NLRB, Region 20 Roundup

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UNITED WHOLESALERS AND RETAILERS UNION'S APPLICATION FOR REIMBURSEMENT OF FEES AND COSTS DENIED BY ALJ

San Francisco, CA – Under the Equal Access to Justice Act ("EAJA"), when an agency conducts an adversary proceeding against a party and loses, and that prevailing party has a net worth of less than $7,000,000, and 500 or fewer employees, it is entitled to fees and other expenses unless the agency was "substantially justified or that special circumstances make an award unjust." Recently, an administrative law judge issued a supplemental decision denying in full all fees and expenses sought under EAJA by United Wholesalers & Retailers Union ("UWRU"). UWRU filed exceptions to the judge's decision, which are currently pending before the National Labor Relations Board. In 1996, the NLRB's General Counsel litigated a series of complaints alleging, in part, that Raley's Supermarkets unlawfully assisted UWRU and unlawfully recognized it as the collective-bargaining representative of Raley's drug clerks, because at the time of recognition, UWRU lacked an uncoerced majority among the drug clerks in that bargaining unit. After the Board ruled against the General Counsel in most respects, UWRU filed an application under EAJA for fees and expenses of over $175,793.16. The administrative law judge in the EAJA proceeding, however, found that the General Counsel was substantially justified as a whole in litigating this matter. In reaching this conclusion, the judge found, among other things, that had the administrative law judge in the underlying trial resolved credibility disputes and made inferences favorable to the General Counsel, a basis would have existed for the Board to have found that Raley's unlawfully assisted UWRU in numerous ways, including sending an employee upstairs to talk to the UWRU employee organizer on work time, while prohibiting business representatives of rival union UFCW Local 588 from also talking to employees on work time; letting UWRU fax its petitions to different stores in violation of Raley's policy restricting use of the fax machines to official company business; and Raley's attorney switching sides and representing UWRU. The Board already has rejected UWRU's request for attorney's fees, stating, among other things that the General Counsel's litigation was not frivolous. Paula R. Katz and Kathleen C. Schneider appeared as Counsel for the General Counsel in these matters.

Board Finds SFO Good-Nite Inn Engaged in Multiple Unfair Labor Practices including Unlawfully Withdrawing Recognition from Union

Washington, D.C. – On March 20, 2008, the National Labor Relations Board affirmed a September 28, 2006, decision of an administrative law judge, finding that SFO Good-Nite Inn unlawfully withdrew recognition from UNITE/HERE!, Local 2; unlawfully refused to bargain with the union;

Section 7 of the National Labor Relations Act (NLRA) gives employees the rights to:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for their benefit and protection
- Choose not to engage in any of these protected activities

Non-Union Protected Concerted Activity

Q: Does the NLRA protect activity with other employees for mutual aid or protection, even if you don't currently have a union?

A: Yes. For instance, employees not represented by a union, who walked off a job to protest working in the winter without a heater were held by the Supreme Court to have engaged in concerted activity that was protected by the NLRA.

terminated two employees because they would not sign a petition to remove the union; and made unlawful threats and promises of benefits to employees to encourage them to remove the union. Concerning the withdrawal of recognition allegation, the Board found that the hotel had unlawfully assisted employees' efforts to petition to remove the union, precluding the hotel from relying on the petition as objective evidence that the union had lost the support of a majority of bargaining unit employees. Because the hotel refused to comply with the ALJ's recommended remedial order, the Board authorized Regional Director Joseph P. Norelli to seek a temporary injunction under Section 10(j) of the National Labor Relations Act while the Board decision was pending. On March 1, 2007, Federal District Court Judge Martin J. Jenkins granted a temporary injunction against the hotel, which has now been terminated, in light of the Board's final disposition of the case. Micah Berul and John Ontiveros appeared as Counsel for the General Counsel, and Mr. Berul also represented Petitioner, Regional Director Norelli, in the Section 10(j) District Court proceedings.

