indeed, this case is much stronger in favor of a violation than *Facchina* and *Zarcon*, cited above, which the Board majority in *Oil Capital* recognized as properly decided, but nevertheless distinguished. This case is also much stronger than *Sproule Construction*, cited above, which was decided after *Oil Capital*.

NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), the Board set forth the following analytical framework for refusal-to-hire allegations:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire . . . ; and (3) that antiunion animus contributed to the decision not to hire the applicants.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them. (footnotes omitted).⁸

Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected or union activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. The respondent does not meet its burden merely by showing that it had a legitimate reason for its action; it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. And if the respondent's proffered reasons are pretextual—either false or not actually relied on—the respondent fails by definition to meet its burden of showing it would have taken the action for those reasons absent the protected activity. See *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003).

A showing of pretext also supports the initial showing of animus and discrimination. See *Wright Line*, supra, 251 NLRB at 1088 n.12, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where a respondent's reasons are false, it can be inferred "that the [real] motive is one that the [respondent] desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference."). Moreover, a trier of fact may not only reject a witness's testimony about his or her reasons for an adverse action, but also find that the truth is the opposite of that testimony. *Pratt (Corrugated Logistics), LLC*, 360 NLRB 304, 314 (2014), citing *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

Applying the above principles, I find that Respondent refused to hire employee-applicants Weeks and O'Leary because of their affiliation with the Union, as clearly stated on their

⁸ The *FES* decision also sets forth a similar analytical framework for refusal-to-consider allegations. 331 NLRB at 15. The complaint in this case, however, only involves refusal-to-hire allegations.

applications. Respondent does not assert a valid business reason for not hiring Weeks and O'Leary. Its only defense, based on Atkinson's testimony, is that their applications were "disqualified off the top" and were never considered because the applications listed, among former employers, a category of "various electrical contractors." However, as I have indicated above, I reject that defense, based on my credibility determinations.

There is no doubt that Respondent had openings for electricians and was seeking to hire at the time of the application of Weeks and O'Leary. There is also no doubt that they were qualified for the positions advertised by Respondent. Those aspects of the *FES* test were thus satisfied here.

The General Counsel has also established that the failure to hire Weeks and O'Leary was motivated by their union affiliation. As shown above in my factual findings, Respondent's owner, Sharon Modestine, coercively interrogated an employee applicant about union matters that clearly indicated her intent to screen out applicants with union connections. The discrimination was plain. Respondent interviewed and hired an employee applicant, Ryan Schillinger, whose application did not show affiliation with the Union. At about the same time, it did not interview or hire two other well-qualified applicants, Weeks and O'Leary, who did mention their affiliation with the Union on their applications. Indeed, Weeks and O'Leary had better qualifications than Schillinger. Moreover, as indicated above, I discredited Atkinson's testimony about how she and her office handled the applications of Weeks and O'Leary. With that credibility determination, I also find that the Respondent's alleged reliance on the "various electrical contractors" language in the applications of Weeks and O'Leary to disqualify them was, in the context of that language indicating union contractors, an effective admission of discrimination. In any event, even if not considered an effective admission of discrimination, Atkinson's attempted benign explanation, as shown above in my credibility determination, was not credible and therefore a pretext. Thus, I am comfortable in believing the opposite of Atkinson's story, namely that she, as Respondent's agent, did indeed make distinctions based on whether applications mentioned union affiliation or not. Modestine's union animus is well-documented, not only by her antiunion speech at Kiss Electric, but also by her testimony on the witness stand, which was related to the Union's salting program and her past experience with it. All of this evidence strongly supports the inference, which I make, that Respondent rejected Weeks and O'Leary and refused to hire them because of their affiliation with the Union. In these circumstances, I find that, by failing and refusing to hire Weeks and O'Leary, Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By coercively interrogating an employee about union activities, sympathies or affiliation, Respondent violated Section 8(a)(1) of the Act.
2. By discriminatorily refusing to hire employee-applicants Robert Weeks and Michael O'Leary because of their affiliation with the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations constitute unfair labor practices within the meaning of the Act.

REMEDY

Having found that Respondent discriminatorily refused to hire certain individuals as indicated above, I shall order the Respondent to offer them reinstatement and make them whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful discrimination against them. Any backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The duration of the backpay period shall be determined in accordance with *Oil Capital Sheet Metal*, 349 NLRB 1348 (2007). Search for work and interim employment expenses shall be paid in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enf'd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017); and tax compensation and Social Security reporting shall be made in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1 (2016).

Respondent shall also be ordered to post the usual notice. Because the violations were committed through the actions of, and at the separate business location of, YourHR, Respondent's agent, the notice shall also be posted at the business location of YourHR. In addition, the violations in this case involved job applicants and the refusal-to-hire violations were effectuated through the use of web-site advertisements for job openings. Thus, the notice in this case must also be addressed to job applicants and its posting must account for web-site advertising. Accordingly, I shall also order that, to the extent that Respondent advertises for future job openings, either directly or through its agent, YourHR, and whether it is through a website posting or by other means, any such advertisement shall include a copy of the notice. Each time such advertisements are posted or publicized, Respondent and/or its agent, YourHR, shall post or attach the notices alongside those advertisements for a total of 60 days of such postings or publications.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁹

ORDER

Respondent, Hard Hat Services, LLC, its officers, agents, successors and assigns, shall

1. Cease and desist from
 - (a) Interrogating employees or employee-applicants about union activities, sympathies or affiliation.
 - (b) Refusing to hire or consider for hire employee-applicants because of their union affiliation.
 - (c) 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.

⁹ If no exceptions are filed, 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 all objections to them shall be waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer reinstatement to Robert Weeks and Michael O'Leary to the positions for which they applied, or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled had they not been discriminated against.

(b) Make Robert Weeks and Michael O'Leary whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this order.

(c) Compensate Robert Weeks and Michael O'Leary for the adverse consequences, if any, of receiving lump backpay awards, and file with the Regional Director of Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Compensate Robert Weeks and Michael O'Leary for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.

(e) 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 back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post, at its Norristown, Pennsylvania facility, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, 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. Copies of such notice shall also be posted and maintained, as mentioned above, at the location of Respondent's agent, YourHR, in Shillington, Pennsylvania. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent, or YourHR, customarily communicates with 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 em-

ployees employed by the Respondent at any time since April 13, 2017.

(g) If and when the Respondent advertises for future job openings, either directly or through its agent, YourHR, and whether it is through a website posting or by other means, any such advertisement shall include a copy of the notice set forth above. Each time such advertisements are posted or published, Respondent and/or its agent, YourHR, shall post or attach a copy of the notice alongside those advertisements for a total of 60 days of such postings or publications.

(h) Within 21 days after service by the Region, file with the Regional Director 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.

Dated at Washington, D.C., December 27, 2017.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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 interrogate or question employees or employee-applicants about union activities, union affiliation or union sympathies.

WE WILL NOT refuse to hire or consider for hire employee-applicants because of their union affiliation.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL offer reinstatement to Robert Weeks and Michael O'Leary to the positions for which they applied, or if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges to which they would have been entitled had they not been discriminated against.

WE WILL make Robert Weeks and Michael O'Leary whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them.

HARD HAT SERVICES, LLC

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-196783 or by using the QR code below. Alternatively, you can obtain a copy of the decision

from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

