Exceptional Professional, Inc. d/b/a EPI Construction *and* Carpenters' District Council of Kansas City and Vicinity Locals 311 and 978 affiliated with United Brotherhood of Carpenters and Joiners of America. Cases 17–CA–19272, 17–CA–19325, and 17–CA–19385

August 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW AND WALSH

On August 5, 1998, Administrative Law Judge Mary Miller Cracraft issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Union filed a brief in opposition to the Respondent's exceptions.

On September 28, 2001, the National Labor Relations Board issued its Decision and Order,[1] finding that the Respondent committed certain violations of Section 8(a)(1) and (3) of the Act and dismissing an allegation that the Respondent violated Section 8(a)(4) and (1) of the Act. The Board also remanded, for further consideration under *FES*,[2] a complaint allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to consider for hire or to hire 10 applicants.

On January 11, 2002, Judge Cracraft issued the attached decision on remand. The Respondent filed exceptions, the Union filed a brief in opposition, and the Respondent filed a reply brief. Additionally, the Union filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.[3]

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 ruling, findings,[4] and conclusions and to adopt the recommended Order.[5]

As noted above, the Board remanded, for further consideration under *FES*, a complaint allegation that the Respondent unlawfully refused to consider for hire or to hire 10 job applicants. To establish a discriminatory refusal-to-hire violation under *FES*, the General Counsel must show that (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel establishes these three elements,

> the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.[6]

In her decision on remand, the judge, applying *FES*, found that the Respondent, a drywall installation contrac-

[1] 336 NLRB 234.

[2] 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[3] The Respondent also filed a motion to reopen the record, and the Union filed a response in opposition to the motion. The Respondent's motion seeks to introduce into evidence copies of letters, asserted to constitute job offers, that the Respondent assertedly mailed to 15 alleged discriminatees after issuance of the judge's initial decision in this case. We deny the motion for the same reasons that we denied the Respondent's virtually identical motion in our original decision in this case. 336 NLRB at 234 fn. 2. As we noted there, the letters sought to be introduced, even if found to constitute unconditional offers of employment, would not alter the decision or the requirements set forth in the Order. See *Hedaya Bros., Inc.*, 277 NLRB 942 fn. 1 (1985). The letters are relevant, if at all, only with respect to the remedial aspect of this case. Thus, they may be presented at the compliance phase of this proceeding. See *Challenge-Cook Bros. of Ohio,* 282 NLRB 21, 26 fn. 7 (1986), enfd. 843 F.2d 230 (6th Cir. 1988). If instatement is ultimately required (see fn. 5, infra) and the letters are determined to constitute valid offers, the Respondent will not be required to make a second offer of instatement.

We also deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] The Respondent has excepted to some of the judges 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.

In addition, in some of its exceptions, the Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[5] For the notice designated by the judge as "Appendix E," we will substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

The instatement and make whole remedy prescribed by the judge shall be implemented in accordance with *Oil Capitol Sheet Metal, Inc.,* 349 NLRB 1348 (2007).

[6] *FES*, above, 331 NLRB at 12.

tor, unlawfully refused to hire two union-affiliated job applicants and refused to consider eight others. Specifically, the judge found that the General Counsel met his initial burden as to the refusal-to-hire allegations for all 10 applicants, but that the Respondent met its rebuttal burden of establishing that it would not have hired 8 of the applicants even in the absence of their union activity or affiliation.

The judge found that eight of the employees whom the Respondent hired to fill its job openings—employees Argaez, Cen, Herrera, Rivero, Varguez, Garcia, Archer, and Self—had superior qualifications to those of the union-affiliated applicants. Thus, employees Argaez, Cen, Herrera, Rivero, Varguez, Garcia, and Archer were well known to Stewart, the Respondent's president, for their drywall work as subcontractors for the Respondent on prior projects, and Stewart had been able to assess their drywall work through their participation in these projects. Additionally, these employees had been working steadily in drywall for at least 1 year before the Respondent hired them. Archer also had been an employee of the Respondent previously, and the Respondent had firsthand knowledge of his work history. Employee Self was highly recommended by employees of the Respondent for his drywall expertise, and the Respondent had recruited him for some time prior to securing him as an employee.

The judge found that these eight employees' *drywall* qualifications—precisely the type of work that the Respondent performed—and their "immediate, observed, steady drywall employment" made them superior applicants to the discriminatees, who were journeymen carpenters. Thus, the judge found that the Respondent established that, even if the discriminatees had not engaged in union activity, the Respondent would have hired these eight employees rather than the alleged discriminatees. We agree.

Our dissenting colleague contends that the judge's finding as to these eight discriminatees cannot stand because, when assessing whether the General Counsel had met his initial *FES* burden, the judge found, among other things, that the Respondent did not uniformly adhere to its hiring criteria, which the judge found were pretextually applied. In our view, however, the judge's finding in this regard was mistaken. The Respondent did uniformly adhere to its hiring *criteria*. It merely deviated from its usual *procedures* for determining whether applicants satisfied those criteria.

