

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

DREAM BUILDERS CONSTRUCTION
OF MARSHALL, INC,
Employer - Respondent,

Case No. C04 C-080

-and-

MICHIGAN REGIONAL COUNCIL
OF CARPENTERS, LOCAL 525,
Labor Organization - Charging Party.

APPEARANCES:

Schaeffer, Meyer & McKenzie, by J. Thomas Schaeffer, Esq., for Respondent

Novara, Tesla & McGuire, PLLC, by Nicholas R. Nahat, Esq., for Charging Party

DECISION AND ORDER

On April 21, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent Dream Builders Construction of Marshall, Inc. violated Section 16(1) and (3) of the Labor Relations and Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.16(1) and (3). The ALJ concluded that Respondent discharged Chad Delano on October 28, 2003, because of activity protected by Section 8 of the LMA. The ALJ recommended that Respondent be ordered to offer Delano reinstatement with back pay and interest computed at the rate of six percent per annum, computed quarterly. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 23 of the LMA. On May 11, 2005, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order.

In its exceptions, Respondent argues that the ALJ's conclusion that it terminated Delano for engaging in union activities is not supported by competent evidence in the record. Respondent submits that it discharged Delano for various reasons, including horseplay, insubordination, dangerous activities, and spreading falsehoods. After a thorough review of the record, we adopt the ALJ's factual findings as our own, and for the following reasons affirm the ALJ's Decision and Recommended Order as modified below.

Factual Summary:

The facts in this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. Respondent is a residential building and home renovation company owned by Marilyn and Rodney Maurer. Chad Delano was hired to work for the Maurers' predecessor company in 1994; he worked on and off for the Maurers until 2002. Respondent rehired Delano to work at Dream Builders in September 2003. On his first day back to work, September 10, a business agent from Charging Party visited the jobsite. Delano introduced him to Rodney Maurer, and Maurer told the agent that he was not interested in operating his business as a union company. Marilyn Maurer repeated this sentiment on the following day. On September 17, Respondent gave Delano a letter prohibiting him from inviting the union business agent to the jobsite or giving him the address of any jobsite. The letter further stated that if the union business agent arrived at any jobsites again by Delano's invitation, it would be considered an act of insubordination.

Delano continued to work for the company for the next few weeks. During this time, there were several incidents of horseplay and inappropriate behavior involving Delano. On October 3, Marilyn Maurer gave Delano a letter informing him of his discharge. The letter cited several reasons for his termination, including the fact that he had been "pushing union rights" on other employees. Other charges against Delano involved speaking rudely to Marilyn Maurer over the phone, arriving at a jobsite without the proper tools, and engaging in horseplay with a portable toilet. Respondent also accused Delano of placing foam board over an electrical outlet, which was a fire hazard. Rodney Maurer subsequently decided that he needed Delano in order to complete the work on time, and on October 8 told Delano that he could return to work that afternoon. Delano arrived at the jobsite around noon with the union business agent.

Rodney Maurer thought that Delano had made a gouge in Maurer's new tool chest on October 23 or 24. When Maurer challenged Delano about the incident on October 27, Delano denied the allegation. That same day, the union business agent appeared on the jobsite to collect authorization cards. Several employees clocked out to speak with him, and Delano gave him a signed authorization card. The next day, Marilyn Maurer told Delano that she did not want the union business agent on any more jobsites. She also stated, "If you want the union – then bye." Rodney Maurer gave Delano a letter notifying him of his termination on October 31, stating that by his actions, Delano had chosen not to follow a professional policy and instead played games, lied, and stole.

Discussion and Conclusions of Law:

Section 8 of the LMA provides that employees have the right to form, join, or assist in labor organization, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection. Under Section 16 of the LMA, it is unlawful for an employer to interfere, restrain, or coerce employees in the exercise of the rights protected by Section 8, or to discriminate against an employee to encourage or discourage membership in any labor organization.