Piner's Napa Ambulance Service Held to Have Unlawfully Disciplined Employee for Talking about Union

Washington, D.C. – On May 30, 2008, the Board upheld an administrative law judge's decision that Napa Ambulance Service., Inc., d/b/a Piner's Napa Ambulance Service, violated Section 8(a)(1) of the Act by disciplining a lead employee union advocate on August 22, 2005, for talking about the union. The discipline was found to be unlawful because Piner's, in disciplining the employee, had equated talking about the union to activity prohibited by federal laws, specifically, sexual harassment. The Board also upheld the judge's decision that Piner's did not violate the Act when it disciplined this employee in April 2005, and subsequently fired this employee in August 2005, because it found that Piner's would have taken these actions even if the employee had not engaged in union activity. This case originally had been consolidated with three other cases, alleging various other violations of the Act including the discipline of three other employee union advocates and the withholding of an annual wage increase. These allegations were withdrawn by the union on the last day of a five-day hearing, as part of a settlement in which the parties signed an initial collective-bargaining contract. The hearing took place from August 14 through August 18, 2006, in San Francisco, California. Christy J. Kwon and Cecily A. Vix appeared as Counsel for the General Counsel.

Ninth Circuit Rules River Oak Center for Children Must Furnish Information to Union

San Francisco, CA – On April 16, 2008, the United States Court of Appeals for the Ninth Circuit denied River Oak Center for Children's petition for review of the National Labor Relations Board's December 9, 2005, order for the employer to furnish information to Social Services Union, SEIU, Local 535. The Court's decision upheld the decision and order of the Board, finding that the employer, a care center for children with emotional and behavioral problems, unlawfully denied the union's request for addresses and telephone numbers of bargaining unit employees. The Court noted that the Board has repeatedly held that home addresses and telephone numbers of bargaining unit employees constitute presumptively relevant information. The Court rejected the employer's argument that its collective-bargaining agreement with the union prohibited it from disclosing this information. This case was litigated in the proceedings before the Board by Counsel for the

Unfair Labor Practice Charge Procedures

Anyone may file an unfair labor practice charge with the NLRB. To do so, they must submit a charge form to any Regional Office. The form must be completed to identify the parties to the charge as well as a brief statement of the basis for the charge. The charging party must also sign and date the charge.

Once a charge is filed the Regional Office begins its investigation. The charging party is responsible for promptly presenting evidence in support of the charge, which often consists of sworn statements and key documents.

The charged party is then required to respond to the allegations, and will be provided an opportunity to furnish evidence in support of its position.

After a full investigation, the Regional Office will determine if the charge has merit. If there is no merit to the charge, the Region will issue a letter dismissing the charge. The charging party has a right to appeal that decision. If the Region determines there is merit to the charge, it will issue complaint and seek an NLRB Order requiring a remedy of the violations, unless the charged party agrees to a settlement.

General Counsel Paula R. Katz, and was investigated by Field Attorney Micah Berul.

Board Orders Legal Services of Northern California to Furnish Information to Union

Washington, D.C. – On May 16, 2008, the National Labor Relations Board reversed the August 7, 2006, decision of an administrative law judge, and ordered Legal Services of Northern California to furnish information to Northern United Legal Assistance Workers. The union had requested a copy of a separation agreement between a bargaining unit employee and Legal Services, but Legal Services refused to furnish it. The administrative law judge rejected Legal Services' confidentiality defense but determined that the union did not establish the agreement's relevance to the union's role as collective-bargaining representative, or establish that the agreement was relevant to the bargaining process, reasoning that the agreement was a settlement of a potential private tort claim. The Board, however, found that the agreement was relevant to the union's ability to function effectively as the representative of the bargaining unit employees, in that it affected mandatory subjects of bargaining. The agreement, the Board also pointed out, included an explicit waiver of the employee's rights under the collective-bargaining agreement between Legal Services and the union. Citing NLRB precedent, the Board stated that "an employer violates the Act when it requires or solicits employees to waive their rights under a collective-bargaining agreement without the union's knowledge or assent." Accordingly, the Board determined the union was entitled to the agreement, and ordered Legal Services to furnish a copy to the union. This case was litigated by Field Attorney Lucille L. Rosen.