According to Stewart's testimony, the Respondent tried to hire employees who had drywall experience, had been working in drywall on a regular basis, and had a steady employment history. Those were the Respondent's hiring criteria. Stewart further testified that he used employment applications to determine whether employees possessed the requisite experience and training, and he requested that applicants list personal references. Finally, Stewart relied on interviews to determine whom to hire. Those were the Respondent's procedures for measuring applicants against its criteria.

The judge, who specifically found that the Respondent's hiring criteria *were not* themselves pretextual, concluded that Respondent did not uniformly adhere to its hiring criteria as to 10 of the 13 individuals placed on the payroll between June 30 and July 27, 1997—including employees Argaez, Cen, Herrera, Rivero, Varguez, Garcia, Archer, and Self—because few of these 13 individuals completed an application, gave personal references, or had interviews. In other words, the judge confused the Respondent's usual procedures for applying its criteria with the criteria themselves. In her analysis of the Respondent's rebuttal case under *FES*, the judge found that the just-named applicants had "immediate, observed, steady drywall employment." That is, they met the Respondent's hiring criteria.

We agree with our colleague, however, that the General Counsel met his initial burden under *FES* by showing that the union applicants had experience or training relevant to the announced or generally known requirements of the positions for hire. The other two elements of the General Counsel's initial case were also shown.[7] The General Counsel having met his burden, the judge properly applied *FES* and analyzed whether the Respondent had met its rebuttal burden of showing that, even if the discriminatees had not engaged in union activity or been affiliated with the Union, the Respondent still would not have hired them. One of the ways that the Respondent may satisfy this burden is by showing, in the words of *FES*, "that others (who were hired) had superior qualifications, and that it would not have hired [the discriminatees] for that reason even in the absence of their union support or activity."[8] The judge found that the Respondent made this showing here.

Although the Respondent did not adhere to all of its hiring procedures when seeking to identify experienced

[7] We agree with our dissenting colleague as to the General Counsel's initial burden under *FES*. The appropriate test under the second prong of the General Counsel's initial burden is whether the applicants had the relevant experience or training *or*, if not, whether the employer did not uniformly adhere to those requirements or applied them in a pretextual way. The Board required the judge to make findings on both parts of the test to preclude a need for a further remand in the event that the Board were to disagree with the judge's finding as to one. The judge apparently misunderstood the remand order to mean that the General Counsel had to show that both parts of the test were met.

[8] *FES*, above, 331 NLRB at 12.

drywall workers to hire, its actual hiring shows that it did hire applicants who had been regularly working in drywall. All but one of the 13 individuals whom the Respondent hired between June 30 and July 27 had drywall experience.[9] Additionally, while Argaez, Cen, Herrera, Rivero, Varguez, Garcia, Archer, and Self did not submit applications or give references, the Respondent, as noted above, was familiar with their work as subcontractors (and, in Archer's case, as an employee) and Self had been recruited by the Respondent based on the recommendations of current employees.[10]

Thus, even though the Respondent did not always follow its usual procedures, its lack of uniformity in this regard did not mean that, given a choice between applicants who had "immediate, observed, steady drywall employment" and others, the Respondent was indifferent or would hire applicants at random. As set forth by the judge, the eight employees whom the Respondent hired had substantial, recent experience in doing drywall work. Moreover, as described above, the Respondent had directly observed the work of all but one of them, and the other came highly recommended by current employees of the Respondent. Given these employees' drywall experience and the fact that the work of all but one of them had been directly observed by the Respondent, we agree with the judge that the Respondent has established that these eight employees were superior applicants and that the Respondent would have hired them rather than the discriminatees even in the absence of the discriminatees' union activity and affiliation.

Our dissenting colleague says that the Respondent "skewed" the overall process so as to prefer nonunion applicants, and "grudgingly" accepted applications from Union adherents. Accepting these quoted terms arguendo, they support our agreement that the General Counsel met his initial burden of proof. However, the judge found, and we agree, that the Respondent then met its burden of showing that those selected had qualifications superior to those of the alleged discriminatees (not simply, as our colleague says, that those selected were qualified). Thus, we cannot agree that those quoted terms establish a violation.

[9] Employee Steve Rucker had no drywall experience, but his father was an employee of the Respondent.

[10] In view of the Respondent's familiarity with these individuals' work, we understand the judge's statement that there was little evidence regarding their qualifications and training as indicating merely that they did not submit, and the Respondent did not introduce into evidence, applications or other documentation formally setting forth their qualifications and training. Clearly, based on the Respondent's familiarity with these individuals' work, the Respondent knew that they were well qualified and had substantial experience in performing the type of work for which the Respondent hired them.