Delano engaged in activities that are protected by Section 8 of the LMA in his attempt to organize Respondent's employees. We find that Charging Party established that these union activities were a substantial factor in his discharge. The burden, therefore, shifts to Respondent to produce

credible evidence that the same action would have taken place even in the absence of the protected conduct. *United Auto Workers v Sterling Heights*, 176 Mich App 123, 129 (1989); *MESPA v Ewart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, Division of Wright Line, Inc*, 251 NLRB 1083 (1980), *enf'd* 662 F2d 899 (CA 1, 1981), *cert den* 455 US 989 (1982). Respondent has not met this burden. Although Respondent claims that Delano was fired for horseplay, insubordination, and untruthfulness, it is clear that but for his union organizing Delano would not have been terminated. He had previously engaged in horseplay yet despite this behavior was rehired on October 8. Both Marilyn and Rodney Maurer made comments regarding not wanting a union and keeping union organizers off the premises. Delano's second termination occurred the morning after Marilyn Maurer observed a union organizer with Delano at Respondent's jobsite. In addition, Marilyn Maurer commented to Delano just prior to his discharge: "If you want the union – then bye." We find that all of these factors establish that Delano's union activities were the motivating factor in Respondent's decision to discharge him on October 28, 2003. *Univ of Michigan*, 2001 MERC Lab Op 41, 43.

After carefully considering each of the arguments set forth by Respondent in its exceptions and brief, we uphold the ALJ's Decision and Recommended Order. We note, however, that the correct statutory interest rate is five percent as prescribed by MCLA 438.31. *Solakis v Roberts*, 395 Mich 13 (1980); *Oakland Co Rd Comm*, 1983 MERC Lab Op 727; *Genesee Christian Day Care Service, Inc*, 1982 MERC Lab Op 1660. We therefore modify the Order as set forth below.

ORDER

The ALJ's Decision and Recommended Order shall become the Order of the Commission, with the following modification. Paragraph 2(b) in the Order shall be modified to read:

b. Make Chad Delano whole for any loss of pay he may have suffered as a result of his unlawful discharge by paying him the amount he would have earned from the date of his discharge, October 28, 2003, to the date of his reinstatement or rejection of Respondent's unconditional offer of reinstatement, less his interim earnings during this period, together with interest on the amount owed at the statutory rate of five percent (5%) per annum, computed quarterly.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, **Dream Builders Construction of Marshall, Inc.** has been found to have committed an unfair labor practice in violation of the Labor Relations and Mediation Act (LMA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discharge employees because of their union or other activities protected by Section 8 of the LMA.

WE WILL NOT in any like manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 8 of that Act.

WE WILL, within 14 days from the date of this order, offer Chad Delano unconditional reinstatement to the position he would have held absent the discrimination against him, without prejudice to any rights or privileges he previously enjoyed.

WE WILL make Chad Delano whole for any loss of pay he may have suffered as a result of his unlawful discharge by paying him the amount he would have earned from the date of his discharge, October 28, 2003, to the date of his reinstatement or rejection of Respondent's unconditional offer, less his interim earnings during this period, together with interest computed at the statutory rate of five percent (5%) per annum, computed quarterly.

All our employees are entitled to organize together, to form, join, or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, and to negotiate or bargain collectively with their employers through representatives of their own free choice.

DREAM BUILDERS CONSTRUCTION OF MARSHALL, INC.

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced, or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

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APPEARANCES:

Schaeffer, Meyer & McKenzie, by J. Thomas Schaeffer, Esq., for Respondent

Novara, Tesla & McGuire, PLLC, by Nicholas R. Nahat, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 16 and 23 of the Labor Mediation Act (LMA), 1939 PA 175, as amended, MCL 423.16 and 423.23, this case was heard in Lansing, Michigan on November 24, 2004, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by Charging Party on January 7, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Michigan Regional Council of Carpenters, Local 525, filed this charge against Dream Builders Construction of Marshall, Inc., on March 22, 2004.¹ The charge alleges that Respondent violated Sections 16(1) and (3) of the LMA when, on October 28, 2003, it fired Chad Delano for attempting to organize Respondent's employees.

