The Bridge

Regions 20, 32, and Subregion 37
An Agency of the United States Government

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Judge Finds Walmart Violated Employee Section 7 Rights

Oakland, CA – On December 9, 2014, ALJ Geoffrey Carter found that Walmart extensively violated Section 8(a)(1) of the National Labor Relations Act in the wake of an advocacy campaign by the Organization United for Respect Walmart (OUR Walmart). The ALJ determined that employees had engaged in a protected work stoppage at Walmart's Richmond store, and concluded that Walmart's issuance of disciplinary coachings to six employees for their participation in the work stoppage was accordingly unlawful. The ALJ further found that Walmart coerced employees in the exercise of their Section 7 rights by maintaining overbroad dress codes which infringed on employee rights to wear union insignia, and that Walmart selectively and disparately applied its dress code to an employee at its Richmond store who was wearing clothing with OUR Walmart and union logos.

In addition, the ALJ concluded that Walmart made numerous statements that had a tendency to interfere with union or other protected activities, including a statement to a Placerville employee that the Placerville store might close if OUR Walmart grew too large, and statements to employees at the Richmond store that Walmart would never unionize, that returning strikers would be looking for new jobs, and that employees were prohibited from talking to returning strikers about their strike activities.

In addition to standard remedies contained in the ALJ's recommended order, the ALJ also recommended that Walmart be ordered to read the Notice aloud to employees at its Richmond facility in the presence of a store manager. The ALJ determined the special remedy was warranted because Walmart's misconduct at the Richmond store was serious and widespread, and he found that a notice reading was necessary to assure employees that they may exercise their Section 7 rights free of coercion.

Region 32 Supervisory Attorney Catherine Ventola and Region 16 Field Attorney David Foley litigated the cases.

Board Overturns ALJ and Clarifies Law Regarding Section 8(f)

Honolulu, Hawaii - On February 9, 2015, the Board issued a decision and order finding that Hawaiian Dredging Construction Company, Inc. violated Section 8(a)(3) and (1) of the Act when it discharged 13 welders who were represented by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 627 because the discharges were motivated by the employees' union affiliation and, alternatively, were inherently destructive of employee rights under the Act.

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.

To learn more about the National Labor Relations Board and the National Labor Relations Act, please

In finding a violation under *Wright Line*, the Board explained that "[a]lthough an employer is free to terminate an 8(f) relationship with a union after expiration of a contract, it cannot discriminatorily discharge its employees because of their affiliation with that union." The Board found that antiunion animus was established by the Employer's summary discharge of all of the Boilermakers-represented employees. The Board was not persuaded by the Employer's defense that it acted in accordance with its strict requirement that all craft work be performed under collective-bargaining agreements. Rather, the Board determined that there were two time periods during which the Employer continued its operations without having an agreement in place.

The Board also found that the Employer's discharge of its Boilermakers-represented employees was inherently destructive of their right to membership in a union of their choosing, free from the threat of adverse employment action. Significantly, the Employer discharged the employees merely because of their affiliation with the Boilermakers. It did not matter that the Employer never intended to become a non-union shop and that it eventually informed the terminated employees that they could return to work through a referral from another union that had entered into an agreement with the Employer. The Board explained, contrary to the judge, that discrimination on the basis of affiliation with one union instead of another violates the Act just as does discrimination on the basis of union membership in general. This is because both forms of discrimination have the tendency to unlawfully encourage or discourage union membership.

The Board decision provides helpful guidance to employers faced with a similar situation. According to the Board, after the Employer ended its relationship with the Boilermakers it could have temporarily ceased its operations while it negotiated a new 8(f) agreement with another union. The Employer could have laid off the employees as long as they remained employees with an expectation of recall once operations resumed. The Employer and the new union at the end of the 7-day grace period provided for by Section 8(f)(2) of the Act could require the employees to meet the new union's criteria for referral and become dues-paying members. However, the new union could not require that the employees be terminated and put through the new union's referral process.

