

**Tim Foley Plumbing Service, Inc. and Indiana State Pipe Trades Association and United Association Local Union No. 661, etc., AFL-CIO.** Case 25-CA-26181(E)

December 20, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND WALSH

On September 22, 2000, Administrative Law Judge David L. Evans issued the attached decision and supplemental decision. The General Counsel filed exceptions and a supporting brief and the Applicant filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The judge's supplemental decision recommends granting the Applicant's application for fees and other expenses under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA) and Section 102.143 of the Board's Rules and Regulations, based on the judge's view that the General Counsel had failed to present evidence in the underlying proceeding establishing a prima facie case of the complaint's allegations. For the reasons set forth below, we find that the General Counsel's position was substantially justified throughout the underlying proceeding, and accordingly dismiss the application for fees and expenses.<sup>1</sup>

The complaint in this case alleged that the Respondent violated Section 8(a)(1) and (3) by soliciting and threatening employees, isolating employee Ronald Duke from other employees, assigning Duke more onerous and less desirable work and thereby causing his constructive discharge, and refusing to hire Duke's son, Thomas Duke. On September 27, 1999, the judge issued the attached decision recommending dismissal of the complaint in its entirety. The judge found that the General Counsel failed to present a "prima facie case" of unlawful conduct by the Respondent on any of the allegations and dismissed the complaint. No exceptions were filed to the judge's decision and by order of November 10, 1999, the Board affirmed the judge's decision.

Thereafter, the Respondent filed an application for an award of fees and expenses under the Equal Access to

Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations. In his supplemental decision, the judge found, in agreement with the Respondent, that the General Counsel was not substantially justified in pursuing the complaint. Accordingly, he granted the application and awarded Respondent fees and expenses totaling \$16,164.93.

In his exceptions, the General Counsel disputes the judge's finding that his position in the underlying unfair labor practice case was not substantially justified, and asserts that his prosecution of the complaint was reasonable and well founded. For the reasons stated below, we find merit in the General Counsel's contentions and reverse the judge's findings and deny the application.

As indicated above, in the underlying case the judge concluded that the Respondent did not commit any of the alleged 8(a)(1) and (3) violations. This conclusion was based on the judge's following findings: (1) the 8(a)(1) allegation that Respondent solicited an employee to induce other employees to oppose the Union did not state a violation of the Act; (2) the General Counsel failed to establish that Leadman Larry Bisel was a supervisor within the meaning of Section 2(11) of the Act, which was necessary to prove the 8(a)(1) allegation that Bisel threatened Ronald Duke with more onerous working conditions; (3) the General Counsel failed to present any evidence of employer knowledge or animus to prove the 8(a)(3) allegations that Respondent unlawfully reassigned and constructively discharged Ronald Duke and refused to hire his son, Thomas Duke; and (4) the General Counsel had further failed to prove that Respondent had reassigned Duke against his will. In his supplemental decision, the judge rejected the General Counsel's argument that these findings turned on credibility resolutions. The judge stated that all of his credibility resolutions were "plainly stated as alternatives to his findings that the General Counsel failed to present a prima facie case."

The Board has held that in order to avoid an EAJA award, the General Counsel must present evidence that, if credited, would constitute a prima facie case of unlawful conduct by the respondent. See, e.g., *Nyeholt Steel, Inc.*, 323 NLRB 436, 437 (1997), citing *SME Cement, Inc.*, 267 NLRB 763 fn. 1 (1983). On a careful review of the record, we find that the General Counsel presented evidence in the underlying proceeding that, if credited, would have constituted a prima facie case in support of the complaint allegations.<sup>2</sup>

<sup>1</sup> In view of our reversal of the judge's finding that the Applicant is entitled to an award of fees, we need not rule on the Applicant's petition to raise the maximum hourly rate of such fees.

<sup>2</sup> With respect to 8(a)(3) allegations, the General Counsel's initial burden is to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The judge's decision in the underlying proceeding was replete with credibility findings supporting his conclusion of "no prima facie case." Thus, for example, in order to establish employer knowledge, Ronald Duke testified that about June 1998, 2 weeks before his alleged unlawful transfer to a more onerous service job, he informed Tim Foley, the Respondent's owner and president, that he had signed a union authorization card. The judge, however, did not credit Duke's testimony that Foley knew about his union activities, but instead credited Foley's denial that he knew that Duke held any prounion sympathies before Duke terminated his employment on July 2.<sup>3</sup>

Similarly, with respect to union animus, the judge in his original decision found that "the General Counsel has offered no evidence of animus other than that which I have discredited." The judge here was apparently referring to his discrediting of Ronald Duke's testimony about certain comments made by Foley and Bisel. With regard to Foley, Duke testified that Foley had solicited employees to induce other employees to oppose the Union. Specifically, Duke testified that Foley said he would like someone to go around and get employees to call the Union and say that they favored the Union so that there would be a vote, everyone would vote no, and the Union would then leave him alone once and for all. The judge credited Foley's denial that he ever said any such thing to, or around, Duke.