¹ The charge was originally filed with the National Labor Relations Board (the Board). On March 3, 2004, the Regional Director for the Board's Region 7 dismissed the charge on the basis that the Board did not have jurisdiction over the employer.

Facts:

Marilyn and Rodney Maurer are co-owners of Respondent, a residential building and home renovation company. The Maurers first hired Chad Delano in about 1994, when he was a teenager. Delano worked for the Maurers' predecessor company, and then for Respondent, off and on between 1994 and 2002. During this period, Delano also worked for other employers, including some with union contracts. In 1999, Delano became a member of Charging Party.

Delano and the Maurers knew each other well. Marilyn Maurer testified that they thought of Delano like a son. In 2003, the Delano and Maurer families maintained many social contacts. For example, Delano, Rodney Maurer, and Rodney Maurer's son, Mitch, were part of group that played pool together once a week, and Delano's daughter and Marilyn Maurer's granddaughter were playmates.

The Maurers hired Delano again on September 9, 2003. Delano asked Marilyn Maurer if they were going to pay him as an employee or as a subcontractor. She said that she could do it either way. Delano chose to be paid as an employee.

On September 10, 2003, Delano's first day of work, Charging Party Business Agent Chad Miller came to Respondent's jobsite. Miller parked in the homeowner's driveway and approached Rodney Maurer. Delano introduced Miller to Maurer and then went back to work. The two other individuals working at the time, Mark Kittenger and Mitch Maurer, remained on the roof of the house. Miller told Rodney Maurer that he wanted to talk to him about the union. Maurer responded that he had once been a member of a union and was not interested in operating his company as a union company. Maurer asked Miller to leave. Before he left, Miller put some of his business cards on the seat of Delano's truck. Later, Delano gave Miller's card to Kittenger, Mitch Maurer, and a third co-worker, Tony Mellow.

On September 11, Marilyn Maurer came to the jobsite. She told Delano that Miller was not welcome on the site and that she did not want him there.

On Tuesday, September 16, Miller visited Respondent's site at lunchtime. Miller again parked in the homeowner's driveway. Miller brought fast food for Delano, Kittenger, and Mitch Maurer. Miller handed out some union literature, and talked to the men about the benefits of a union. When Mellow arrived at work, Delano gave him some of the literature.

On Wednesday, September 17, Marilyn Maurer came to Delano's work location and handed him the following letter:

It was brought to my attention that you invited Mr. Chad Miller from your past employment, an organizer for Local Union 525, to our jobsite a second time. He was there again on 9/16/03. Rodney and I have expressed that we are NOT in anyway interested in what he has to say or offer. We [told] you the first time he came to our jobsite that we did not want him to be invited to any of our jobsites in the future. Unfortunately, you [invited him] again anyway. So this is a written notice to address this matter and ask you to NOT INVITE OR GIVE Mr. Chad Miller any addresses of

any of our jobsites, and not to let him [visit] you at any of our jobsites. You must schedule your personal appointments on your own [time] and never again on any of our jobsites. If this is a lunch break appointment, please leave our site and go to your meeting. If Mr. Chad Miller shows up again by your invitation to any of our jobsites, you and he will be asked to leave immediately and this will be considered an act of insubordination. We appreciate you taking care of this issue and hope it does not reoccur, because it will not be tolerated a third time.

On September 19, Delano used his two-way radio to complain to Marilyn Maurer that he had been shorted a half-hour on his paycheck. According to Marilyn Maurer, Delano spoke to her rudely and screamed so loudly that others in her office overheard him over the radio. Delano testified that he did not recall yelling or being rude. Later that day, Rodney Maurer called Delano and asked what his problem was. Delano told Rodney that he had made a math error, and there was no problem. Rodney Maurer asked Delano why he had spoken rudely, and Delano said that he did not think that he had.