The Board ordered reinstatement and a make whole remedy for the discriminatorily discharged employees. The Boilermakers Union has filed a Petition for Review in the Ninth Circuit and the Employer has filed a Petition for Review in the D.C. Circuit. Subregion 37 Field Attorneys Meredith Burns and Trent Kakuda tried the case.

ALJ Clarifies Union's Duty in Withdrawal of Recognition Cases

San Francisco, CA - On February 23, 2015, ALJ Mary Cracraft issued her decision in Scoma's of Sausalito, LLC (Respondent). The case presented a novel question not previously addressed in withdrawal of recognition cases - whether a union is obligated to notify the employer that it has evidence of majority support when the employer intends to withdraw recognition. Judge Cracraft ruled in favor of the General Counsel, thereby confirming that the burden rests squarely on the employer to prove actual loss of majority support at the time of withdrawal recognition.

At issue in this case was whether Respondent unlawfully withdrew recognition from Unite HERE! Local 2 (the Union) when it relied exclusively on a decertification petition it previously received. While 29 of 54 bargaining unit members signed the decertification petition, six of the signatory employees then subsequently revoked their signatures by signing a revocation petition with the Union. The Union did not

visit the Agency's website at:

http://www.nlrb.gov/

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,

share this information with Respondent. With the six revocation signatures removed from the count, only 23 valid signatures – or 43% - appeared on the decertification petition at the time Respondent withdrew recognition.

This case required a fresh look at the withdrawal of recognition standard set forth in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), and the use of revocation signatures as first discussed in *Fremont-Rideout Medical Center*, 354 NLRB 453 (2009), adopted 359 NLRB No. 51 (2013). In *Levitz*, the Board held that an employer may withdraw recognition only where it can show the union has in fact lost majority support. This showing is made as an affirmative defense. The Board made clear that an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status. Here, Respondent believed it had evidence of actual loss of majority status by way of the decertification petition. The question was whether the revocation signatures which the Union obtained without Respondent's knowledge defeated that showing.

A situation similar to the case here occurred in *Fremont-Rideout* where the Board found the withdrawal of recognition to be unlawful even though the union did not inform the employer of countervailing evidence of union support. The notable difference between that case and the case here was that the employer in *Fremont-Rideout* had knowledge of the countervailing evidence despite the union failing to notify it. Thus, the Board's ruling in *Fremont-Rideout* that the union does not have a duty under *Levitz* to provide such notice to the employer was put to the test here.

Judge Cracraft ruled that the Respondent's withdrawal of recognition was unlawful because it could not prove that the Union actually lost majority support at the time it withdrew recognition. Judge Cracraft noted that the Board took pains in *Levitz* to balance the Act's principles of safeguarding industrial stability and fostering employee rights of free choice, with the concern of recognizing a minority union. The standard for filing an RM election was lowered in *Levitz* in order to provide a safeguard for employers who are uncertain of the union's majority status. Judge Cracraft concluded that with these safeguards in place, *Levitz* does not require that a union notify an employer that it is gathering evidence in support of majority support. Region 20 Field Attorney Sarah McBride tried the case.

Court Backs NLRB Preliminary Injunction Bid, Orders Successor Firm to Hire Union Activist

Sacramento, CA - On February 10, 2015, a federal district court in California issued a preliminary injunction requiring a Job Corps center to hire a residential adviser while the National Labor Relations Board considers a union's allegation that the individual was denied employment because of her background as a union officer (*Frankl v. Adams & Assocs., Inc.*, 2015 BL 36246, E.D. Cal., No. 2:14-cv-02766, 2/10/15).

Granting the NLRB's petition for injunctive relief under Section 10(j) of the National Labor Relations Act, Judge Kimberly J. Mueller of the U.S. District Court for the Eastern District of California said she was satisfied Adams & Associates Inc. (Adams) knew the discriminatee was the union president at a predecessor firm, Horizons Youth Services.