The judge also found, in any event, that even if Foley had made the statement, Respondent did not violate Section 8(a)(1) of the Act, as alleged in the complaint. As indicated above, no exceptions were filed to this finding.<sup>4</sup> However, the Board has held that an employer's anti-union comments, while themselves lawful, may nevertheless be considered as background evidence of animus toward employees' union activities.<sup>5</sup>

<sup>3</sup> In response to Ronald Duke's explanation why he informed Foley that he signed an authorization card, the judge stated, "Duke's quoted reason makes no sense to this trier of fact."

<sup>4</sup> This 8(a)(1) complaint allegation did not constitute a discrete substantive portion of the proceeding. Accordingly, its dismissal is not enough by itself to find that the General Counsel was not substantially justified in his prosecution of this portion of the complaint. *Lathers Local 46 (Building Contractors)*, 289 NLRB 505, 506 (1988).

In regard to this 8(a)(1) allegation, Chairman Hurtgen relies solely on the judge's credibility resolution.

<sup>5</sup> See, e.g., *Ross Stores*, 329 NLRB 573, 576 (1999), enf. denied on other grounds 235 F.3d 669 (D.C. Cir. 2001); see also *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 103 (5th Cir. 1963); *NLRB v. Venco, Inc.*, 989 F.2d 1468, 1473-1475 (6th Cir. 1993); *Orchard Corp. v. NLRB*, 408 F.2d 341, 342 (8th Cir. 1960) (employer's hostility to unionization may properly be considered as background evidence of animus); but see *Carry Cos. of Illinois v. NLRB*, 30 F.3d 922 (7th Cir. 1994); and *NLRB v. Lampi*, 240 F.3d 931 (11th Cir. 2001) (antiunion animus may not be inferred from employer's lawful communication of its opinion of

With respect to Bisel, Duke testified that although he had been promised that he would be assigned only to new construction projects, Bisel reassigned him to the service job shortly after he revealed having signed a union card. Duke testified that when he complained to Bisel about the assignment, Bisel "just told me to get used to this work because he had another one . . . just like this one waiting for me when I finished." Again, the judge discredited Duke's testimony and found that this statement was not made.

The judge also found that the General Counsel had failed to present any substantial evidence regarding Bisel's supervisory status under Section 2(11). However, the complaint also included a separate, more general, allegation that Bisel was also an agent of the Respondent under Section 2(13).<sup>6</sup> The General Counsel presented evidence that Bisel had communicated the reassignment to Duke, and that Duke interacted solely with Bisel at the jobsite. The judge failed to address this separate allegation. We find that the evidence presented by the General Counsel provided a substantial justification for the allegation that Bisel was an agent of the Respondent, at least for the purpose of conveying information regarding the Respondent's intentions for prospective job assignments.

Finally, the judge also made pivotal credibility resolutions in finding, contrary to Ronald Duke's testimony, that Duke had in fact requested the reassignment to the service job. Because the judge credited Foley's testimony that Duke requested the transfer, and thus was not

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unions or unionization). Although this case arose in the Seventh Circuit, which in *Carry Cos.* disagreed with the Board's reliance on protected speech as evidence of animus, the General Counsel properly applied well-established Board precedent in relying on such statements. The Board's duty to apply uniform policies under the Act, and the Act's venue provisions for review of Board decisions, make it, as a practical matter, impossible for the Board to acquiesce in every contrary decision by the Federal courts of appeals. *TCI West, Inc.*, 322 NLRB 928 (1997) (citing *Arvin Industries*, 285 NLRB 753, 757-758 (1987)), enf. denied sub nom. *TCI West, Inc. v. NLRB*, 145 F.3d 1113 (9th Cir. 1998), and *Insurance Agents (Prudential Insurance Co.)*, 119 NLRB 768, 773 (1957).

Chairman Hurtgen dissented in *Ross Stores*, supra, and finds that statements protected by Sec. 8(c) cannot form the basis of a finding that the General Counsel has demonstrated, as part of his prima facie case, that an employer harbored animus concerning union activity. He agrees with his colleagues, however, that the General Counsel relied on Board precedent in arguing that the Applicant's statement demonstrated union animus.

<sup>6</sup> In his brief to the judge, the General Counsel argued that Bisel was an "authoritative spokesman" for the Respondent, that he "spoke for management" and that "even absent supervisory status, an employer can be responsible for the conduct of an employee, as agent, where under all of the circumstances the employees [(herein Ron Duke)] would reasonably believe that the employee [(herein Bisel)] was reflecting company policy and acting on behalf of management." (Citations omitted.) It is thus clear that the General Counsel was not relying solely on Bisel's alleged supervisory status.

involuntarily transferred, the judge found it unnecessary to decide whether or not the conditions at the service job were less desirable than the conditions at the new construction jobsite where Duke had been working.