Rodney Maurer testified that on September 23 he saw a message written on the inside of the portable toilet at the jobsite. The message was in Delano's handwriting and made a derogatory comment about another employee. According to Maurer, Delano denied writing anything on the toilet wall. Rodney Maurer testified that, two days later, one of Delano's co-workers complained that while he was inside the portable toilet Delano tried to tip it over. On October 2, according to Marilyn Maurer, Delano's co-workers told her that Delano had put a ladder against the portable toilet door when someone else was in it. According to Rodney Maurer, that same day he discovered Mitch Maurer's screwdriver in Delano's truck. Mitch Maurer had been looking for the screwdriver for two weeks. Rodney Maurer also testified that about this time Delano made a dangerous error by putting foam board over an electrical outlet.

Delano testified that he did not write anything in the toilet, and that Rodney Maurer never said anything to him about this. Delano admitted that he pretended to tip the portable toilet over, although he claimed that all the employees tried this at one time or another. Delano also admitted putting the ladder against the toilet door. According to Delano, he was not aware that Mitch Maurer's screwdriver was in his truck. Delano admitted that putting the foam board over the outlet was a mistake, but he claimed that the outlet was old and he thought it was being terminated.

On Friday, October 3, Marilyn Maurer called Delano into her office. She handed him this letter:

Since you were hired on 9/10/03, you have received a verbal and then a written warning (letter dated 9/17/03). There have been complaints from other employees about your pushing union rights and on 9/18/03 you brought more material to our jobsite and distributed it to our employees on our time and jobsite. Our letter dated 9/17/03 made it perfectly clear that this would not be tolerated again. Then on 9/19/03 you verbally attacked me, screaming that I was ripping you off again (however, this was your first paycheck since you returned to work) and that you were shorted a half-hour of pay. There were others in my office when you used a Nextel two-way feature to address your payroll issue. Unfortunately others around me

overheard your rude manner of speech and shared your misconduct with Rodney when he returned home at the end of the workday. They verified how degrading and inappropriately you spoke to me as you badgered me about this issue. I kindly invited you to stop by our office later that day and discuss this matter and compare hours documented. We heard nothing from you. When Rodney returned to the office later on 9/19/03 he called you and asked what was the problem. You replied the error was yours and there was no problem. Rodney asked you why did you address this matter with a rude attitude, you replied you didn't think you had one. Rodney said even others confirmed your rudeness and asked you to be without one when addressing any issue. Then on 9/23/03 you showed up to work without proper tools, (which is a requirement to work). When Rodney spoke to you about this, your response was like "oh well." Rodney said next time you would be sent home because without proper tools you can't work. Then later that day Rodney found a message written in your handwriting in our port-a-john slamming another employee. Rodney told you that you were not to take any writing tools in the port-a-john in the future. You said o.k. Then on 9/25/03 another employee complained that while he was in the port-a-john you attempted to tip it over. On 10/2/03 I had lunch with two members of our crew and was told you put a ladder on the port-a-john door while someone was in it. Then Rodney said he found another employee's screwdriver in your truck, which had been missing for two weeks. It had the other employee's initials carved in it. Also, the same day you lied about having another pencil when you had three in your truck. And Rodney showed me where you foam-boarded over an electrical outlet and did not mark where it was, which could have been dangerous.

Chad, you have only worked for us three weeks and your behavior is intolerable. You have been talked to and still continue with your inappropriate behavior on our jobs. We prefer to run a professional work environment, I'm sorry your actions have caused us to terminate your job/position with our company.

You may contact our office and make arrangements to pick up your check.