In sum, the judge found, and we agree, that the General Counsel met his initial burden. The burden then shifted to the Respondent. We conclude, as did the judge, that the Respondent would have chosen the persons hired because of their superior drywall qualifications, even absent the union affiliation and activity of the nonchosen applicants.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exceptional Professionals, Inc. d/b/a EPI Construction, Nixa, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

MEMBER WALSH, dissenting in part.

I join in all aspects of the majority's decision, with the exception of its adoption of the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by refusing to hire 8 of the 10 union-affiliated job applicants. That finding is the apparent result of our misstatement of the appropriate test in the remand order, and it is fundamentally inconsistent with *FES*.[1]

Under *FES,* in a hiring discrimination case, the General Counsel has the initial burden of showing: (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, *or, in the alternative,* that the employer has not adhered uniformly to such requirements, or that the requirements themselves were pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. If the General Counsel satisfies that burden, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

In this case, the judge found that the General Counsel established the first and third elements of its initial burden: that the Respondent was hiring when the 10 union-affiliated applicants applied for work and that antiunion animus contributed to the Respondent's decision not to hire them. Regarding the second element of the test, the judge found that all of those applicants had experience or training relevant to the announced or generally known requirements of the positions for hire *and* that the Respondent had not adhered uniformly to those require-

[1] 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

ments. With respect to the second part of that test, the judge specifically found that the Respondent applied one set of criteria to the union-affiliated applicants and a different set to other applicants. In other words, as the judge stated, the Respondent's hiring criteria were "pretextually applied."

In making that finding, the judge correctly observed that *FES* set forth that element of the test—whether the applicants met the announced or generally known job requirements *or* that the employer had not uniformly adhered to those requirements—in the disjunctive, but that the Board's decision remanding the case to her stated it in the conjunctive. "In an excess of caution," the judge proceeded "as instructed . . . ." Based on those findings, the judge found that the General Counsel met his initial burden, and that the burden therefore shifted to the Respondent to show that it would not have hired those applicants even in the absence of their union affiliation.

The judge then found that the Respondent met its rebuttal burden as to 8 of the 10 applicants, because it established that it hired 8 other applicants who possessed stronger qualifications than those of any of the union-affiliated applicants. Accordingly, the judge concluded that the Respondent violated Section 8(a)(3) and (1) only by refusing to hire two of the union applicants.[2]

Although the judge correctly found a violation regarding the Respondent's refusal to hire two of the applicants, her finding concerning the remaining eight cannot stand. The judge found that the Respondent applied its hiring criteria pretextually, but she then permitted the Respondent to avoid liability by showing that it would have refused to hire 8 of the 10 union applicants because it hired 8 other applicants who possessed stronger qualifications. That finding is illogical.[3] Having found that the Respondent acted with antiunion animus and that it applied its announced hiring criteria pretextually, the inquiry was over: at that point, it was no longer possible for the Respondent to mount a defense based on a neutral application of those same criteria.[4] Accordingly, the judge should not have found that the Respondent acted lawfully in hiring the eight nonunion applicants, based on their allegedly superior credentials.

I would reverse the judge's finding that the Respondent met its rebuttal burden as to any of the refusal-to-hire allegations, and would therefore find that the Respondent's refusal to hire all 10 of the union-affiliated applicants violated the Act.

APPENDIX E

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 fail and refuse to hire employees because of their activity on behalf of or membership in Carpenters' District Council of Kansas City and Vicinity Locals 311 and 978 affiliated with United Brotherhood of Carpenters and Joiners of America (the Union).

WE WILL NOT refuse to consider applicants for employment because of their activity on behalf of or membership in the Union.

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[2] The judge did not specify which 2 of the 10 discriminatees were unlawfully refused employment; the judge left that determination to the compliance stage of the proceeding.

[3] The majority contends that the Respondent did not discriminatorily apply its hiring *criteria,* as the judge found, but that it failed to uniformly adhere to its hiring *procedures* for determining whether the applicants satisfied those criteria. The majority then argues that, because the Respondent's application of the hiring criteria was nondiscriminatory, its determinations that the nonunion applicants were more qualified than the union applicants was made without regard to union affiliation. That argument does not withstand scrutiny. Whether the Respondent discriminatorily applied its hiring criteria, or, alternatively, whether it discriminatorily applied its hiring procedures to determine whether applicants met those criteria, the fact remains that the Respondent skewed the overall process to give preferential treatment to nonunion applicants. Although the nonunion applicants who were hired may have been qualified for the positions for which they applied—and it is difficult to tell, as many of them did not submit applications, furnish references, or have interviews—it is more likely than not that the Respondent viewed their qualifications more favorably than those of the union applicants, whose applications it accepted only grudgingly and who were otherwise excluded from the hiring process, consistent with the Respondent's strong preference for hiring nonunion applicants. In the circumstances, it cannot be said that the Respondent's overall evaluation of the applicants was nondiscriminatory and gave no regard to union affiliation, as the majority suggests.