In sum, it was clearly the judge's crediting of all of the Respondent's witnesses, not the General Counsel's failure to state a prima facie case, which led to the judge dismissing the complaint. Had the judge (1) properly considered Foley's comments as evidence of animus, (2) credited Ronald Duke's testimony that he had told Foley he had signed a union authorization card and that Foley involuntarily transferred him 2 weeks later from a new construction job to a more onerous service job, and (3) found that Bisel was an agent or conduit for the Respondent and credited Duke's testimony that Bisel told Duke to "get used to it" when Duke complained about the less desirable work he had been assigned, the judge could justifiably have found that the General Counsel satisfied his initial burden with respect to Duke's alleged unlawful constructive discharge (as well as the alleged collateral unlawful failure to hire Duke's son).

In view of the above, we find that the General Counsel acted reasonably in issuing the complaint and proceeding to a hearing at which the judge could assess the credibility of the witnesses and weigh the evidence in light of those credibility findings. We, therefore, conclude that the General Counsel's position was substantially justified throughout the proceeding. Accordingly, we dismiss the application for fees and expenses.

#### ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and orders that the application of the Applicant, Tim Foley Plumbing Services, Inc., Muncie, Indiana, for fees and expenses under the Equal Access to Justice Act is denied.

*Steve Robles, Esq.*, for the General Counsel.

*David Crittenden and Stephen D. LePage*, of Greenwood, Indiana, for the Respondent.

*Anthony Bane*, of Richmond, Indiana, for the Charging Party.

#### DECISION

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me on June 24, 1999, in Muncie, Indiana. On August 18, 1998,<sup>1</sup> The Indiana State Pipe Trades Association and United Association Local Union No. 661, a/w United Association of Journey-men and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union) filed the charge in Case 25-CA-26181 alleging Tim Foley Plumbing Services, Inc. (the Respondent) had committed unfair labor practices under the Act. On December 18, based on that charge

(as later amended), the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(3) and (1) of the Act by, inter alia, constructively discharging Ronald Duke and refusing to hire Thomas Duke. The Respondent duly filed an answer to the complaint admitting that this matter is properly before the National Labor Relations Board (the Board) but denying the commission of any unfair labor practices.

On the testimony and exhibits entered at trial,<sup>2</sup> and on my observations of the demeanor of the witnesses,<sup>3</sup> and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

#### I. JURISDICTION

As it admits, the Respondent is a corporation that is located in Muncie, Indiana (its facility), that has been engaged in the construction industry in the business of prefabrication, installation and maintenance of light commercial and residential plumbing systems, and the remodeling of light commercial and residential kitchens and baths. During the 12-month period ending March 31, the Respondent, in conducting the business operations, purchased and received at its facility goods valued in excess of \$50,000 directly from suppliers located at points outside the State of Indiana. Therefore, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

On September 18, 1997, a Board election was conducted among the Respondent's employees. The Union did not win that election, but it filed objections and unfair labor practice charges against the Respondent which became the subject of a complaint that was tried before NLRB Administrative Law Judge Arthur J. Amchan in late May and early June. Judge Amchan issued his decision on August 3, finding that the Respondent had committed certain unfair labor practices. Judge Amchan's decision is currently pending before the Board on exceptions.

Tim Foley is the Respondent's owner and president. The Respondent's business involves two general types of activities, new construction and service work. As the names imply, new construction work is work on buildings that are under construction, and service work is the repair of occupied buildings, such as fixing drains and toilets in homes. Foley employs both plumbers and carpenters. Foley also employs two individuals who often serve as leadmen, John Adams and Larry Bisel. The complaint alleges, and the Respondent denies, that Adams and Bisel are supervisors within Section 2(11). (Ultimately, I find and conclude that Bisel was not a supervisor; I would find the same for Adams if his status affected any other issues in this case, which it does not.)

<sup>2</sup> Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate redundant words; e.g., "Doe said, he mentioned that . . ." becomes "Doe mentioned that . . ."

<sup>3</sup> Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

<sup>1</sup> Unless otherwise indicated, all dates are in 1998.

Ronald Duke is a journeyman plumber. Duke has had three rounds of employment with the Respondent. The first time that Duke worked for the Respondent was about 5 years before the hearing in this case; Duke testified that that round of employment lasted for about 1 year. Duke could not remember when his second round of employment with the Respondent occurred, but he testified that it lasted about 6 months. Duke's third round of employment with the Respondent began in December 1997, and it ended on July 2. Duke testified that when he began his second and third rounds of employment with the Respondent, he and Foley reached agreements that he would only be assigned to new construction work.

The Respondent's Forest Oak job was a new apartment construction project in Muncie. Duke testified that in March or April 1998 (or about 6 or 7 months after the Board election), at a time that he was working as a plumber on the Forest Oak project, Foley came to the clubhouse area and:

Mr. Foley said that he would like for someone, he did not direct this directly to me, but for someone to go around to the employees and tell them to call the union, or [Union representative] Tony Bane, and tell them that they wanted to go ahead and get a union in Foley's, some of the employees that had not agreed to this before so that when they did have the vote that they could—everybody would vote no, and blow the union out of the water, and they'd leave him alone once and for all.