After Maurer gave Delano the letter, they discussed the incidents mentioned in it. Delano gave Marilyn Maurer the explanations for his conduct he gave at the hearing. After some discussion, Marilyn Maurer was convinced that Delano was not the only one who had engaged in horseplay with the portable toilet. She asked Delano if he still wanted to work for the company, and he said he did. He promised he would cut out the horseplay. Maurer told Delano that she was giving him a chance to change his attitude, but that he was to understand that any future problems would result in his termination. Maurer told Delano to think about it and to call her on Sunday. When Delano spoke to Marilyn Maurer on the telephone on Sunday, she said that she was still uncertain and was going to think about whether Delano could continue to work for Respondent. According to Marilyn Maurer, Rodney Maurer later decided that Respondent needed Delano to complete its work on time.

On Wednesday, October 8, Delano went to Respondent's new jobsite at 9 am. He told Rodney Maurer that he needed to know if he was being fired so he could file for unemployment. Delano went over with Maurer the incidents mentioned in the October 3 letter, and Delano gave

Rodney Maurer the same explanations he had given Marilyn Maurer. Rodney Maurer told Delano that he could start back to work that afternoon.

At noon on October 8, Delano came to the jobsite with Miller as Rodney Maurer and his employees were leaving for lunch. Miller approached Maurer and attempted to persuade him that it would be good for his company to have a union shop. Rodney Maurer said that he would have to talk to his wife.

Sometime between October 13 and 16, Miller stopped at the new jobsite and gave Mellow his business card. Later that same day, Marilyn Maurer came to the jobsite. While she was there, she told Delano that she had heard compliments on his work.

Rodney Maurer testified that about this time he received complaints from Delano's co-workers and the homeowners at the new jobsite about his engaging in horseplay with the portable toilet. Delano denied participating in any such horseplay after October 3.

Sometime around October 20, Mitch Maurer told Delano he was interested in signing a union authorization card. On October 24, Miller met at a restaurant with Delano, Mitch Maurer, Kittenger and Kittenger's brother, who occasionally worked for Respondent. Miller talked about the benefits of the union and handed out union authorization cards. There is no indication that any of the men signed a card at that time.

According to Rodney Maurer, on October 23 or 24, Delano made a gouge in Rodney Maurer's new tool chest. As Maurer described it, he and Delano were the only two on the jobsite that day, and he told Delano to cut through a wall that was in front of the tool chest. He later found the gouge and also discovered that his saw, which Delano had used, had orange plastic shavings from the chest on it. Maurer confronted Delano on Monday, October 27, but Delano denied damaging the tool chest. Maurer testified that employees have damaged his tools before, and that his usual practice is to ask them to replace it if it is no longer functional. However, Maurer was upset that Delano refused to admit that he damaged the chest. According to Marilyn Maurer, after this incident she and Rodney decided to terminate Delano.

At about 4 pm on October 27, Miller came to the jobsite to collect authorization cards. Miller parked in the road. Mitch Maurer, Kittenger, and Delano clocked out and went to speak to him. Delano gave Miller his signed authorization card. When Rodney Maurer radioed Delano and asked him what he was doing, Delano said they had clocked out. Maurer told them that there was cleanup to do, and to come back to work. Maurer then came down the driveway and said the same thing to the men and Miller. The men went back to work. As Miller and the men were speaking, Marilyn Maurer pulled into the driveway at the site. According to Marilyn Maurer, at that time Miller was on the sidewalk and the others were on the lawn of the house.

The next day, October 28, Marilyn Maurer radioed Delano as he was driving to work. She told him that she did not want him on her jobsites anymore. According to Delano's uncontradicted testimony, Maurer said that she was tired of him playing games, and that she did not want Miller on her jobsites. Maurer told Delano, "If you want the union – then bye."

On Friday, October 31, Delano called Marilyn Maurer and asked her if she was going to give him a good reference. According to Delano's uncontradicted testimony, Marilyn Maurer said that she would, that he was a good carpenter but that she just did not want to go union at this time. Delano then went to Respondent's jobsite to pick up his check. At the jobsite, Rodney Maurer told Delano that Miller was not to come to Respondent's jobsites anymore. Delano pointed out that other non-employees had been on the jobsites. Rodney Maurer said that it didn't matter; Miller was not welcome there. According to Delano's uncontradicted testimony, Maurer also said that if he found out that Kittenger and Mitch Maurer had signed authorization cards, they would also be terminated. Rodney Maurer gave Delano his check and the following letter.

