

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PALACE ARENA FOOTBALL, LLC,
a/k/a DETROIT FURY

Case No. 7-CA-45132

and

ARENA FOOTBALL LEAGUE PLAYERS
ASSOCIATION

Erikson Karmol, Esq., for the General Counsel.
Robert M. Verduynde and Gary S. Fealk, Esqs.,
(*Verduynde, Metz & Murray, P.C.*)
Bingham Farms, Michigan, for the Respondent.
Timothy English, Esq., of Washington, D.C.,
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan on October 31 and November 1, 2002. Another session of the trial was held via videoconference on February 25, 2003.¹ The charge was filed May 15, 2002 and the complaint was issued July 17, 2002.

The General Counsel alleges that on November 28, 2001, Respondent threatened to terminate Antoine Worthman, the Detroit Fury's player representative for the Union, the Arena Football League Players Association, for engaging in union activity.² He also alleges that on December 7, 2002, Respondent terminated Worthman's employment in retaliation for his protected activities.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ General Counsel's motion (brief p. 34, n. 12), to reopen the record to include the documents relating to my decision to order the taking of Jay Gruden's testimony via videoconference, is granted.

² The Union represents all Arena League players in a single bargaining unit.

³ I have noticed numerous typographical errors and mistranscriptions in the transcript. However, none of them appear to substantively affect the record in this matter. For example, at Tr. Line 23, the transcript has this judge addressing somebody named "Jim." Not only would I not address counsel by their first name, there was nobody by that name appearing in this proceeding. Similarly, Tr. 195, line 24 reads that I will "waive" an exhibit, rather than "receive" the exhibit.

As stated during the hearing, I have not accorded any weight to Exhibit R-6, which has not been shown to be a fair and accurate representation of Antoine Worthman's performance during the 2001 season.

Findings of Fact

I. Jurisdiction

5 Respondent, a corporation, operates the Detroit Fury franchise in the Arena Football League. It has an office and facility in Auburn Hills, Michigan. During 2001, Respondent received gross revenue in excess of \$500,000 and purchased goods valued in excess of \$50,000 from points outside of the State of Michigan, which were shipped directly to its facility in Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the Arena Football League Players Association, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

15 Antoine Worthman, the alleged discriminatee, played professional football for nine years. He played three years (1992-94) in the Canadian Football League (CFL) and then six (1996-2001) in the Arena Football League (AFL). In November 2000, he signed a three-year contract with the Detroit Fury, a team about to play its initial season in the AFL. This contract did not obligate the Fury to retain Worthman as a player; it only set forth his compensation for three years if he was retained.

20 In 2001 and 2002, the AFL season began in April and ended in July. The Arena Football game is designed to be a high-scoring game, featuring more scoring and more passing than the National Football League (NFL). The playing field is 50 yards long and 85 yard wide; there are eight players on the field, rather than eleven. To facilitate scoring, one receiver, the "high motion man" is allowed to move forward towards the line of scrimmage. In the NFL and in American college and high school football, offensive players are prohibited from moving forward before the ball is snapped.

30 Three players on the field are defensive backs. Two of these are called defensive specialists (DS); the other is called a cornerback, who plays an offensive position as well. Generally six of the eight players on the field are playing offense and defense. Antoine Worthman started every game for the Fury in 2001 at a defensive specialist position (DS) and was the team's leading tackler. He was awarded three game balls during the season for being the team's outstanding player of the game. Worthman did not play any offensive position.

35 In July 2001, the AFL players chose to be represented by the Union. The Detroit Fury players elected Andy Chilcote to be their player representative and Antoine Worthman to be the alternate player representative. When Chilcote sustained a neck injury, ending his career with the Fury, Worthman, at least unofficially, assumed his duties.

45 On or about November 16, 2001, the Fury paid for Worthman to fly to Detroit to attend a season ticket promotion. On or about November 27, 2001, Worthman had a telephone conversation with Jay Gruden, who had recently announced that he was stepping down as coach of the AFL's Orlando Predators, to resume his playing career. Worthman and Gruden had been teammates in 1996 on the AFL Tampa Bay Storm.

