GREGORY D. WOLFLICK (SBN 108699)
WOLFLICK & SIMPSON
130 N. Brand Blvd.,
Suite 410
Glendale, CA 91206
Tel: 818-243-8300
Fax: 818-243-0122

Attorneys for Employer
DIRECTV U.S. DIRECTV HOLDINGS LLC

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

DIRECTV U.S. DIRECTV HOLDINGS LLC Respondent, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 947 AFL-CIO Charging Party.	)	**Case 21-CA-39546** **RESPONDENT'S REPLY TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

I. SUMMARY

The Acting General Counsel's ("AGC") Answering Brief does nothing more than highlight the shortcomings of the ALJ's Decision and demonstrates why the Board, on review, must decline to enforce that decision. In particular:

1. The Answering Brief does nothing to correct the lack of evidence to support the ALJ's finding of animus by DIRECTV towards unions or union representation. The fact that DIRECTV educated employees about unions or even lawfully stated that it preferred a union free environment does not establish union animus.

2. The Answering Brief fails to establish any union animus by Zambrano, the decision-maker in Edmonds' termination.

3. The Answering Brief does nothing to address the fact that the ALJ's Decision speculated that someone other than Zambrano was the decision-maker nor does it present any record evidence to support such a conclusion.

4. There is virtually no traditional evidence of pretext in this case. DIRECTV's reason for Edmonds' termination, his profanity laced outburst at his supervisor in front of 40 to 60 other employees, presents legitimate grounds for Edmonds' discharge which is consistent with established past practice and no evidence of disparate treatment in similar circumstances.

5. The Answering Brief fails to identify any record evidence to support the ALJ's conclusion that the policies in question were unlawful on their face and would reasonably tend to inhibit protected activity of any sort.

6. Finally, the Answering Brief fails to cite any relevant case law to supports its conclusion that the disclaimers posted by DIRECTV to address any concerns with these policies was not an effective remedy. The cases cited by the ACG deal exclusively with the

circumstances where there had been evidence introduced at the hearing that the employer had engaged in conduct which discriminated against protected activity. In the present case, the record is void of any such evidence.

II. ARGUMENT

A. EDMONDS' TERMINATION CLAIM

1. There is No Evidence of Union Animus by DIRECTV

To establish a prima facie case the General Counsel must first establish by a preponderance of the evidence that "anti-union sentiment" was a "motivating factor" for the discipline or discharge (*Wright Line*, 251 NLRB 1083, 1089 (1980)). The AGC's Answering Brief is void of any direct evidence to support the ALJ's finding that such anti-union sentiment existed on the part of DIRECTV. The AGC desperately attempts to characterize the testimony of Noe Gallegos as establishing such union animus because the Vice President of Operations for DIRECTV, Adrian Dimech, allegedly asked Gallegos to identify supervisors and employees who supported the union at the company's Rancho Dominguez facility (AGC's Answering Brief Pg. 28)[1]. But that was not Gallegos' testimony. Gallegos testified that Dimech had asked Gallegos to identify any other "field supervisors" who had been involved in union organizing activity[2] (Trans. Pg. 271:5-21) and Gallegos confirmed that Dimech **did not** ask him for the names of any rank and file employees involved in the union organizing activity at the Rancho Dominguez facility (Tr. Pg. 272:11-15). Gallegos' testimony does not establish any anti-union sentiment on the part of DIRECTV.

The AGC in its Answering Brief attempts to support the finding of union animus by the ALJ by referencing that DIRECTV held meetings in Riverside with its employees to talk about

[1] Edmonds worked at the Riverside facility where the ALJ concluded Management had no knowledge of union activity (ALJD p 13:note27).