You were terminated on October 3, 2003 after receiving verbal and written warnings which occurred within three weeks of employment with us. Your actions and unprofessional behavior stood [sic] intolerable. You asked us to check out some of the horseplay and see that it was not just you. We did, and found that most of the time you initiated it. You called several times wanting to know if you could have another chance.

Then on October 8, you phoned Rodney and begged for another chance. You were crying and said you realized that you were wrong and would change. Rod allowed you to come back on a trial basis, and again within two weeks the same issues reoccurred. Chad, your termination is final. There will be NO more chances to change. I'm sorry, but trust, honest communication and working as a team, which has been expressed to you over and over again, is a vital part of our company. You chose not to follow our policy even after we gave you a second chance. We sincerely tried many ways to show and teach you, however, your actions proved not to follow a professional policy and instead you played games, lied, and stole.

At the hearing, Respondent's counsel asked both Rodney and Marilyn Maurer why they fired Delano in October. Rodney Maurer testified that they terminated Delano for "continuation of misbehavior, bad attitude and lying when confronted with something." Marilyn Maurer testified:

His total lying, not being a team member, the continuance [sic] pushing of inviting Mr. Miller. The only way Mr. Miller knew where we were at is by Mr. Delano's telling him where our job changed to. It was just constantly. I could see – I asked Chad when we were in our office – I said, "You know, if you want to go to the union, you're more than welcome to go to the union if you need to make more money for your family. We're at-will here. If you need to better yourself, go for it." We are a small margin company. I explained this to Mr. Miller at the very first day after I get – Chad comes and wants to be hired, we hire him. Then I get a phone call from Mr. Miller saying, "Oh, you want to hire through the union?" I said I can't hire through the union. And we couldn't possibly make it and hire through a union organization because I can't pay the margins. I don't charge them – I don't even have the overhead to – I have to run our company as well.

Respondent maintained that Kittenger, Mellow and Mitch Maurer were subcontractors, not employees, because Respondent did not withhold taxes from their checks and because they also

worked for other employers. In September and October 2003, Mellow worked for Respondent only in the afternoons. However, the record indicates that during this period Kittenger, Mellow, Maurer and Delano worked regularly at Respondent's jobsites under Rodney Maurer's supervision. All four used both their own tools and tools belonging to Respondent, clocked in and out, and were paid an hourly rate.

Discussion and Conclusions of Law:

Delano's Activities Protected by the Act

Section 8 of the LMA protects the rights of employees covered by that statute "to organize together or to form, join or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or ... other mutual aid or protection." Sections 16(1) and (3) make it unlawful for an employer or its officers or agents "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in section 8" and "to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in any labor organization." The above language is identical to language in Sections 7 and 8 of the National Labor Relations Act (NLRA), 29 USC 151 et seq.

Respondent asserts that Delano did not engage in any activity protected by Section 8 of the LMA because Delano was Respondent's only employee. Charging Party asserts that even if this were the case, Delano's efforts on Charging Party's behalf were protected because Delano was "assisting in labor organization." Charging Party offers no case authority for this interpretation of the statute. However, I find it unnecessary to address this argument because I agree with Charging Party that the record indicates that Kittenger and Mellow were also Respondent's employees.² Section 2(e) of the LMA states:

"Employee" includes an employee, and shall not be limited to the employees of a particular employer, unless the act explicitly provides otherwise . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or any person at his home, or any individual employed by his parent or spouse, or any individual employed as an executive or supervisor...

