



Special points of interest

- ◆ Summary of Four Recent Board Decisions: By Jim Paulsen, Regional Director
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NLRB CONNECTIONS

Summary of Four Recent Board Decisions: By Jim Paulsen, Regional Director

MikLin Enterprises, Inc., d/b/a Jimmy John's, 361 NLRB No. 27 (August 21, 2014) .

Issue: Did a poster and press release about the employer's sick leave policy lose the protection of the Act because they were so "disloyal, reckless or maliciously untrue" under Jefferson Standard and MasTec? [NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953) and MasTec Advanced Technologies, 357 NLRB No. 17 (2011).] In this case, the employer did not provide paid sick leave. The union, as part of its organizing campaign, developed posters that displayed a sandwich made by a healthy worker and a sick worker. The posters asked could you tell the difference and stated, "We hope your immune system is ready because you are about to take the sandwich test . . ." There was also a press release that included the poster.

A majority of Board (Pearce and Schiffer) found the press release and posters did not lose the protection of the Act because 1) the communications were related to a labor dispute; 2) the communications were not reckless or maliciously untrue, and 3) the communications were not "so disloyal" to lose the protections of the Act. Therefore, the Board found that discharging six employees and disciplining three others for their involvement in the union's Sick Days Poster Campaign violated Section 8(a)(3) of the Act. Board Member Johnson dissented and found that the union's "contaminated sandwich" poster campaign "purposefully disparaged MikLin Enterprises' signature product in a manner that was out of all proportion to the alleged sick leave dispute." Id. at 10.

Three D, LLC d/b/a Triple Play Sports Bar and Grille, 361 NLRB No. 31(August 22, 2014).

Issue: Facebook Postings: The Board (Miscimarra, Hirozawa and Schiffer) found that the Employer violated Section 8(a)(1) by discharging two employees for their participation in a Facebook discussion involving claims that employees unexpectedly owed additional state income taxes because of the Employer's tax withholding mistakes. The facts of the case are that a former employee posted: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do tax withholding correctly!!! Now I OWE money . . . WTF!!!" A current employee liked this posting. Another current employee posted: "I owe too. Such an a-hole." The Employer discharged one employee for her posting stating that she was not loyal enough to be working for the Employer. The Employer also questioned the employee who had liked the initial posting and fired him because he liked what the Employer considered to be disparaging and defamatory comments.

The ALJ found, and the Respondent did not contest, that the two employees were engaged in protected concerted activity because the discussion concerned workplace complaints about tax liabilities. The issue was whether the discussion exceeded the protections of the Act. The Board initially concludes that the Atlantic Steel (245 NLRB 814(1979)) framework does not apply because it is tailored to workplace confrontations. The Board applied the Jefferson Standard (NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953)) and Linn (Linn v. Plant Guards Local 114,383 U.S. 53 (1966)) tests: Did the employees' conduct amount to disloyal disparagement of their employer so as to fall outside the protection of the Act or were the statements uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false."

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Unfair Labor Practice Litigation

REGION ISSUES TWO DECISIONS ON NEW YORK CHARTER SCHOOLS; BOARD TO REVIEW

Section 2(2) of the Act excludes from its definition of employer “any State or political subdivision thereof.” It is well known that the NLRB does not have jurisdiction over public or governmental entities, although it has jurisdiction over private contractors acting as government contractors. But what if a government allows “independent” boards of trustees to run “public” schools – are they still public? Region 29 has recently weighed in on this tricky jurisdictional issue in two cases. In Hyde Leadership Charter School – Brooklyn (Case 29-RM-126444), Local 2, United Federation of Teachers, filed a petition with the New York State Public Employment Relations Board (PERB), seeking to represent teachers – as public employees – at a relatively new charter school in Brooklyn. On the same day, the school itself filed a petition with Region 29, claiming that it is an employer subject to the jurisdiction of the NLRB, not PERB. The Region analyzed the state’s Charter Schools Act, and of the creation of this particular school, as well as case law interpreting Section 2(2)’s definition of “employer.” Relying heavily on the Board’s analysis in Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012), the Region decided that the Hyde Leadership Charter School is essentially a government contractor subject to the Board’s jurisdiction. The Region also relied on an unpublished opinion in which the majority of a three-member panel (Members Hirozawa and Schiffer) asserted jurisdiction over a Pennsylvania charter school, over the dissent of Member Johnson. The Union later

filed a request for review of the Region’s decision in HydeLeadership. An election was held among the teachers in June 2014, but the ballots were impounded pending the Board’s review.