[2] Supervisory involvement in soliciting union cards was the basis for Respondent's objections to the outcome of the election at DIRECTV's Rancho Dominguez facility (General Counsel Exhibit 2).

union organizing at the Rancho Dominguez facility characterized as an alleged effort to keep the organizing from spreading (AGC's Answering Brief, Pg. 28). But holding such meetings does not establish union animus. Opposition to union organizing or even general hostility towards unions is not enough to establish animus (*GSX Corp. v. NLRB*, 918 Fd.2d 1351, 1356 (8th Circ. 1990); *Carlton Coll v. NLRB*, 230 Fd.3d. 1075 (8th Circ. 2000)). Similarly, union animus cannot be inferred from an employer's statement of opposition to unions or which challenge Board proceedings (*NLRB v. Lamp LLC*, 240 Fd.3d, 930 (11th Circ. 2001) denying enforcement to 372 NLRB 222 (1998)). The AGC cites no contrary authority to suggest that an employer's lawful exercise of its right to oppose union organizing is sufficient to establish union animus.

2. <u>There is No Evidence of Animus by the Decision-Maker Zambrano</u>

The AGC, like the ALJ, attempts to infer some animus on the part of Zambrano based solely on the disputed contention that Zambrano told Edmonds one morning that his job would be "QC'd" meaning subject to quality control inspections. But of course, that statement by itself does not establish any union animus nor is there any record evidence that a single one of Edmonds' jobs was ever "QC'd" by Zambrano or anyone else after Edmonds' comments on May 22, 2010 in support of union representation. Hence, this bald disputed comment does not establish any union animus by Zambrano.[3]

3. <u>The ALJ's Speculation that Someone Other Than Zambrano was the Decision-Maker</u>

One of Respondent's major exceptions is that the ALJ speculated that someone other than Zambrano was the decision-maker in Edmonds' termination and that that unknown person must have harbored union animus (ALJD p.15:14-25; Respondent's Objection Number 27). The AGC

[3] The ACG in its Answering Brief in Footnote 17 on Page 30 references the fact that Zambrano admitted that when he made the decision to fire Edmonds, he consulted with his boss, Scott Thomas and, a human resources person (ALJ Decision Pg 15:20-22). However, there is no record evidence, nor does the ACG cite to any, to suggest that Scott Thomas or the human resources individual had ever demonstrated any union animus. Hence, the fact that Zambrano consulted with these individuals does not establish union animus.

tacitly accepts this conclusion because it offers no evidence to rebut this obvious error by the ALJ. Rather, the ALJ in an effort to reach his predetermined outcome fabricated this unidentified decision-maker because the unrebutted evidence establishes a complete lack of animus by the true decision-maker, Zambrano.

4. <u>There is No Evidence of Pretext</u>

The AGC's argument that the record supports the ALJ's conclusion of pretext is equally absurd (AGC's Answering Brief Pg. 32). In support of pretext, the AGC cites to: (i) the fact that Edmonds had been promoted to the highest level of pay just immediately before his discharge; and (ii) that Edmonds' performance prior to discharge was viewed by DIRECTV as good (AGC Answering Brief, Pg. 32). But these arguments are ludicrous.

First, even assuming that Edmonds had been promoted to the highest salary level before his termination (July 28, 2010) such would only suggest that Zambrano and DIRECTV had no animus against Edmonds after his comments on May 22, 2010 in support of union representation.

Second, there is no possible way that any rational person could conclude that DIRECTV viewed Edmonds performance as "good". To the contrary, the record establishes that Edmonds had received seven (7) separate incidents of discipline including 2 suspensions, a demotion and 2 final warnings for various violations of company rules. In 2010 alone Edmonds received discipline on 3 separate occasions including: a suspension on January 8 (GC Exhibit 13); a 2 day suspension on January 21, 2010 (GC Exhibit 14); and, a written warning on March 12, 2010 (GC Exhibit 15). No, DIRECTV did not believe that Edmonds' performance was "good".

Conspicuously absent from the AGC's Answering Brief is any of the other type of evidence one would typically expect to establish pretext such as:

- Disparate treatment
- Deviation from past practices

- Inconsistencies between the employers initial explanation for the termination and subsequent explanations (*Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

To the contrary the evidence establishes that numerous other employees were terminated for swearing at their supervisor (as opposed to just using profanity)[4] (Respondent Exhibits 10 - 14). Still further, the unrefuted evidence establishes that there were several other employees who spoke out in favor of union representation at the May 22 meeting but they were not discharged (Tr. pages 166; 185). Neither the AGC nor the ALJ offer any reason why Edmonds would have been singled out for his comments while others suffered no retaliation for making similar comments. This certainly does not establish any finding of pretext.