Adams said the discriminatee was unqualified, but the court said the NLRB countered the employer's defense and is likely to prevail in an ongoing administrative hearing over the failure to hire the residential adviser.

Adams did hire two other employees who had served as union representatives at Horizons, but Mueller said an interviewer's remarks about the discriminatee exhibiting "inappropriate and quite demanding" behavior supported the NLRB's

it will issue complaint and seek an NLRB Order requiring a remedy of the violations, unless the charged party agrees to a settlement.

Representation Case Procedures

The National Labor Relations Act provides the legal framework for private-sector employees to organize into bargaining units in their workplace, or to dissolve their labor unions through a decertification petition.

The filing of a petition seeking certification or decertification of a union should be accompanied by a sufficient showing of interest to support such a petition. Support is typically demonstrated by submitting dated signatures of at least 30% of employees in the bargaining unit in favor of forming a union, or to decertify a currently recognized union.

Any union, employer or individual may file a petition to obtain an NLRB election.

The NLRA does not include coverage for all workers, excluding some employees such as agricultural and domestic workers, those employed by a parent or spouse, independent contractors,

allegation that anti-union animus motivated the company's decision not to offer the discriminatee employment.

Mueller ordered the company to offer the discriminatee employment "pending the final disposition of the matter" by the NLRB.

According to the court, Adams took over operations at a Sacramento, Calif., Job Corps center in March 2014. The company was responsible for residential, counseling, career and wellness services.

Adams interviewed Horizons staff members for possible employment, but it declined to hire the discriminatee, who had worked at the Sacramento center for more than five years. The discriminatee had been the president of the Sacramento Job Corps Federation of Teachers, American Federation of Teachers Local 4986, for approximately four years.

The court said an Adams official, who knew the discriminatee was the union president, filled out a company "disqualification" form on the discriminatee, reporting that "credible information from a knowledgeable source" had shown that the discriminatee's work for Horizons was not "suitable."

The Adams official also wrote that the discrminatee had engaged in "inappropriate and quite demanding" behavior after she visited an office that was set up to manage the transition from Horizons to Adams. The discriminatee was making inquiries about the new employer's hiring plans and decisions concerning particular employees when she visited the transition office, and the court said, "The Board can reasonably find that what [the Adams official] refers to as 'inappropriate and quite demanding' behavior was [the discriminatee] exercising her authority, as the Union President, to act for all Union members."

Adams said it rejected the discriminatee's candidacy because during a job interview she failed to give the Adams official "any strong sense of her accomplishments, leadership skills, or her interpersonal skills." However, Mueller said the company could not defeat the NLRB's case for a preliminary injunction "simply by presenting conflicting evidence."

Finding the NLRB is likely to determine that the discriminatee was denied employment due to her union activities in violation of the NLRA, the court said the preliminary injunction is necessary "to prevent an unfair labor practice from succeeding due to delay in the administrative process." Mueller ordered Adams to employ the discriminatee as a residential adviser or, if that position no longer exists, to a substantially equivalent position, pending completion of the NLRB proceeding. Region 20 Field Attorney Joe Richardson argued the case before the District Court. He and Region 20 Field Attorney David Reeves tried the case before an ALJ.

Region 20 Commemorates African American Heritage month and Women's History Month

San Francisco, CA - Region 20 jointly commemorated African American Heritage month and Women's History month on February 24, 2015. The first half of the program featured guest speaker Phyllis Gould, one of the original *Rosie the Riveters*. Following Ms. Gould's fascinating oral history, Region 20 staff members read from an array of works penned by African American poets, scholars, and civil rights and labor activists.

Phyllis Gould, 93, vividly described the challenges and joys she experienced when

supervisors, public sector employees, and workers engaged in interstate transportation covered by the Railway Labor Act.

