NATIONAL LABOR RELATIONS BOARD
GENERAL COUNSEL – OFFICE OF APPEALS

NATIONAL WHISTLEBLOWER CENTER, NATIONAL WHISTLEBLOWER LEGAL DEFENSE & EDUCATION FUND, AND KOHN, KOHN, AND COLAPINTO, LLP, A JOINT EMPLOYER	:	
- and -	:	Case No. **05-CA-095886**
RICHARD R. RENNER	:	
Charging Party	:	

MEMORANDUM OF LAW IN SUPPORT OF APPEAL
SUBMITTED ON BEHALF OF RICHARD R. RENNER

The charged parties – National Whistleblowers Center, National Whistleblowers Legal Defense and Education Fund, and Kohn, Kohn & Colapinto, LLP (collectively the "Joint Employer") – terminated the charging party, Richard Renner, along with fellow charging party, Lindsey M. Williams, and three other co-workers based on their exercises of protected activity under Section 7 of the National Labor Relations Act (hereafter, "Act"). These activities included, but were not limited to active efforts to form a staff union that included five other newly hired employees along with the five longtime employees. By summarily firing Mr. Renner and Ms. Williams, both of whom had spearheaded these activities, as well as the three other longtime employees who had joined in these activities, the Joint Employer immediately and completely stifled all concerted activity.

Following the terminations, Mr. Renner and Ms. Williams jointly filed an unfair labor practice that the Regional Director for Region 5 dismissed through the issuance of separate decisions. Ms. Williams has already submitted her appeal and filed a memorandum in support of

the appeal. This memorandum is filed on behalf Richard Renner based on the Regional Director's decision dated April 25, 2013, to dismiss the aforementioned ULP charge.

Background

Richard Renner, Lindsey M. Williams and three longtime coworkers of the Joint Employer had worked at wage rates that were substantially below the market rate for similarly situated employees who worked at public interest and private law firms and performed similar work activities. These individuals agreed to accept these substandard wages in large part because the founders of the Joint Employer (Stephen M. Kohn, Michael D. Kohn, and David K. Colapinto, collectively the "Founders") had repeatedly stated that the Joint Employer was having financial difficulties and could not afford to pay higher salaries.[1] The Founders also repeatedly promised that employees would receive substantial raises, or even partnership, once the Joint Employer was in a better financial situation.[2] The staff also had longstanding concerns about working conditions, financial transparency, and management of the Joint Employer.

On September 11, 2012, the Joint Employer held a press conference at the National Press Club to publicly announce that it had secured a $104 million whistleblower award for its client, Bradley Birkenfeld.[3] The Founders refused to disclose the Joint Employer's share of the award, [4] but the staff assumed it to be at least several million dollars. With its receipt of this money, the Joint Employer brought in five recent law school graduates, called law fellows. [5] On September 17, 2012, the Founders had a staff meeting where they announced their plans to provide raises,

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[1] Declaration of Richard Renner, 01/11/2013, pp. 5, 10, ¶¶ 11, 30; Declaration of Richard Renner, 02/25/2013, pp. 10-11; Declaration of Snyder, p. 2, ¶ 4.

[2] Declaration of Richard Renner, 01/11/2013, pp. 10, ¶¶ 30.

[3] Declaration of Williams, 01/11/2013, p. 10, ¶ 24; Declaration of Renner, 01/11/2013, p. 11, ¶ 34.

[4] Declaration of Williams, 01/11/2013, pp. 13-15, ¶¶ 28-31; Declaration of Renner, 01/11/2013, pp. 1, 15-17, ¶¶ 2, 55-66.

[5] Declaration of Williams, 01/11/2013, pp. 13-15, ¶¶ 28-31; Declaration of Renner, 01/11/2013, pp. 1, 15-17, ¶¶ 2, 55-66.

bonuses, and expanded office space through the acquisition of a neighboring building valued at over $1 million or building a substantial addition to the existing building.[6] The Founders also announced that they had set aside enough money from the Birkenfeld settlement to fully fund the National Whistleblowers Center for the remainder of 2012, and for all of 2013.[7] The staff thereafter discovered that most would get no raises, and the bonuses were meager.[8] The Founders expressed regret that they could not afford larger bonuses.