Based on this testimony by Duke, the complaint at paragraph 5(a), alleges that, in violation of Section 8(a)(1), "Respondent, by Tim Foley, at Respondent's Forest Oaks jobsite, solicited its employees to induce other employees to oppose the Union."

Duke further testified that he signed a union authorization card in March or April. The parties stipulated, however, that Duke signed a union authorization card only "after June 3, 1998." At any rate, Duke testified that after he signed the union authorization card, he informed Foley that he had done so. When asked on direct examination why he had so informed Foley, Duke testified:

Because there was information going around the job site that Mr. Foley had gained knowledge of the people who had signed a union card. And I didn't want to lose my job or to think, you know, for him to think that I was—was something wrong.

As discussed *infra*, Foley denied knowing that Duke had held any prounion sympathies before July 2.

Duke testified that "no more than two weeks" after he told Foley that he had signed a union authorization card, he was transferred from the new construction job at Forest Oaks and sent to a service job at the home of a family named DeCamp in Shamrock Lakes, Indiana. According to a recent atlas, Shamrock Lakes is about 20 miles north of Muncie (where, again, the Forest Oaks project was located). Shamrock Lakes is about 7 miles from Hartford City, Indiana, where Duke resides. Duke testified that it was Leadman Bisel who told him that he was being transferred to a service job in Shamrock Lakes. Duke testified that he did not ask for the transfer to the DeCamp job

and that he wondered at the time why he was being transferred, but Bisel did not tell him and he did not ask.

Duke testified that he worked on the DeCamp job for about 8 or 10 days. Part of his job there was to repair existing drains and add new drains in a crawl space under the house. On direct examination, Duke was asked and he testified:

Q. Could you describe the condition of the area . . . underneath the house where you were working?

A. There had been broken sewage lines under there, and it was very muddy and nasty. And I had to spray off with a hose every time I came up from underneath the house, with a garden hose. Very bad. Insulation falling down.

Q. Was there collected human waste in the area in which you were—

A. Yes, there was sewage under there in the broken sewer lines.

Duke further testified that in late June he asked Bisel why he had been transferred to the DeCamp job. Bisel, according to Duke, "just told me to get used to this work because he had another one . . . just like this one waiting on me when I finished." Duke asked if the crawl space on the next job was "as bad as this one." Bisel, further according to Duke, replied, "I didn't even look." Based on this testimony by Duke, the complaint at paragraph 5(b) alleges that Respondent, by Bisel, "threatened its employees with onerous work assignments because they had formed, joined and assisted the Union."

Duke testified that at some point he was transferred back to the Forest Oak job, but he was then transferred back to the DeCamp job. Just which days these would have been is not reflected by the record.

Duke further testified that the Respondent's employees work 10-hour days, Mondays through Thursdays, and Fridays are used for working overtime only when necessary. According to Duke, on Monday, June 29, he was at the Respondent's facility in Muncie where he met Leadman Adams. Duke testified that he told Adams that he needed to be off work on Thursday, July 2, and that he would make up the lost time on Friday, July 3. Adams replied that that would be "fine." Further according to Duke, on the night of Wednesday, July 1, Adams called him at his home and:

Mr. Adams asked me if there was any way that I could go ahead and work Thursday, that he had forgotten to tell the office girls or whoever schedules, makes the schedules, that I was going to be off; and that they had already scheduled work for me for Thursday and it was very important that I be there.

And I told him that I had made arrangements to have the day off, and it was very important that I miss that day.

And he again told me, he said, well, he said, we have a policy at Foley's that we try to get in a full work week and only work Friday if we have to. And then he requested me come in again.

And when I told him again that I really didn't believe that I was going to be able to make it in there on Thursday, he said, "Well, I don't do the hiring or firing on this at Tim Foley Plumbing. All I do is make the recommendations."

And then he . . . told me that if I did not come in, that he would recommend that I be fired. . . .

I told him I would go ahead and put my business aside, and I would be there the following morning.

After this testimony, Duke was asked and he testified:

Q. In relation to the work that you didn't care for at DeCamp, how would you describe this situation with John Adams, being required to come in to work on Thursday?

A. I didn't like it. Tired of being pushed.

Q. What decision did you make at that time, if any?

A. That I felt like I would be better off working for the union. . . . I [felt that I] couldn't be bullied around in that fashion if I was working for the union.

Duke did go to the Respondent's facility on July 2, but he did not report to work. Instead, he went to the warehouse section where he met Sean Auker, the attendant there. The parties stipulated that Duke left with Auker a preprinted form that was created by the Union. The form had Duke's name filled in, and it stated that Duke was "immediately going on strike." The form concluded that if the recipient (i.e., the Respondent) had any questions, he could call one of four named individuals, including Union Representative Bane (who signed the form that Duke presented to Auker). The parties further stipulated that Auker delivered the form to Foley.

