

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

RANDOM ACQUISITIONS, LLC

Respondent

and

Case 7-CA-52473

SHERRIE CVETNICH, An Individual

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE
TO RANDOM ACQUISITIONS, LLC'S MOTION FOR LEAVE
TO AMEND ANSWER TO CONFORM TO THE EVIDENCE**

On March 21, 2011, Administrative Law Judge Mark D. Rubin (hereafter, Administrative Law Judge) issued a decision (ALJD) in the above matter, finding that Respondent discharged the Charging Party, (Sherrie Cvetnich), Eric Cvetnich and Teresa Burge in violation of Section 8(a)(1) of the Act.

On April 14, 2011, Counsel for the Acting General Counsel was served Random Acquisitions, LLC's undated Motion for Leave to Amend Answer to Conform to the Evidence.

Paragraph 8 of the Complaint (GC Ex. 1 (c)) alleges that "On October 16, 2009, Respondent terminated its employees the Charging Party [Sherrie Cvetnich], Eric Cvetnich and Teresa Burge."

In its initial Answer to the Complaint (GC Ex. 1 (g)), dated July 21, 2010, Respondent "Admitted" to paragraph 8 of the Complaint. In its "Amended

Answer” to the Complaint, dated September 28, 2010, just two days before the start of the trial, Respondent again admitted (“Respondent admits same”) to paragraph 8 of the Complaint. (GC Ex. 1(l)). At the start of the trial, Respondent agreed that its answers to Complaint paragraphs 1, 2 and 3(a), (b), and (c) be changed from denials to admissions. (Tr. 7-8) Yet, Respondent made no request to change any other answer to the Complaint. Thus, despite ample opportunity, Respondent failed to amend its answer as to either the date the employees were terminated or the fact that they were “employees” within the meaning of the Act.

Respondent declined the offer of the Administrative Law Judge to make an opening statement explaining its position or defense to the Complaint allegations prior to the introduction of any testimony. (Tr. 16) On two separate occasions during the trial, Respondent again declined to make a statement regarding its position on the Complaint allegations, despite being asked to do so by the Administrative Law Judge. (Tr. 99-102, 212) It was not until Respondent submitted its Brief to the Administrative Law Judge, after the conclusion of the trial, that Respondent, for the first time, argued that Sherrie Cvetnich and Eric Cvetnich were not “employees” because the building manager Linda Tessin is their mother, and that Eric Cvetnich was a supervisor because he assertedly hired his son Zach to work at the building.

Respondent, now apparently dissatisfied with the outcome of the trial, belatedly seeks to alter the result by asking the Board to allow Respondent to

amend its answer to conform to the evidence. In part, Respondent contends that this would not prejudice the Acting General Counsel.

Respondent is incorrect in contending that an amendment to Respondent's answer would not be prejudicial to the Acting General Counsel. To the contrary, because Respondent twice admitted the date of the terminations of the Cvetniches and Burge and their status as "employees," Counsel for the Acting General Counsel did not adduce certain evidence which established the date of the terminations as being October 16, 2009, and the status of Sherrie Cvetnich, Erik Cvetnich and Teresa Burge as employees. Further, Counsel for the Acting General Counsel relied on the Respondent's answer relating to both the date of the terminations and the status of the alleged discriminatees in his brief to the Administrative Law Judge. Thus, on page 18 of the brief, Counsel for the Acting General Counsel stated:

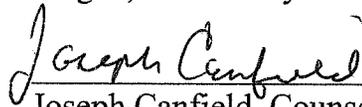
Hogan also insists that they (the alleged discriminatees) were fired on October 3 when he instructed Joseph to fire them. In its answer to the Complaint, Respondent admits the employees were terminated on October 16. (GC Ex. 1(1)).

While Counsel for the Acting General Counsel did further argue facts refuting Hogan's claim that the employees were fired on October 3, nevertheless, he also relied on Respondent's Answer to the Complaint. Further, in reliance on Respondent's Answer to the Complaint, Counsel for the Acting General Counsel's Brief to the Administrative Law Judge did not address the status of the alleged discriminatees as "employees" within the meaning of the Act.

While Section 102.23 of the Board's Rules and Regulations apparently gives the Board discretion to allow a respondent to change its answer after the hearing, in *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005), the Board, citing *Vencare Ancillary Services*, 334 NLRB 965, 969 (2001), enf. denied on other grounds, 352 F.3d 318 (6th Cir. 2003), concluded that an attempt by a respondent to amend its answer when raised for the first time in its post hearing brief to the administrative law judge was "untimely raised."

Respondent had ample opportunity to move to change its answer before or during the trial in this matter, at a time when Counsel for the Acting General Counsel could have effectively responded, and failed to do so. To allow Respondent to change its answer at this point after receiving an unfavorable ALJD would create an injustice against both the Acting General Counsel and the alleged discriminatees. Accordingly, Counsel for the Acting General Counsel respectfully asks that Respondent's Motion for Leave to Amend Answer to Conform to the Evidence be denied.

Dated at Detroit, Michigan, this 2nd day of May, 2011.



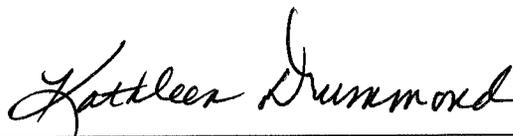
Joseph Canfield, Counsel for the Acting
General Counsel

National Labor Relations Board, Region Seven
Patrick V. McNamara Federal Building, Room 300
477 Michigan Avenue
Detroit, Michigan 48226

I certify that on May 2, 2011, I served Counsel for the Acting General Counsel's Response to Random Acquisitions, LLC's Motion for Leave to Amend Answer to Conform to the Evidence on the following parties of record:

James R. Durant
J.R. Durant & Associates, P.C.
8051 Moors Bridge Road
Portage, MI 49024
jdurant@moorslaw.com

Sherrie Cvetnich, Pro se
556 Lakeview Avenue
Battle Creek, MI 49015
United Parcel Service (next day air)



Kathleen Drummond, Mail Clerk