One month after the Region’s Hyde Leadership decision, the U.S. Supreme Court decided in NLRB v. Noel Canning, 134 S.Ct. 2550 (2014), that the Board lacked a quorum during an 18-month period when three of its members were invalid “recess appointments.” Since Chicago Mathematics was decided during this period, the case could no longer be cited as valid precedent. Coincidentally, on the same day as the Supreme Court’s decision in Noel Canning, a teacher employed by the Riverhead Charter School in Suffolk County, New York, filed a petition in Region 29 (Case 29-RD-132061), seeking to decertify the union which had represented her bargaining unit for about 10 years. The Region issued another decision, similar to its decision in Hyde Leadership, asserting jurisdiction over the charter school. Nevertheless, the Region acknowledged that the legal precedent was in a “peculiar posture,” with Chicago Mathematics’ validity in doubt, the Board panel’s divided decision in the Pennsylvania case, and the Board’s pending review in Hyde Leadership . (Continued on page 5)



Region 29 Board Agents Volunteer at Fundraising Event

On April 16, 2015, Board Agents and Peggy Browning Fellowship alumni, Brady Francisco-FitzMaurice (top left), Francisco Guzman (top right) and Anthony Schroth (not pictured) volunteered at the 2015 Peggy Browning Fund New York Awards Reception. They also got a chance to speak with NLRB Chairman Mark G. Pearce (top center), who was in attendance. The reception was held at the Sheraton New York Times Square Hotel. The Peggy Browning Fund coordinates five Awards Receptions around the country each year, in Chicago, Los Angeles, New York, Philadelphia, San Francisco and Washington, DC, recognizing social justice champions who have distinguished themselves with passion and dedication to the rights and needs of workers and their families. This year’s New York reception honored Richard B. Roberts, Business Agent at Large, Enterprise Association of Steamfitters Local 638, Amy Gladstein, Esq., Partner, Gladstein, Reif & Meginniss, LLP and Barbara Deinhardt, Esq., Arbitrator. Funds raised by the event go to providing stipends to law students who dedicate their summer to working in labor law positions either with labor unions, worker centers, employee associations, the U.S. Department of Labor, the National Labor Relations Board, private firms or other non-profits. ■



NLRB Chairman Mark G. Pearce was very clearly excited to meet Board agents from Region 29.

There are currently five Peggy Browning Fellowship alumni at the NLRB Region 29 Office: Naoki Fujita (PBF ‘12), Brady Francisco-FitzMaurice (PBF ‘12), Francisco Guzman (PBF ‘13), Seth York (PBF ‘14), and Anthony Schroth (PBF ‘14).

Cultural Enhancement Program

On April 15, 2015, the Agency unveiled the NLRB Culture Enhancement Program, a new initiative to further promote an atmosphere of respect and inclusiveness within the Agency. The Agency's Office of Equal Employment Opportunity (OEEEO), the Office of Employee Development (OED), and the Division of Operations- Management, joined forces to spearhead the Program, which is designed to provide multiple and varied opportunities for Agency personnel to explore and address issues of civility, diversity, and inclusion in the workplace. On May 12, 2015, the Agency broadcasted the Program's kick off event in Headquarters to employees in the field. Chairman Mark Gaston Pierce, General Counsel Richard Griffin and the Region's own Regional Director James G. Paulsen, were among the speakers who shared their personal views on the importance of diversity and inclusion within the Agency. The Agency will continue the discussion about civility, diversity and inclusion with Agency employees through interactive online videos, inter-office group discussions, Agency-wide live chats, discussion boards, podcasts, All Aboard articles, and a cultural assessment seeking employee feedback on areas in need of improvement.

The first and second podcasts were circulated on May 13 and May 21, 2015 respectively, with weekly installations scheduled thereafter.

Be sure to stay tuned as the Agency continues to roll out this new initiative and challenge all employees to gain a better appreciation of our diverse workforce, including the unique backgrounds, talents, and strengths that contribute to our success. ■

The Board found that the comments at issue did not even mention, much less disparage the employer's products or services. The Board also found that the comments were not defamatory. The Board then found that the Employer violated Section 8(a) (l) by discharging the two employees because of their protected concerted activity.

Two members of the Board also found that the Internet Blogging Policy was unlawful:

"when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engage in inappropriate discussions about the company, management and/or coworkers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. ... In the event state or federal law precludes this policy, then it is of no force and effect."

The majority of the Board concluded that rule was overbroad under *Lutheran Heritage* (343 NLRB 646 (2004)) because employees would reasonably interpret the rule as proscribing discussion of terms and conditions of employment deemed "inappropriate" by the Employer. The majority notes that unlawful actions in this case indicated to employees that the savings clause did not protect them.