[4] The same principle applies in pretext cases decided under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982): "Where it is shown that the reason or reasons given by the Company for its adverse action were a pretext—that is that the reasons either do not exist or were not in fact relied upon—it necessarily follows that the Company has not met its burden and the inquiry is logically at an end." *Overnite Transportation Co.*, 343 NLRB 1431, 1454 (2004), and cases cited.

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

WE WILL offer instatement to two individuals we discriminatorily failed and refused to hire, whose identity will be determined in a Board compliance proceeding, in the positions for which they applied or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had we not unlawfully refused to hire them.

WE WILL make these individuals whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL consider the remaining discriminatees, whose identity will be determined in the compliance proceeding, for future job openings in accord with nondiscriminatory criteria, and WE WILL notify them, the Union, and the Regional Director for Region 17 of future openings in positions for which the discriminatees applied or substantially equivalent positions.

WE WILL remove from our files any reference to our unlawful refusal to hire or to consider for hire the individuals identified in the compliance proceeding as stated above, and WE WILL notify each of them in writing that this has been done and that the refusal to hire them or consider them for hire will not be used against them in any way.

EXCEPTIONAL PROFESSIONAL, INC. D/B/A EPI CONSTRUCTION

Stanley D. Williams, Esq., for the General Counsel.
Donald W. Jones, Esq. (Hulston, Jones, Gammon 8 Marsh), of Springfield, Missouri, for the Respondent.
Michael T. Manley, Esq. (Blake 8 Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION ON REMAND

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This is a remand pursuant to *FES*, 331 NLRB 9 (May 11, 2000).[1] In *FES* the Board restated, inter alia, the elements that the General Counsel must establish in order to meet the initial burden in refusal-to-hire and refusal-to-consider for hire cases. In light of *FES*, on September 28, 2001, the Board remanded a portion of the instant case for further consideration of the complaint allegations that the Respondent unlawfully refused to consider for hire or to hire 10 applicants. *EPI Construction,* 336 NLRB 234 (2001). The Board requested that on remand, further consideration be given to

> (1) whether there were available openings at the time that the alleged discrimination occurred; (2) the number of such available openings; and (3) whether the applicants had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied. The judge may, if necessary, reopen the record to obtain evidence required to decide the case under the *FES* framework.

EPI Construction, 336 NLRB at 235. The Board specifically noted that its remand allowed for consideration of other factors as well.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the original and additional briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, I make the following

FINDINGS OF FACT ON REMAND

A. There were Available Openings at the Time of the Alleged Discrimination

The date of the alleged discrimination is June 30, 1997, and thereafter. Thus, the complaint alleges that about June 30, 1997, Respondent refused to consider for hire or to hire employee applicants Jim Carsel, Larry Collinsworth, Roger Hensley, Bob Hum, John Duncan, Tom McFarland, Mike Joyce, Shelley Williams, Steve Wilson, and Matt Rausch. In my original decision, 336 NLRB 234, 250 (2001), I found that on June 30, 1997, at about 10 or 10:30 a.m., Carsel and the other alleged discriminatees completed job applications and submitted them to Respondent. Stewart said he would not get to these applications for 2 weeks. He said he would call.

On June 30, 1997, or shortly thereafter Respondent had available openings. In my original decision at 336 NLRB at 250, I found that although Respondent's president, Fred Stewart, initially told Carsel that Respondent was not taking applications on June 30, 1997, when Carsel countered that Gerald Hill, Job Supervisor for General Contractor Dalton Killinger, told Carsel that Respondent was behind on the Dalton Killinger project, Stewart replied, "fine," and handed job applications to all of the alleged discriminatees. I further found that Respondent hired at least 13 employees shortly after June 30, 1997, and additionally utilized 4 employees from its general contractor between June 25 and July 30, 1997. 336 NLRB 251. Based upon this evidence, I conclude that Respondent had available openings on June 30, 1997, or shortly thereafter.[3]

[1] Following a hearing in November 1997 and March 1998, on August 5, 1998, I issued a decision in this case.

[2] Following a conference call held on November 9, 2001, all counsel participating, I determined that the record was sufficient to decide the case under the *FES* framework. A date was set for briefing of the issue on remand. All counsel filed additional briefs on remand. A copy of this ruling on remand is attached as "Appendix A."

[3] Respondent argues that its use of four Dalton Killinger employees to perform carpentry work cannot be viewed as job openings for which the alleged discriminatees could be considered. I agree that Respondent's arrangement to utilized Dalton Killinger employees began on June 25, 1997, and therefore predates the alleged discriminatees' appli-

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