Based on the above testimony by Duke, the complaint alleges that in violation of Section 8(a)(3):

6. (a) About June of 1998, Respondent removed its employee Ron Duke from construction work and assigned him to service work.

(b) About June of 1998, Respondent:

(i) isolated its employee Ron Duke from other employees; and

(ii) assigned its employee Ron Duke more onerous and less desirable work.

(c) By the conduct described above in paragraphs 6(a) and (b) Respondent caused the termination of its employee Ron Duke.

At trial, the General Counsel made clear that by these allegations he was contending that the Respondent constructively discharged Duke.

On cross-examination, Duke acknowledged that it had rained during the night before he first arrived at the DeCamp job and that he and carpenter Randy Brown pumped out the crawl space before he began working there. Duke further acknowledged that repairing the broken sewer pipes in the crawl space was "part of the repair." Duke further testified that after his July 1 telephone conversation with Adams ended, "I thought about it for a little while, and decided I was just fed up with it. So I called Mr. Bane and asked him for a strike letter."

On brief, in argument that Bisel is a supervisor within Section 2(11) and that the Respondent is bound with responsibility for what the General Counsel alleges as a threat in paragraph 5(b) of the complaint, the General Counsel first relies on Duke's direct examination testimony that Bisel is the person who told him to go from the Forest Oak job to the DeCamp job. On cross-examination, however, Duke acknowledged that

Foley probably made the decision that he be transferred.<sup>4</sup> The General Counsel further argues that Bisel must have been a statutory supervisor because there was no one else who could have spoken for management on the DeCamp job. Finally, the General Counsel cites several time cards of Bisel which indicate that Bisel met with purchasers of service work, made estimates, ordered materials and inspected work that had been done.

Foley testified that the only time that he spoke to Duke about the Union was after the September 18, 1997 Board election when:

And I said, what would have really been fun, if we would have had the vote and the amount would have been swinging totally my way with just one or two votes against the company. And I said, "That would have really been a funny situation as opposed to the way it went when it was a close decision at the end."

Foley flatly denied that he ever had a conversation with Duke about a union authorization card. Foley further testified that Duke asked him to be transferred to the DeCamp job from the Forest Oak job. Foley testified:

[Duke said,] "I heard Randy [Brown] was getting ready to start a job up at Hartford City. . . . I'm working on the house, I got the bank appointments, and I've got a lot of time that I have to take off work coming up that I might have to be up there. . . . Is there any way that I could work that job? It's only going to be a week and a half, two week job." . . . And he said that would work out for him timing-wise.

Foley testified that he agreed with Duke's request because Duke was then driving one of the company trucks home at nights and the shorter distance between Duke's home and the DeCamp job would save the Respondent money in mileage. Foley further testified that, at the time that Duke delivered his "strike letter" on July 2, Duke was not working at the DeCamp job, but had returned to the Forest Oak job. Foley further testified that the first that he knew that Duke may have been pro-union was when he received the "strike letter" on July 2. Foley did not deny that he and Duke had agreements that Duke would not do service work during his last two rounds of employment, but he also testified that he considered the DeCamp job new construction because it involved converting an ordinary bedroom to a large bathroom (for a handicapped person) with new piping for water and a hot water heater. On cross-examination, Duke admitted that his home was closer to the DeCamp job than to Muncie, but he denied that he had any bank paperwork having to do with construction on his new house at the time that he worked on that job. Duke further denied requesting the transfer to the DeCamp job.

Bisel testified that he estimated the DeCamp job for the Respondent, at which time he went into the crawl space. Bisel flatly denied that there was any waste in that crawl space. Bisel acknowledged that the crawl space did have rain water in it

<sup>4</sup> The Tr. p. 127, L. 5, is corrected to change "I suppose he runs the company." to "I suppose. He runs the company."

when Brown and Duke started the job, but he came to the site and provided a pump that he ordinarily carries on his truck for eliminating such water. (Duke admitted that it had rained the night before he started on the DeCamp job.) Bisel further testified that Foley made the decision to transfer Duke from the Forest Oak job to the DeCamp job. Bisel also testified that the only complaint that Duke expressed about the DeCamp job was that he was not making enough money, and Bisel flatly denied that he ever told Duke to get used to the DeCamp job because there was another job just like it that was in store for him.

The Respondent's employees who are working in the Muncie area submit time sheets or other information daily to the Respondent by placing such information in a box for that purpose at the end of each workday. Adams testified for the Respondent that Duke did ask him if he could take the day off on July 2, but he also testified that he only told Duke to put in a request to Foley with his daily timesheet. Adams denied telling Duke that he could have July 2 off, and he denied having any telephone conversation with Duke on July 1.

Brown testified on behalf of the Respondent that when he and Duke started the DeCamp job there was in the crawl space no sewage that he saw or smelled. Brown further testified that when the Respondent's employees do discover sewage on one of the Respondent's jobs, the employees "put lime down . . . to dry things up and to sanitize things." Brown further testified that Duke made no complaints about the DeCamp job and expressed only gladness that he had the shorter distance to drive to work.