***Purple Communications, Inc.*, 361 NLRB No. 26 (Decemeber 11, 2014).**

Use of Employer's E-mail System for Section 7 Activity: Relying on a *Republic Aviation* (324 U.S.793 (1945)) analysis, the Board will presume that employees who have rightful access to their employer's email system in the course of their work have the right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating special circumstances necessary to maintain production or discipline that justify restricting its employees rights. Because limitations on employee communication should be no more restrictive than necessary

to protect the employer's interests, the Board anticipated that it will be a rare case where the special circumstances will justify a total ban on non-work email use by employees. However, an employer may apply uniform and consistently enforced controls over their email system to the extent necessary to maintain production and discipline. The decision addresses only email systems and not any other electronic communications. The decision encompasses email use by employees only and does not grant non-employees any rights to access the employer's emails system. The decision does not require an employer to grant employees access to its email system where it has not chosen to do so. The presumption in this decision to use the Employer's E-mail is expressly limited to non-working time. ***Casino San Pablo*, 361 NLRB No. 148 (December 16, 2014).**

Employer Work Rules: An employer's rule that prohibited gossiping about team members was found to be lawful because it would not be construed to include Section 7 activity. The Board said gossip "is commonly defined and reasonable understood as chatty talk or rumors or reports of an intimate nature." However, the Board found that a rule prohibiting "insubordination or other disrespectful conduct" to violate the Act because the rule might be deemed as "encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority." *Id.* at 3. The problem in this case was the rule was not limited to "insubordination," which the Board would find to be lawful.

The Board also found that a rule prohibiting false, fraudulent, or malicious statements is overbroad and violated Section 8(a)(1) because prohibiting employees from making merely false statements, as opposed to maliciously false statements, would tend to chill Section 7 activity. Similarly, the Board found a rule prohibiting employees from being in the back of the house for more than 30 minutes before or after shifts was unlawful because it did not uniformly prohibit access to off-duty employees seeking entry to the property. Rather, the rule permitted off-duty access for business with human resources, and training and orientation sessions, and additionally allowed access when approved by a manager. ■

Women's History Month Program 2015

Women's history month grew out of Women's History Week, an event sponsored by the Sonoma, California school district in 1978. The year after, historian and activist Gerda Lerner chaired a fifteen-day women's history conference at Sarah Lawrence College. In 1980, President Jimmy Carter issued a presidential proclamation declaring March 8th as National Women's Week. Referring to Gerda Lerner's statement that women's history is women's rights, President Jimmy Carter remarked, "It is an essential and indispensable heritage from which we can draw pride, comfort, courage, and long-range vision."

In 1987, after a petition from the National Women's History Project, Congress approved a resolution that designated the month of March as Women's History Month.

On March 18, 2015, Region 29 held a program in participation of Women's History Month. This year's National Theme "Weaving the Stories of Women's Lives," is a celebration of the countless ways in which women's achievements and contributions are woven into the fabric of American history and culture.

Region 29 celebrated Women's History Month with the screening of the film "Makers: Women Who Make America," the first part of a 2013 documentary series about the struggle for women's equality in the United States from the 1950s to the turn of the century. The documentary told the remarkable story of women's struggle for equality and autonomy, and the revolutionary movement that swept the nation in the 1960s, the effects of which still resonate today.

As with many gatherings in Region 29, good food, great conversations, a sense of camaraderie were the order of the day. The movie was very inspiring and thought-provoking, and sparked conversations about how far women's fight for equality has come and the challenges that still lie ahead. ■



Field Attorney Marcia Adams introduces the program for Women's History Month

Region 29 Gives Back



Pictured (from left to right) are Dana Graves-Brown, Regional Director James G. Paulsen, Henry Powell and a member of the staff from the Little Flower Children and Family Services of New York.

For the past 15 years, Field Attorney Henry Powell has spearheaded the Region's efforts in collecting contributions for children in need during the holiday season. Every year, Mr. Powell collects both toy and cash contributions from the office staff to donate to a local charitable organization. And every year, the staff of Region 29 generously provides contributions towards Mr. Powell's efforts. Mr. Powell believes that "everybody should have something that shows that somebody cares about them especially during the holidays. It makes me feel good that a child has a gift that means something to them. It could change somebody's life."

This year, Compliance Assistant Dana Graves-Brown joined Mr. Powell to shop for toys with the cash contributions from the office. The results of this effort were quite rewarding. On December 23, 2014, Region 29 donated several large bags of toys for the holidays to Little Flower Children and Family Services of New York. In its Spring 2015 newsletter, Little Flower thanked the Region for making the holidays a little brighter for those they serve. Region 29 thanks both Henry and Dana for giving back to the community we serve. ■

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The union in the second case, Riverhead Charter School, also filed a request for review. An election was held in September 2014, but the ballots were impounded pending the Board's review.

It remains to be seen whether the Board – now with a full contingent of five Senate-confirmed members – will adopt the rationale of Chicago Mathematics as its own, or will perhaps choose to reconsider the rationale, as Member Johnson has suggested. If the Board decides to assert jurisdiction over New York charter schools, then the ballots in both cases would be opened and the appropriate certifications would be issued.