Finally, the AGC somehow tries to argue that the timing of Edmonds' discharge supports a finding that the reason for his termination was pretextual (AGC Answering Brief, Pg. 34). This is a rather absurd argument given that the ALJ concluded that it was unnecessary to determine the precise date on which Edmonds spoke out in favor of union representation (ALJ Decision p13: 28). DIRECTV took exception to the ALJ's Decision for failing to make such a finding (Respondent's Exceptions Number 23).

The obvious reason the ALJ did not make a finding on this important point is because the overwhelming evidence establishes that the meeting took place on May 22 not, as Edmonds testified in July (Tr.Pg. 148:13-17).[5] As the AGC concedes, all of Respondent's witnesses

[4] The AGC references the fact that employees and supervisors used profanity in the workplace in a feeble attempt to justify Edmonds' use of profanity directed at Zambrano. But even the ALJ acknowledged that Edmonds' use of profanity toward Zambrano on the day in question was unprotected and a violation of DIRECTV policy (ALJD p.13, note 25).

[5] The AGC contends that Dimech knew the date was May 22nd because he testified that he made notations on his calendar (AGC Answering Brief p. 35). But that is NOT what Dimech testified to. Dimech testified that he simply looked at his calendar, not that he had any "notation" on his calendar about the meeting (Tr. p. 288:19-25). There was a break in the hearing to allow Zambrano to search his records to produce "any documents" that showed the date of the meeting that Dimech attended where Edmonds spoke out in favor of the union (Tr.417:19-25). The only document in the possession of Zambrano was in fact produced, Respondent Ex. 7 (Tr. p. 418-419). DIRECTV offered to allow the General Counsel to conduct a forensic examination of Zambrano's computer disk to verify the authenticity of the email and the information contained thereon (Tr. p. 426:10-20). The General Counsel never

testified that the meeting where Edmonds expressed his union support took place on May 22, 2010 (AGC's Answering Brief Page 35). In support of such, Respondent introduced Exhibit 7, an email between Scott Thomas dated Saturday, May 22, 2010. The subject line of the email is "meeting this morning" and Thomas asks Zambrano "Is Adrian still there?" to which Zambrano responds "Adrian left this morning around 9 a.m." to which Thomas responds, "How did it go?"and "Any complaints other than SD?" (Respondent's Exhibit 7). In contrast, not a single witness produced by the General Counsel could even give a date on which the meeting in question took place. Obviously, the more precise and exact recollections of all Respondent's witnesses, bolstered by Respondent's Exhibit 7, would leave the ALJ with no conclusion but to establish that the meeting took place on May 22, more than 2 months before Edmonds discharge. Hence, the timing of the termination clearly establishes that Edmonds' protected comments were not a motivating factor nor does the timing of the termination suggest pretext (*NLRB v. Florida Med Center*, 576 Fd.2d 666 (5th Circ. 1978; *Maine Medical Center*, 248 NLRB 707 (1980); *Rockland-Bamberg Print Works*, 231 NLRB 305 (1977)).

B. THE ALJ INCORRECTLY CONCLUDED THAT RESPONDENT'S RULES VIOLATED SECTION 8(a)(1) OF THE ACT.

1. The Decision is Void of any Factual Basis for Concluding the Rules are Unlawful on Their Face

In its Answering Brief, the AGC characterizes DIRECTV's exception regarding the policies in question as a failure of the ALJ to make "a finding that employees would reasonably construe these rules to prohibit Section 7 activity" (AGC Answering Brief p. 40). That is not Respondent's exception at all. To the contrary, DIRECTV's argument is that there was no evidence introduced at the hearing to support a finding that employees somehow reasonably construed the language to prohibit Section 7 activities (Respondent's Brief in Support of

requested the disc. Hence the Respondent produced "all" documents in its control that verify the date of the meeting Dimech spoke at and there is no adverse inference as the AGC argues.

Exceptions pp.33-35). No witness called by the General Counsel testified that the rules in question were promulgated in response to union activity or that any of these rues had been applied to restrict the exercise of Section 7 rights. In the absence of such evidence, the rules cannot be found to be unlawful (*Lutheran Heritage Village –Livonia,* 343 NLRB at 646-647 (2004)).