#### Conclusions

The complaint alleges that Foley unlawfully solicited employees to induce other employees to oppose the Union. As a factual basis for the allegation, the General Counsel relies on Duke's testimony that Foley once stated that he hoped that someone would tell Union Representative Bane that the employees favored the Union and that he further hoped that "when they did have the vote," the Union would lose. Assuming that the event occurred as Duke testified, there is no evidence that Foley attached any threat or promise of benefit to his "solicitation." On brief, the General Counsel cites no case authority for the proposition that a supervisor may not solicit an employee to induce other employees to vote against a union, even where the solicitation contains no threat or promise of benefit. The General Counsel only argues that Foley's statement in the presence of Duke (not to Duke) constituted an "instruction" and was therefore violative. Even if credited, however, Duke's testimony that Foley said that he "would like" some employees to do something contains no hint of any type of instruction. Moreover, I found Foley credible in his denial that he said any such thing to, or around, Duke. I shall therefore recommend dismissal of paragraph 5(a) of the complaint.

Any union authorization card that Duke may have signed was not offered into evidence. The parties stipulated, however, that Duke signed such a card "after June 3" (which, of course, could have been after Duke terminated his employment with the Respondent). At any rate, Duke testified that he told Foley that he had signed a union authorization card, and I have quoted his stated reason above. Duke's quoted reason makes no sense

to this trier of fact. If Duke feared for his job, telling his supposedly antiunion employer that he had signed a union authorization card would hardly provide insurance against discharge; also, if Duke did not want Foley to think that there was something "wrong," this was hardly a way to assure him otherwise. Moreover, Foley credibly denied knowing that Duke held any prounion sympathies before Duke submitted his "strike letter" on July 2. I therefore discredit Duke's testimony that, before July 2, he told Foley that he had signed a union authorization card.

Paragraph 5(b) of the complaint alleges that Bisel unlawfully threatened Duke with onerous working conditions because he had joined the Union. This allegation assumes the supervisory status of Bisel, something that the General Counsel simply did not prove. Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The General Counsel proved that Bisel sometimes meets with customers, and the General Counsel proved that Bisel sometimes inspects work of other employees, but the General Counsel did not prove, or even attempt to prove, that Bisel possessed any of the indicia of a supervisory status as listed by Section 2(11). Certainly, the General Counsel did not prove that Bisel transferred Duke from the Forest Oak job to the DeCamp job. Bisel and Foley both credibly testified that Foley made that decision.

Assuming, *arguendo*, that the General Counsel proved Bisel's supervisory status, the General Counsel does not contend that Bisel ever made any express statement about the Union to Duke. Rather, for factual support of paragraph 5(b) of the complaint, the General Counsel relies on the above-quoted testimony by Duke that, within 2 weeks of his telling Foley that he had signed a union authorization card, Bisel told him that he had better "get used" to onerous work such as that at the DeCamp job because he was going to assign Duke more of such work. The General Counsel therefore contends that there was an implicit threat in Bisel's alleged statement to Duke. I have found above, however, that Duke did not tell Foley that he had signed a union authorization card, and there is no other evidence of how the Respondent could have known before July 2 that Duke had joined, or otherwise supported, the Union (if Duke actually did so). Therefore, even assuming the credibility of Duke's testimony about Bisel's alleged "get used to it" statement, there could not have somehow been an implicit reference to any prounion sympathies that Duke may have held before July 2. Finally on this point, Bisel credibly denied making such a "get used to it" statement to Duke. I shall therefore also recommend dismissal of paragraph 5(b) of the complaint.

The General Counsel has offered no evidence of animus other than that which I have discredited. On brief, the General Counsel relies on certain findings by Judge Amchan as evi-

dence of relevant animus, but that decision has not been adopted by the Board. Moreover, at trial I told the parties that, “first of all, and absolutely first of all, I make my own credibility resolutions.”<sup>5</sup> Nevertheless, the General Counsel did not offer at the hearing before me any of the evidence of animus that he had offered to Judge Amchan.<sup>6</sup>

The General Counsel further has not proved that the Respondent isolated Duke and thereafter assigned him more onerous working conditions by transferring him from the Forest Oak job to the DeCamp job. Foley was credible in his testimony that Duke requested the transfer in order to be nearer the bank that was financing his new house that he was building near to the DeCamp job. Moreover, even if the transfer was against Duke’s will, and even if the conditions at the DeCamp job were as Duke described, the conditions to which Duke was allegedly subjected at that job were nothing more than those which plumbers frequently encounter in their work. Duke, himself, acknowledged that any human waste was “in the broken sewer lines,” not where he might have to touch it. Also, Brown credibly testified that the Respondent’s employees sometimes do encounter waste when drainage pipes are replaced, but the employees put down lime to “sanitize” any such area. The mud at the DeCamp job, of course, was to be expected after a rain. That is, even if I credit Duke’s testimony about the conditions at the DeCamp job, and even if the conditions at that job may have not have been as pleasant as those at the Forest Oak job, Duke asked for the transfer, and he was subjected to conditions no worse than those to which plumbers are often subjected. (As Duke testified, the broken drainage pipes were “part of the repair.”) Finally, I credit Bisel and Brown that there was no detectable sewage at the DeCamp job.