On the other hand, if the Board declines to assert jurisdiction over New York charter schools as public schools, the teachers' unions will presumably head back to PERB.



Hyde Leadership Charter School (Brooklyn, NY)

Region 29 Welcomes New Staff



From left to right, bottom to top: Dan Rosazza, Liz Montesclaros, Francisco Guzman, Ana Castro, Sharon Marfan, Freda Devonshire, John Mickley (not pictured Delby Alba)

John Mickley joined our office in September 2014. John has a B.A. from the University of Michigan (2011), and graduated from Tulane Law School in 2014. In between years of law school, his labor-related experience included stints in the AFL-CIO "Union Summer" program and at the Levy Ratner law firm in NYC. In addition, during his last year of law school, he worked as an intern in NLRB Region 15 in New Orleans. John has passed the bar exam, and is scheduled to be officially admitted to the New York Bar in June 2014. John lives in Brooklyn with his fiancée. Congratulations to John, on both his bar admission and his engagement!

Former Region 29 intern **Francisco Guzmán** re-joined our office in August 2014. A graduate of New York University (B.A. 2008), Francisco had interned here in the summer of 2012, between his first and second years of law school. The next summer, he was also a Peggy Browning Fellow in the AFL-CIO's Office of Legal Counsel. Francisco graduated from the Indiana University Maurer School of Law in 2014, moved back to New York, and passed the NY and NJ bar exams shortly thereafter. He is expected to be sworn in as an attorney shortly.

Ana C. Castro is our newest Language Specialist. She comes to us after seven years of government service at the Manhattan office of the Equal Employment Opportunity Commission. Prior to that, Ms. Castro also worked for the U.S. Department of Homeland Security. She holds Bachelor's Degrees from Baruch College, New York and Universidad de San Carlos de Guatemala.

Freda Devonshire, RA Secretary, joins us from Region 22 where she was the ARD Secretary. In her spare time, Freda enjoys reading, roller skating, arts and crafts.

Delby Alba, Litigation Support Assistant, Former Army Sergeant born and raised in New York City. "My parents, both born in the Dominican Republic, worked hard in order to provide a better life for my brother and I. Today I am working hard on earning my bachelor's degree in order to move up in my career so that my parents have something to be proud of and know that their hard work and sacrifices were not in vain."

Sharon Marfan, one of our new administrative professionals, came from the Department of Homeland Security as a TSA officer and was an office manager in the private sector for over 10 years. Sharon's greatest passion is mission work. She has been to Uganda three times, ministering and teaching men, women and children.

Liz Montesclaros, one of the new members of the support staff, is an Army veteran and has deployed to Afghanistan with the 272nd Military Police Company. Liz is currently pursuing a master's degree in Security Management.

Dan Rosazza, promoted to Language Specialist in August 2014, started as Office Automation Assistant (Bilingual - Spanish) at Region 2 in 2011. He previously served five years in the U.S. Army, stationed in Germany and deployed to Baghdad, and attended the Defense Language Institute. Dan holds a BS in Liberal Arts with mentions in Modern Standard Arabic and Spanish. He loves to travel and to learn foreign languages. Dan also speaks basic French, German and Portuguese.

Wagner Warriors Finish Strong in the 2015 NLRB Fitness Challenge

Sixteen people from Region 29 participated in the 2015 Fitness Challenge, organized by the Division of Operations-Management. There were over 40 teams in the Challenge this year and hundreds of employees from all areas of the Agency participating.

The team participated with the same name as last year, a combination of The Wagner Act of 1935 and the 1979 cult-classic film entitled The Warriors.

Each week team members logged their activities to earn points for the team, using the Presidential Challenge online tracking system. There were opportunities for bonus points, such as taking group walks on Tuesdays or using the stairs instead of the elevator on Fridays. Region 29 is well situated for the



The Wagner Warriors walk across the Brooklyn Bridge first, with the team enjoying our beautiful Brooklyn surroundings such as the Brooklyn Heights Promenade and the Brooklyn Bridge, but we have to use a little ingenuity to rack up the Friday stairs points. The team also planned a special group activity involving lunch time Just Dance using the Smart Board in one of the hearing rooms. Dancing really burns calories!

The extreme winter weather challenged the team for most of the challenge, but members found ways to make the snow work for them instead of against them. Warriors racked up an incredible amount of points for shoveling snow as well as as skiing in Europe! ■

NLRB Mobile Apps

The NLRB currently offers the **NLRB Guide**, a mobile app that provides employers, employees and unions with information regarding their rights and obligations under the National Labor Relations Act.

- The NLRB Guide is available for:
- iPhone users on the Apple App Store
 - Android users on Google Play

NLRB E-File

Parties may now file Charges and Petitions through the Agency's new E-Filing system at www.nlrb.gov

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