50 During their conversation, Gruden mentioned that his team, the Orlando Predators, might lose some of its players who were free agents.⁴ Worthman told Gruden that the Fury was

⁴ A player must play in the AFL for four years before he becomes a free agent.

negotiating with some of its players. At some point in the conversation Worthman mentioned Kelvin Kinney, a Fury lineman, who was not eligible for free agency. Worthman concedes that he told Gruden that Kinney wanted more money than the Fury was paying him and that other players were being paid substantially more (Tr. 77). Worthman denies suggesting to Gruden that the Predators might be able to obtain Kinney's services. I find, however, that at least implicitly, Worthman indicated to Gruden that Orlando might be able to acquire Kinney.⁵

Within an hour of this conversation, Jay Gruden called Darrel "Mouse" Davis, then the Fury's coach.⁶ Gruden mentioned that he talked to Worthman and that he understood that Kelvin Kinney was available to other AFL teams. Davis told him that was not so. On November 28, 2001, Davis left a message on the telephone answering machine at Worthman's home. Davis' message was that he had just heard some disturbing news that made him think of cutting (terminating) Worthman from the Fury. However, Davis said he wanted to discuss what he had heard with Worthman.

The same day Davis and Worthman had a forty-minute telephone conversation. Davis made it very clear that he was angry with Worthman. He told Worthman that he had heard that Worthman spoke with Jay Gruden and was trying to sell some of the Fury's players to the Orlando Predators (Tr. 31-34, 83-84).⁷ After a thorough venting of this subject, Worthman mentioned that he had been advising players to look at the AFLPA website and providing them information about the team's salary cap. I credit Davis' testimony that he indicated that these activities didn't bother him.

On December 6, 2001, Torey Hunter, a defensive specialist, signed a contract with Respondent. The next day, Davis called Worthman to inform him that he was being released from the team. On or about December 10, 2001, the Fury selected Carl Greenwood, a defensive specialist, in a "dispersal draft" of players who had become available by virtue of the demise of the AFL Houston franchise. Greenwood signed a contract with the Fury in February 2002.

In late April or early May of 2002, after the Fury had lost their first three games of the 2002 season, Worthman called Davis to inquire about rejoining the team. Davis told Worthman

⁵ Gruden testified that Worthman told him that Kinney was not happy and was trying to get out of Detroit. He further testified that Worthman asked him if he'd be interested in acquiring Kinney. While, I find that Gruden's recollection of this conversation was somewhat vague, I find his testimony generally credible.

⁶ The Fury fired Davis and Rich Stubler, his defensive co-coordinator, another of Respondent's witnesses, in July 2002, at the conclusion of a 1 –13 season.

⁷ I credit Davis over Worthman and find that the initial part of their telephone conversation concerned Worthman's telephone conversation with Gruden. Worthman's testimony at Tr. 83-84 and 100, that this subject didn't come up until late in the conversation, is illogical and incredible. Worthman's testimony on direct at Tr. 31-34, makes it clear that Davis called Worthman on November 28 to discuss Worthman's recent conversation with Gruden and Davis' belief that Worthman was "acting like an agent for players on the team (Tr. 31)" and "contacting other teams, trying to sell our players (Tr. 33)." I also credit Davis' testimony that he indicated that he had no problem with Worthman's other activities on behalf of the Union and the Fury players. As Davis testified, somebody was going to act as player representative and there was no reason for him to be angry with Worthman for doing so. Moreover, there is absolutely no evidence of anti-union animus on the part of Davis or any other management official—apart from Worthman's account of his November 28, 2001 telephone conversation with Davis.

that the defensive backs he had were better than Worthman. On May 8, 2002, the Fury signed DS Kenny Wheaton. On May 13, it waived Torey Hunter. On May 14, the team suspended Wheaton. On May 21, the Fury signed DS Quincy Davis. On May 28, it activated Kenny Wheaton from suspension and on June 3, it waived Carl Greenwood.⁸

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Analysis

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected concerted activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.⁹ Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981).

In the instant case, there is no evidence of anti-union animus, except for Antoine Worthman's testimony regarding his November 28, 2001 conversation with Darrel Davis. The lack of reliable evidence of anti-union animus is the single most important factor in my decision to dismiss the Complaint. The General Counsel essentially seeks a finding of discrimination on the basis on Worthman's account of his conversation with Davis and evidence that indicates that Respondent's stated reasons for waiving Worthman are pretextual. As evidence of pretext, the General Counsel argues that Respondent has advanced shifting reasons for releasing Worthman and that the testimony of Davis and Stubler is inconsistent with Respondent's position statement. While Respondent and its witnesses have not been consistent in their explanation for the release of Worthman, I find this insufficient, when considering the record as a whole, to infer illegal motive.