To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Kathleen Schneider at 415-356-5130, or Region 32's Jeff Henze at 510-637-3300. For questions about The Bridge, contact Newsletter Editor, Field Attorney Carmen León at: 415-356-5130.

she began working as a welder during World War II. One of the biggest obstacles she faced was overcoming gender stereotypes and the gender expectations of her generation. Initially, Gould was not allowed to work even though she had obtained her welder's certificate and the employer had hired her because the union was prohibiting women from becoming members. Once the union finally agreed to let her and other women join its ranks, women faced other challenges in workplace, such as being escorted by chaperones. Gould described the joy of perfectly welding two pieces of heavy steel together and the independence that came along with earning a paycheck. She also described the pressures she faced from her father and husband as they were not always supportive of her working. In 2014, the White House invited Gould and a small group of other Rosie the Riveters. They met with President Obama and Vice President Biden. Currently, Gould is working alongside Congressional representatives to enact a national Rosie the Riveter day to highlight the role women played during World War II. The attendees of this event were enlightened and inspired by Gould's oral history of her life.

For the second half of the program, six staff members shared a poem or other words they found meaningful in honor of African American Heritage month. They read from Langston Hughes, A. Philip Randolph, Arna Bontemps, Bayard Rustin, Audre Lorde, and Claudia Rankin. One of the favorite quotes that was read aloud was from A. Phillip Randolph, an important civil rights and labor rights activist: *Justice is never given; it is exacted and the struggle must be continuous for freedom is never a final fact, but a continuing evolving process to higher and higher levels of human, social, economic, political and religious relationship*.

L to R: Regional Director Joseph Frankl, Guest Speaker Phyllis Gould, and Special Emphasis Program Coordinator Elvira Pereda

New Attorneys Join Region 32

Oakland, CA – Region 32 has recently hired five new field attorneys and the staff is very pleased to welcome them.

Coreen Kopper received her bachelor's degree in Latin American Studies and Human Rights from Columbia University in 2006. In 2012, Coreen earned her law degree from UC Berkeley, Boalt Hall School of Law. After law school, she was awarded a

Fulbright Scholarship to work with H-2B guest workers in Mexico who seasonally migrate to the U.S. to work in the traveling fair and carnival industry. Coreen is fluent in both English and Spanish.

David Willhoite attended Dartmouth College as an undergraduate and spent two years abroad in Germany and Peru prior to receiving an MA in Philosophy from UC Riverside in 2007. Before earning his law degree from UC Hastings, David worked for three years as an organizer for the UAW. Upon graduation from law school in 2013, David worked for California Rural Legal Assistance and for the California Teachers Association as a law clerk.

Edris Rodriguez earned two bachelor's degrees from the University of California, Santa Cruz (go slugs!) in Language Studies and Politics. Edris earned his law degree from the University of California, Hastings College of the Law in 2012. Prior to joining Region 32, Edris worked as an Associate at the law firm of Villegas Carrera LLP, where he represented California employees in class action wage and hour litigation and individual employment discrimination litigation, and as an Assistant District Attorney with the San Francisco District Attorney's Office in the Misdemeanor Trial Unit. Edris is fluent in both Spanish and French.

Emily Erdman attended the University of Oregon as an undergraduate (Go Ducks!). Emily moved to the Bay Area in 2009 to teach special education in a low-income urban high school as part of the organization Teach for America. After fulfilling her commitment to Teach for America in 2011, Emily earned her law degree from UC Hastings, where she concentrated on labor and employment issues.

Lelia Gomez received a B.A. in Political Science and Global Studies from the University of California, Santa Barbara. Upon completion of her undergraduate studies, Lelia worked as a Legislative Fellow for Congresswoman Barbara Lee. Lelia went on to work as a Legislative Assistant for Congressman Howard L. Berman for three and a half years. In 2014, Lelia received her J.D. from the University of California, Berkeley School of Law.

Welcome aboard Coreen, David, Edris, Emily, and Lelia!

L to R: David Wilhoite, Lelia Gomez, Emily Erdman, Coreen Kooper, and Edris Rodriguez