Furthermore, these rules on their face do nothing to explicitly restrict activities protected by Section 7. The ALJ's bald conclusion that these rules would somehow "preclude employees from contacting or conferring with representatives of the media" or "cause employees to be reluctant to contact the Board or deal with the Board agents" is simply speculation on his part. (ALJ Decision Pg. 18: 50- Pg.19:5). Hence, the rules in question cannot be found to be unlawful in accordance with the established standard's set forth by the Board in *Lutheran Heritage Village –Livonia, supra.* pp. 646-647.

2. The ALJ Incorrectly Concluded That DIRECTV's Disclaimers Were Not Effective Remedies for the Alleged Policy Violations

Shortly after the Complaint was issued in the present case DIRECTV, in an effort to address concerns regarding the polices in question, posted the following disclaimers at the Riverside facility and on the company intranet where the policies were posted:

> Employee Handbook:
>
> The Policies contained in the DTVHS Employee Handbook previously distributed to you (including but not limited to Confidentiality, Using Social Media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions). (Respondent Exhibit 4)
>
> Company Policies
>
> The Company polices on the DEN (including but not limited to Confidentiality, Using Social Media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7

> of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions) (Respondent Exhibit 5).

Both the ALJ and the AGC in its Answering Brief argue that these disclaimers failed to comply with the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (ALJ Decision Pg. 19:12-14; AGC's Answering Brief Pg. 41).

In *Passavant* the employer was charged with two violations of Section 8(a)(1) of the Act. The first involved unlawful interrogation by a supervisor regarding an employee's union activities and sympathies and the second involved representations by the company during employee meetings that they would be fired if they participated in an economic strike. The employer subsequently published a short statement in its employee newsletter acknowledging the rights of employees to engage in economic strike and the right of an employer to permanently replace any employee who participates in an economic strike. The ALJ concluded that while the comments the employer made were unlawful, the ALJ declined to recommend any remedial order based on the employer's statement in its newsletter. It was in this context that the Board reversed the ALJ and concluded that the posting in the employee newsletter was an inadequate remedy to clear any taint or correct any violation of Section 8(a)(1). But the case at hand is quite different.

First, *Passavant* did not involve policies and procedures but rather, involved direct conduct by the employer in interrogating employees and making threats those employees who participate in an economic strike would be terminated.

Second, in the present case there has been no evidence whatsoever introduced that DIRECTV ever applied the policies in question in such a way as to discourage union activity or that any employee even held a perception that the policies would prevent them from engaging in protected conduct.

Therefore, *Passavant* does not control in the present case and is factually distinguishable. The ALJ, and the AGC's Answering Brief provide no facts nor any case law that would support a conclusion that the corrective action taken by DIRECTV in posting a memo at the Riverside Facility and posting the disclaimers identified above would not be legally sufficient to correct any misunderstanding that the policies in question would not be applied in a way so as to discourage protected activity. As a result, the ALJ's Decision regarding these policies cannot be sustained on review.

III. CONCLUSION

For all these reasons, Respondent respectfully submits that the ALJ's Decision with regards to the discharge of Edmonds and the policies in question cannot be sustained on review.

WOLFLICK & SIMPSON

Dated: March 6, 2012

By: _____

Gregory D. Wolflick, Esq.
Counsel for RESPONDENT,
DIRECTV U.S. DIRECTV
HOLDINGS LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 130 N. Brand Boulevard, Suite 410, Glendale, California 91203.

On March 6, 2012, I served the foregoing document(s) described as: **RESPONDENT'S REPLY TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF** on the interested parties in this action by placing a true copy thereon enclosed in sealed envelope(s) addressed as follows:

James F. Small, Regional Director
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, California 90017-5449
Jean.libby@nlrb.gov

David A. Rosenfeld, Esq.
WEINBER, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200Alameda, California 94501-1091
Drosenfeld@unioncounsel.net

XXX **(BY ELECTRONIC SERVICE)** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message, or other indication that the transmission was unsuccessful.

XXX **(BY STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 6, 2012, at Glendale, California

MARGO KAZARYAN