Respondent argues that it waived Worthman because it found players it thought were better and because it considered him disloyal in suggesting to Jay Gruden that he might be able to acquire Fury player Kelvin Kinney.¹⁰ Although Respondent may not have been completely content with Mr. Worthman's play, I find that it had no plans to release him until late November 2001. Further, I conclude that but for Davis' conversation with Jay Gruden concerning Worthman's call to Gruden, the Fury would not have released Worthman on December 7, 2001. However, I conclude that Davis' decision to release Worthman was motivated by Worthman's

⁸ Hunter, Greenwood and Wheaton were selected in the National Football League draft and played briefly in the NFL in the 1990s. Worthman was not drafted by an NFL team nor did he play in the NFL. Although the Fury publicized the NFL experience of its players, it does not appear that such experience played any role in the Fury's decisions as to which players to acquire, keep or terminate.

⁹ *Flowers Baking Company, Inc.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

¹⁰ Darrel Davis was not always consistent in his testimony in this regard. At Tr. 169 Davis indicated that the only reason he waived Worthman was that he was trying to acquire better players. However, at Tr. 235 Davis conceded that Worthman's call to Jay Gruden was a factor in the decision to waive Worthman. I find this inconsistency to be insignificant in that I find Worthman's discussion with Gruden regarding Kelvin Kinney to be unprotected.

conversations with Gruden regarding Kelvin Kinney and not about Worthman's other activities on behalf of the Union or Fury players. In this regard, Worthman's protected activities were quite unremarkable and appear not to be the sort of endeavors that would provoke discrimination by a unionized employer.

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The General Counsel relies on *Boeing Airplane Co.*, 110 NLRB 147 (1954)¹¹ in arguing that Worthman's efforts on behalf of Kelvin Kinney were insufficiently disloyal to be deemed unprotected. However, that case is distinguishable in that unlike the *Boeing* employees, Worthman was only acting on behalf of Kelvin Kinney; his activity was not protected concerted activity.¹² The *Boeing* employees arranged a job fair with other employers during a collective bargaining impasse. There was no issue as to whether their conduct was concerted, only whether it was sufficiently disloyal to lose the protections of the Act. Moreover, *Boeing* is also distinguishable in that the Boeing employees were attempting to persuade their employer to meet their demands. By way of contrast, there is no evidence that Worthman was attempting to obtain any result from Respondent. For these reasons I find *Boeing Airplane* irrelevant to this case.

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While I credit Davis and find that Torey Hunter's availability was a factor in the timing of Worthman's release, Respondent concedes that it did not have to release Worthman to make room on its roster for Torey Hunter. Respondent could have invited Worthman to training camp in the spring of 2002 had the team desired his presence.¹³ At that time Respondent could have re-evaluated the relative merits of Worthman, Hunter and other defensive specialists. The only significance I find in Worthman's performance during the 2001 season was the it was obviously not so superior to cause Davis to overlook his anger towards Worthman's conduct regarding Kelvin Kinney.

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In conclusion, I find that the General Counsel has not established that Respondent threatened Antoine Worthman with termination due to union or other protected concerted activity or that it terminated his employment due to such activity. Rather, I conclude that Davis was motivated to release Worthman due to his conversation with Jay Gruden in which he attempted to interest Gruden in acquiring Kelvin Kinney for the Orlando Predators. This activity is unprotected by the Act.¹⁴

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¹¹ Enforcement of *Boeing* was denied at 238 F. 2d 188 (9th Cir. 1956). However, the case remains valid Board precedent.

¹² There is no evidence as to whether Kinney authorized Worthman to contact other teams about acquiring him.

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¹³ Davis testified that he waived Worthman in December 2001 in order to afford him an opportunity to land a job with another team.

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¹⁴ The General Counsel emphasizes the fact that Jay Gruden was no longer a coach with the Orlando Predators at the time of this telephone conversation. It argues that Gruden was a fellow bargaining unit member with whom Worthman was free to discuss Kelvin Kinney's status. Although Gruden was no longer officially a coach, I find that Worthman understood that, at least unofficially, Gruden had input into personnel decisions made by the Orlando Predators' management.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

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The complaint is dismissed.

Dated, Washington, D.C. April 22, 2003.

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Arthur J. Amchan
Administrative Law Judge

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¹⁵ 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 deemed waived for all purposes.