Because the General Counsel has not presented evidence that the Respondent possessed relevant knowledge of, or had animus toward, Duke’s supposed pronoun sympathies that he held before he decided to terminate his employment with the Respondent, and because the General Counsel has failed even to prove that the Respondent had taken any adverse action against Duke before he decided to submit his “strike letter” on July 2, it must be concluded that the General Counsel has not presented a prima facie case of unlawful discrimination against Duke. The complaint’s allegations for Duke, including the allegation of constructive discharge, must therefore be dismissed. Nevertheless, I feel constrained to point out that I do not believe that Duke quit because of any of the conditions at the DeCamp job. In the first place, Duke was not working at the DeCamp job when he submitted the “strike letter” on July 2; the General Counsel made no attempt to rebut Foley’s testimony that, by the time Duke submitted the “strike letter,” he had been transferred back to the Forest Oak job. Also, Duke did not testify that he was, in fact, working at the DeCamp job when he decided to submit the “strike letter.” Also, Duke and Adams both agree that Duke submitted his request to be off on July 2 when

Duke was at the Respondent’s Muncie facility; when Duke was working at the DeCamp job, he did not even go into Muncie, which was about 20 miles away. Finally on this point, Duke did not advance any testimony that the conditions at the DeCamp job had anything to do with his quitting, except with improper help from counsel for the General Counsel. Again, counsel asked Duke: “In relation to the work that you didn’t care for at DeCamp, how would you describe this situation with John Adams, being required to come in to work on Thursday?” The strained syntax that counsel was required to employ for his blatantly leading question was a telling admission that there was no evidence that conditions on the DeCamp job had anything to do with Duke’s termination on July 2.

I do believe, and find, that Adams first told Duke that he could have the day off on July 2, and then Adams told Duke on July 1 that he could not have July 2 off. I further believe, and find, that Adams told Duke that he would recommend Duke’s discharge if he did not come to work on July 2. It is apparent to me, however, that it was because of Duke’s desire not to work on July 2, and because of Adams’ threat to cause Duke’s discharge, and because of Duke’s desire to concoct a putative basis for an unfair labor practice charge over his anticipated discharge, that Duke contacted the Union and attempted the ploy of a one-man strike. It was only after Duke learned that there was no such thing as a one-man strike that he decided that what he had done by submitting the “strike letter” was to quit. Even then, Duke’s retroactive decision that he had actually quit was not premised on the conditions at the DeCamp job; rather, as he testified (without being led to it): “I felt like I would be better off working for the Union.” For this reason, and all of the reasons that I have stated above, I shall recommend dismissal of all allegations made on behalf of Ronald Duke.

Thomas Duke is the son of Ron Duke. In early 1998, Thomas Duke was hired by the Respondent as a laborer. In May, Thomas Duke quit the Respondent’s employ to go to school. Thomas Duke testified that, thereafter, in June, he attempted to call Foley to seek reemployment. Foley refused to take Thomas Duke’s telephone calls. The complaint alleges that the Respondent refused to rehire Thomas Duke in violation of Section 8(a)(3). The General Counsel contends that Foley refused to reemploy Thomas Duke because of his father’s pronoun sympathies. As I have found, however, there is no credible evidence that Foley knew that Ronald Duke held any pronoun sympathies before July 2. Accordingly, I shall also recommend that the allegations of the complaint in regard to Thomas Duke be dismissed.

[Recommended Order for dismissal omitted from publication.]

*Steve Robles, Esq.*, for the General Counsel.

*David Crittenden and Stephen D. LePage*, of Greenwood, Indiana, for the Respondent.

#### SUPPLEMENTAL DECISION

[Equal Access to Justice Act]

On December 18, 1998, the General Counsel issued a complaint alleging that Tim Foley Plumbing Services, Inc. (the Applicant), had violated Section 8(a)(1) and (3) of the Act by

<sup>5</sup> Tr. 22.

<sup>6</sup> Although the General Counsel could not have asked for a second order based on the evidence that he presented to Judge Amchan, there was nothing to prevent him from presenting the same evidence to me only as evidence of animus.

soliciting and threatening employees and by constructively discharging employee Ronald Duke and by refusing to hire Thomas Duke. The case was tried before me on June 24, 1999, in Muncie, Indiana; thereafter, on September 27, 1999, I dismissed the complaint in its entirety. On November 10, 1999, in the absence of exceptions, the Board affirmed my decision.

