

# Unicorn Sighting: NLRB Overturns ALJ Credibility Determination

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As we have seen, there are few things that can be counted on in labor relations. Oftentimes, several experts look at the same problem and come to vastly different conclusions ([here](#), [here](#) and [here](#) are some examples). What is (almost) guaranteed, however, is that the NLRB rarely disturbs the determinations made by an Administrative Law Judge of witness credibility made during testimony at trial. This is mainly because the ALJ, as the sole fact finder, is the only person in a position to observe the demeanor of the witness and evaluate credibility.

In a fairly rare case, the NLRB recently refused to adopt an ALJ's credibility determinations concluding that a judge's determination that a charging party-witness was not credible was not something that could stand because it relied on "improper bases."

In [International Longshoremen's Assn, Local 28, 366 NLRB No. 20 \(February 20, 2018\)](#) the Charging Party was a female union member who claimed in a charge that her union discriminated against her in the referral of work and training opportunities for reasons related to her gender.

## **Charging Party Claims Sexual Harassment as Reason for Denial By Union of Work Opportunities.**

The union operated hiring hall in which it dispatched union members to jobs. The union also sponsored training to allow its members to gain skills to perform additional jobs. Charging Party was a truck driver member of the union.

In the charge that initiated the case, the Charging Party stated that the union representative "unlawfully refused to allow . . . [Charging Party] to be placed on the certification list . . . [and] refer ...[Charging Party] to any jobs for unfair, arbitrary , and invidious considerations." As with all unfair labor practice charges, the Charging Party had to swear under penalty of perjury the allegation was correct. After investigation, the General Counsel issued complaint and the matter went to trial.

The evidence established that for a period of years the Charging Party had received some work referrals through the union hall although on what amounted to a part-time basis. Part of getting additional work had to do with being certified to perform additional jobs, the skills for which required training. The Charging Party asserted that she had repeatedly requested the union to place her in training but the union denied these requests. Charging Party stated that on 10 separate occasions during a 5 year period when she went to the union representative's office to discuss training and she was subjected to physical assault of a sexual nature in what she described in her testimony as a "never-ending cycle" of grabbing and groping.

The alleged harasser, a union representative, testified that he did not engage in any sexual harassment. The union also demonstrated Charging Party had in fact been referred to jobs through the union hiring hall which appeared to contradict the statement in the charge that Charging Party had not been referred to "any" jobs.

Thus, the case turned credibility of these two opposing witnesses. The ALJ recommended dismissal of the complaint after concluding Charging Party's testimony was not credible.

### **ALJ Gives Three Reasons as to Why Charging Party's Version was not Credible**

In his decision, the judge noted first that Charging Party was a "highly uncooperative witness, who effortlessly answered virtually all of the General Counsel's direct examination queries, but then responded to equally simple cross-examination questions with delays, pauses, additional questions, recollection issues, and reported confusion." Had this basis formed the entirety of the judgment's assessment that Charging Party was not credible the ruling likely would have been upheld on appeal.

The judge's second reason for deciding Charging Party was not credible was the "glaringly false statement in her ULP charge." This was a reference to the body of the charge which said Charging Party had not been referred to "any" jobs when, in fact, she had been sent to jobs.

The third reason the ALJ gave for the Charging Party's lack of credibility was the "implausibility of several parts of her story." In this regard, the ALJ noted that it was unbelievable that the Charging Party, "a tough woman who performs stevedoring work...and previously drove a truck in Iraq, would have meekly allowed [the union representative] to harass her a whopping 10 times, without an utterance."

After the complaint was dismissed, the General Counsel appealed on the grounds that the judge's credibility determinations were "based on sex stereotypes and demonstrated bias."

A three member panel of the Board (Kaplan, Pearce and Emmanuel) agreed and set aside the decision. The Board remanded the case to the chief administrative law judge to assign to another judge to rehear the case.

### **Takeaway-It's Still Hard To Attack A Credibility Determination**

The burden to overturn a credibility determination is very high and that the Board's general standard is not to disturb such determinations unless "a clear preponderance of the all the relevant evidence convinces [the Board] that they are incorrect." Usually, when judges discredit testimony it is because of the demeanor of the witness which is nearly impossible to challenge.

This is an unusual and interesting case because the ALJ gave much more detailed reasons for his denial of the claim which ultimately led to reversal. In this case, the second and third reasons given by the judge were not typical. For example, using the statement in the charge as a basis to conclude the charging party was lying would open up many charges to attack. Such apparent conflicts between the charge allegation and the trial testimony are not usually given much weight for the simple reason that the literal words used on an unfair labor practice form, a document that does not require specificity and is often filled out without any expert assistance, would open up an entire new line of defense. Charging Party's statement in her charge that she did not get "any" work opportunities when she in fact had been referred work was more along the lines of an exaggeration rather than an outright lie.

The third reason, that Charging Party's accounts of harassment were "implausible" was the obvious focus of the Board in its reversal. The Board did not want to endorse a ruling that stated because an alleged victim of sexual harassment did not complain about each instance of harassment meant the allegations were "implausible."

The case is an interesting insight into the determination of credibility, however.

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