In determining whether an individual is an independent contractor or an employee, the Commission looks at (1) whether the employer maintains control over the manner and means of performing the work, as well as the end to be achieved, and (2) whether the work to be done by the individual can be characterized as an integral part of a common task. *City of Detroit*, 1986 MERC Lab Op 395, aff'd, *Detroit v Salaried Physicians Prof Ass'n*, 165 Mich App 142 (1987); *State Judicial Council (Third Judicial Circuit Court)*, 1984 MERC Lab Op 545, 552. See also *City of Northville*, 1995 MERC Lab Op 586, 589.³

² As an individual employed by his father, Mitch Maurer was not an employee under Section 2(e) of the LMA.

³ The Board currently applies the common law agency test to determine whether an individual is an employee or an independent contractor. *Roadway Package System*, 326 NLRB 842, 850 (1998); *Slay Transportation Co*, 331 NLRB 1292, 1293 (2000). The Board places the burden on the party asserting independent contractor status to show that the classifications in question are independent contractors. *BKN, Inc*, 333 NLRB 143, 144 (2001).

In *State Judicial Council*, supra, the Commission held that individuals who executed agreements designating them as independent contractors were in fact employees when (1) they were supervised and received tasks from the employer's supervisor; (2) they were paid on an hourly basis rather than from profits or by fees as is customary of independent contractors; (3) they worked in the employer's building and used the employer's equipment; and (4) they performed tasks which were integrated with those of the employer's other employees or which could be performed by the employer's other employees.

Here, the record indicates that Delano, Mellow, Mitch Maurer and Kittenger worked together on Respondent's jobsites under Rodney Maurer's supervision and direction. All three were paid on an hourly basis, and clocked in and out. They all used both Respondent's tools and their own. The only evidence that Mellow, Kittenger or Mitch Maurer were independent contractors was the fact that Respondent did not withhold taxes from their checks. In *Lansing Charter Twp*, 18 MPER ¶ 12 (2005), the Commission found an individual to be an employee and not an independent contractor, despite the fact that her employer did not withhold taxes from her paycheck. Based on the evidence on this record as a whole, I find that Delano, Mellow and Kittenger were all employees of Respondent as defined in Section 2(2) of the LMA.

I also find that Delano engaged in activity protected by Section 8 of that statute when he attempted to organize Respondent's employees by contacting Miller, telling him of the location of Respondent's jobsites, talking to the other employees about the union, and giving these employees union literature. I note that the record does not establish that Delano engaged in any of these activities during actual work time, as opposed to before or after clocking in or during lunch break.

Delano's Discharge

In addition to protected activity, Charging Party must also establish that Respondent had union animus or hostility towards Delano's exercise of his protected rights, and suspicious timing or other evidence that protected activity was a motivating factor in Respondent's decision to discharge him. *City of St Clair Shores*, 17 MPER ¶ 76 (2004); *Univ of Michigan*, 1990 MERC Lab Op 272. Once Charging Party establishes that union activity was one of the causes of the discharge, the burden shifts to Respondent to produce credible evidence that the same action would have taken place even in the absence of the protected conduct. The ultimate burden of proof remains with the Charging Party, although the outcome usually turns on a weighing of the evidence as a whole. *MESPA v Ewart Public Schools*, 125 Mich App 71, 74 (1982); *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 706.

Here, the Maurers' hostility toward Delano's protected activity was clear. They repeatedly stated not only that they were not interested in signing a union contract, but that they did not want Miller on their jobsites talking to their employees. On September 11, 2003, the day after Delano first brought Miller to Respondent's jobsite, Marilyn Maurer told him that Miller was not welcome there. After Miller visited the jobsite a second time, the Maurers gave Delano a reprimand for inviting him

there and threatened Delano with further discipline if Miller showed up again by his invitation. Respondent's October 3 letter explaining its decision to discharge him the first time mentioned Delano's union activities. On October 28, Marilyn Maurer cited Delano's bringing Miller to the jobsite as one of the reasons for Respondent's decision to discharge him a second time. When Delano came to pick up his check on October 31, Rodney Maurer told Delano that Miller was not to come to Respondent's jobsites anymore and that if he found out that Kittenger or Mitch Maurer had signed a union card he would terminate them. I find that these incidents, the sequence of events in this case, and Marilyn Maurer's response at the hearing to the question of why Respondent fired Delano a second time, establish that Delano's union activity was at least one of the causes for his discharge on October 28, 2003.