On December 10, 1999, the Applicant filed its application for fees and expenses under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA) and Section 102.143 of the Board's Rules and Regulations (the application). Simultaneously, the Applicant filed a "Motion to Withhold Financial Information from Public Disclosure" (the motion to withhold financial information). On December 27, 1999, the General Counsel filed a motion to dismiss the application for fees and expenses and a motion to strike the motion to withhold financial information. By Order dated August 8, 2000, I denied the General Counsel's motion to dismiss, finding, *inter alia*, that the Applicant had demonstrated that, at the time that the complaint issued, it employed no more than 500 employees and had a net worth of no more than \$7 million, as required by Sections 102.143(b)(5) and 102.147 of the Rules and Regulations. In said Order, I further granted the Applicant's motion to withhold financial information. On September 13, 2000, the General Counsel filed an answer to the application.

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless: "the position of the agency was substantially justified or that special circumstances make an award unjust." Under Section 102.144(a) of the Board's Rules and Regulations, the burden of establishing substantial justification is on the General Counsel. The test of whether this burden has been met is one of reasonableness, but, at minimum, the General Counsel must present evidence which, if credited, states a *prima facie* case of the complaint's allegations. The General Counsel cites *SME Cement, Inc.*, 267 NLRB 763 (1983), for the proposition that "nor does the failure of the General Counsel to establish a *prima facie* case necessarily require a finding that his position was not substantially justified."<sup>1</sup> This is true; but, although the General Counsel need not "establish" a *prima facie* case, he must, at least, state one. As concisely stated in footnote 1 of the Board's decision in *SME Cement*:

The Administrative Law Judge correctly stated, citing *Enerhaul, Inc.*, 263 NLRB 890 (1982), that, in actions to collect attorneys['] fees and expenses pursuant to the Equal Access to Justice Act, if the General Counsel's position in the underlying case was substantially justified, it is immaterial that the General Counsel may not have established a *prima facie* case of a violation. We note, however, that for the General Counsel's position to be substantially justified within the meaning of Sec. 102.144(a) of the Board's Rules and Regulations, Series 8, as amended, the General Counsel must present evidence which, if credited by the fact-finder, would constitute a *prima facie* case of unlawful conduct by the respondent.

<sup>1</sup> Answer, p. 4.

The Applicant contends that the General Counsel was not substantially justified in pursuing this action because he did not, and apparently could not, meet his burden of stating a *prima facie* case. I agree.

The complaint made two allegations of 8(a)(1) violations. The first was that the Applicant's president had "solicited its employees to induce other employees to oppose the Union." As I stated in my decision, this allegation did not state a violation of the Act; employers may solicit employees to induce other employees to oppose a union, as long as there is no threat or promise of benefit involved. The complaint's second allegation of an 8(a)(1) violation was that one Larry Bisel threatened employees with more onerous work assignments if they supported the Union. On its face, that allegation stated a violation of the Act, but it was entirely dependent on another allegation of the complaint, that Bisel was a supervisor within Section 2(11) of the Act. As I stated in the unfair labor practice decision, the Applicant denied that allegation, but the General Counsel offered no evidence which, even if credited, would prove that Bisel ever possessed any of the indicia listed by Section 2(11). The General Counsel presumably would have presented such evidence if he had possessed it before trial. Accordingly, I find and conclude that the General Counsel was not substantially justified in presenting or pursuing the 8(a)(1) allegations of the complaint.

The complaint made the 8(a)(3) allegations that the Respondent constructively discharged Ronald Duke and refused to hire Thomas Duke. Allegations of violations of Section 8(a)(3) require, as part of the *prima facie* case, proof of employer animus. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The General Counsel, however, presented no such evidence at trial. Again, the General Counsel presumably would have presented such evidence if he had possessed it when this case went to trial.<sup>2</sup> Accordingly, I also find and conclude that the General Counsel was not substantially justified in presenting or pursuing the 8(a)(3) allegations of the complaint.

In view of the General Counsel's failure to present a *prima facie* case, I need not pass on the Applicant's other contentions of why the General Counsel was not, or the General Counsel's other contentions of why he was, substantially justified in the prosecution of this case. I am, however, constrained to state that the answer's contentions are false to the extent that they imply that some parts of my unfair labor practice decision rested on credibility resolutions; all credibility resolutions were plainly stated as alternatives to my findings that the General Counsel had failed to present a *prima facie* case.

The application claims 199.50 attorney's hours and expenses of \$1,202.43. The General Counsel does not contest the reasonableness of either of these amounts. The application claims attorney's fees of \$110 per hour, but the Board's Rules and

<sup>2</sup> As I discussed in the unfair labor practice decision, the General Counsel earlier possessed *prima facie* evidence of animus, and he presented such evidence to a different administrative law judge, but he did not present it to me.

Regulations, Section 102.145, sets the maximum fee for attorneys at \$75 per hour.<sup>3</sup>

[Recommended Order omitted from publication.]

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<sup>3</sup> With the application, the Applicant also filed a petition to increase the maximum attorney's rate. The Board retained that petition when it

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referred the application to me.