Board Modifies Law Concerning a Discriminatee's Duty to Search for Interim Work

Washington, D.C. – In *Grosvenor Orlando Associates, LTD.,* 350 NLRB No. 86 (2007), the Board found "that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 2-week period. . ." Thus, a discriminatee will lose backpay if there is more than a 2-week period after his/her termination, layoff or refused hire in which s/he does not engage in a search for work. However, even if the discriminatee fails to search for work during this 2-week period, the backpay period does not stop. If a discriminatee unreasonably delays an initial search, the Board will toll backpay until such time as a reasonably diligent search begins.

As a result of this decision, if backpay and/or other reimbursement is due as part of the remedy for the unfair labor practice, for instance, an unlawful discharge or refusal to hire, the Board requires discriminatees to mitigate (offset) the backpay by beginning to look for another job in the same or similar line of work promptly.

If a discriminatee is unable to establish that s/he actively sought to mitigate damages, s/he may face the risk of having whatever money is owed reduced.

Accordingly, discriminatees should keep careful records of when and where they sought employment.

To learn more about the National Labor Relations Board and the National Labor Relations Act, please visit the Agency's website at:

http://www.nlrb.gov

To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Regional Attorney Olivia Garcia or Field Attorney Carmen Leon at: **415-356-5130**

or visit us online at the Internet address above and click on the speakers link.

For questions about *NLRB, Region 20 Roundup*, contact Newsletter Editor, Field Attorney Micah Berul at:

415-356-5169

Dish Network Settles Unfair Labor Practice Allegations

Benicia, CA – On April 3, 2008, the Region closed the unfair labor practice cases against Dish Network California Service Corporation after concluding that it had fully complied with the provisions of the bilateral settlement agreement that resolved all complaint allegations against the company. The complaint issued by the Region on October 31, 2007, alleged that in the midst of an organizing drive by IBEW, Local 1245, Dish Network fired the lead employee union organizer; unlawfully solicited grievances and promised to remedy those grievances in order to dissuade employees from supporting the union; threatened to freeze employees' wages, promotions and other benefits if employees selected the union to represent them; and reduced employees' workloads in order to encourage them to abandon their support for the union. The complaint sought a *Gissel* bargaining order (which is requested when an employer's unfair labor practices have had the effect that a fair election to determine employees' true wishes concerning union representation cannot be held), or in lieu of the bargaining order, it sought several special remedies, including the reading of a Board Notice to Employees by the company to ensure the employees understood that Dish Network would respect the employees' rights under the National Labor Relations Act.

The NLRB settlement agreement that Dish Network entered into with the union provided for the employer to pay full backpay to the lead employee union advocate who had been discharged, and to post the Board Notice to Employees for 60 consecutive days. It also included three *special* remedies which required: the Board Notice to Employees to be read to employees by a high level Dish Network manager and witnessed by co-Counsel for the General Counsel Jason Wong; and that Dish Network provide the union with access to employees during non-working times in non-working places of the employer's facilities and access to the employer's bulletin board to post union-related information. The parties also stipulated to hold a re-run election and to include in the Notice of Election a statement that the original election was set aside because Region 20 found that Dish Network interfered with the employees' exercise of a free and reasoned choice by engaging in the actions alleged in the complaint as described above. In entering into this settlement agreement, Dish Network did not, however, admit it violated the Act. Counsel for the General Counsel Christy J. Kwon was instrumental in achieving a settlement of these unfair labor practice allegations, and Compliance Officer Karen Thompson secured Dish Network's full compliance with the provisions of the agreement.

Region 20 Welcomes Summer Law Externs

Region 20 is pleased to report the selection of Jessica Ollendorf and Noah Woods to serve as summer externs in the San Francisco Regional Office. Ms. Ollendorf is a J.D. candidate at the UC Davis School of Law and originally hails from the Chicago area. Mr. Woods, who grew up in the San Diego area, is a J.D. candidate at the University of San Francisco School of Law. In addition to their legal talents, both Mr. Woods and Ms. Ollendorf have demonstrated much interest and enthusiasm for the Agency and its mission to uphold Section 7 rights. We welcome these two fine additions to our staff for the summer.