As set out above, once Charging Party establishes that Delano's protected activity was a motivating cause of his discharge, Respondent must produce evidence that it would have discharged him even in the absence of this activity. I credit the Maurers' testimony that many things about Delano's conduct between September 10 and October 28, 2003 seriously displeased them. This included Delano's refusal to admit to mistakes, such as keeping Mitch Maurer's screwdriver in his truck and damaging Rodney Maurer's tool chest, and his continuing to engage in horseplay involving the portable toilet. However, I conclude that Respondent would not have discharged Delano on October 28, 2003 if he had not continued to engage in union activity. First, the Maurers knew Delano well when they hired them on September 10, and I believe that they also knew his personality and character. Second, as Marilyn Maurer testified, Respondent needed Delano to finish its job on time. As Marilyn Maurer told Delano after his discharge, the Maurers considered him a good carpenter. Third, the fact that both Marilyn and Rodney Maurer brought up the union with Delano after they had discharged him indicates that this issue was foremost in their minds. Based on the evidence as a whole, I conclude that the precipitating cause of Respondent's decision to discharge Delano on October 28 was not his refusal to acknowledge that he had damaged the tool chest, but the appearance of Miller at the jobsite once again on October 27. I conclude that Respondent discharged Delano on October 28, 2003 because of activity protected by the LMA, and that the discharge violated Sections 16(1) and (3) of that Act.

Based on the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Dream Builders Construction of Marshall, Inc., its officers and agents, are hereby ordered to:

1. Cease and desist from:
 - a. Discharging employees because of their union or other activity protected by Section 8 of the Michigan Labor Mediation Act; and
 - b. In any like manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 8 of that Act.
2. Take the following affirmative action to effectuate the purposes of the Act:
 - a. Within 14 days from the date of this order, offer Chad Delano unconditional reinstatement to the position he would have held absent the discrimination against him, without prejudice to any rights or privileges he previously enjoyed.
 - b. Make Chad Delano whole for any loss of pay he may have suffered as a result of his unlawful discharge by paying him the amount he would have earned from the date of his discharge, October 28, 2003, to the date of his reinstatement or rejection of Respondent's unconditional offer, less his interim earnings during this period, together with interest on the amount owed at the statutory rate of six percent (6%) per annum, computed quarterly.
 - c. Post the attached notice on Respondent's premises, in a place or places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, **Dream Builders Construction of Marshall, Inc.**, has been found to have committed an unfair labor practice in violation of the Michigan Labor Mediation Act (LMA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discharge employees because of their union or other activities protected by Section 8 of the LMA.

WE WILL NOT in any like manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 8 of that Act.

WE WILL, within 14 days from the date of this order, offer Chad Delano unconditional reinstatement to the position he would have held absent the discrimination against him, without prejudice to any rights or privileges he previously enjoyed.

WE WILL make Chad Delano whole for any loss of pay he may have suffered as a result of his unlawful discharge by paying him the amount he would have earned from the date of his discharge, October 28, 2003, to the date of his reinstatement or rejection of Respondent's unconditional offer, less his interim earnings during this period, together with interest on the amount owed at the statutory rate of six percent (6%) per annum, computed quarterly.

Both pages of this notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

All our employees are entitled to organize together, to form, join or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, and to negotiate or bargain collectively with their employers through representatives of their own free choice.

DREAM BUILDERS CONSTRUCTION OF MARSHALL, INC.

By: _____

Title: _____

DATE: _____

Both pages of this notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.