The suddenness of these plans and the staff's lack of participation made their longstanding concerns particularly acute. On October 9, 2012, the five legacy employees approached the founders as a group. They expressed concern about the lack of transparency and the below market wages. The staff specifically mentioned that if they chose to form a formal staff union, they would have a right to see the Joint Employer's books if they continued to assert that they could not afford to pay the prevailing market rates paid to similarly skilled attorneys.[9] Founder Michael Kohn questioned whether attorneys could even form unions.[10] The Founders persisted in their refusal to disclose the amount of their share of the Birkenfeld award, but reluctantly agreed to convene a staff meeting on October 18, 2012, at 4:00 p.m. Renner confirmed this discussion in an email the next day.[11]

The Founders postponed the October 18, 2012, staff meeting – without specifying a new date. The five legacy staff thereafter invited the five new law fellows to lunch on Monday,

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[6] Declaration of Richard Renner, 01/11/2013, p. 12, ¶ 41.

[7] Declaration of Richard Renner, 02/25/2013, p. 10.

[8] Declaration of Renner, 01/11/2013, pp. 13-14, ¶¶ 49-51.

[9] Declaration of Lindsey Williams, 01/11/2013, pp. 13-15, ¶¶ 28-31; Declaration of Richard Renner, 01/11/2013, pp. 1, 15-17, ¶¶ 2, 55-66.

[10] Declaration of Renner, 01/11/2013, p. 16, ¶ 62.

[11] Declaration of L. Williams, 01/11/2013, pp. 16-17, ¶ 35; Declaration of R. Renner, 01/11/2013, pp. 17, ¶ 67.

October 22, 2012, to discuss the formation of a formal staff union. Renner told the Joint Employer's Managing Partner, Mary Jane Wilmoth, that she could not attend this luncheon because it was for the purpose for forming a staff union and she was a confidential employee. She was upset.[12] The Founders were upset.[13] The Joint Employer's Deputy Director, Estelle Kohn, was so upset that she told Renner and another employee that they could all be replaced.[14] Estelle Kohn also objected to Renner that he should not be organizing a staff union when he was a Board member of NWC. Renner promptly resigned from the NWC Board.[15] The Founders never discussed with the Board any plans to make any substantial changes in the Joint Employer's staffing – before or after Renner resigned from the Board.

On October 25, 2012, the Joint Employer convened separate meetings for those they considered employees, and those they considered supervisors and managers. They invited Renner and Williams to their "first ever meeting of managers and supervisors."[16] However, they did not tell Renner or Williams that this meeting would be for "supervisors and managers." After Founder Stephen Kohn announced that the meeting was for "supervisors and managers," Renner objected that he was neither, and that this new meeting was an obvious attempt to manipulate the

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[12] Declaration of L. Williams, 01/11/2013, p. 14, ¶ 30; Declaration of Richard Renner, 01/11/2013, p. 19, ¶ 70.

[13] Declaration of Richard Renner, 01/11/2013, page p. 22, ¶¶ 81-82; Declaration of Richard Renner, 02/25/2013, p. 11.

[14] Declaration of Owen Dunn, 11/12/2012, p. 3, ¶ 19 (Estelle Kohn threatened to fire Dunn after learning that he attended the lunch); Declaration of L. Williams, 01/11/2013, and p. 20, ¶ 41 (Williams told that unapproved staff meetings were now prohibited and that the staff could not talk about union organizing during work time and preferred if staff did not talk at lunch either); and email from Chioma Chukwu, 11/08/2012 (Estelle Kohn told her that "anybody who had anything to do with the meetings (who attended) can't have a key" to the newly changed office locks).

[15] Declaration of Richard Renner, 01/11/2013, page pp. 21-22, ¶¶ 78, 80, 83.

[16] Declaration of L. Williams, 01/11/2013, pp. 18-20, ¶¶ 39-41; Declaration of R. Renner, 01/11/2013, p. 25, ¶¶ 89-96.

bargaining unit; Williams joined in the objection.[17] Renner walked out. On the same day, the founders informed Erik Snyder that Renner and Williams were supervisors. Snyder found this "odd" as "to my knowledge Lindsey and Richard had no actual supervisory authority …."[18]

On November 5, 2012, the joint employer summarily terminated the employment of the five legacy staff employees, including Lindsey Williams and Richard Renner. The discharge was in response to protected, concerted activities directed to securing improvements in wages and working conditions. Ms. Williams and Mr. Renner spearheaded these activities, which included preliminary efforts to form a staff union to address these matters collectively. While the underlying work issues had pre-existed, they became far more acute after the joint employer publicly announced that it had secured a $104 million whistleblower award on behalf of a client at a press conference held at the National Press Club on September 11, 2012.[19]

These terminated staff members had all openly engaged in protected, concerted activity, including preliminary efforts to form a staff union. The joint employer thereupon required the terminated employees to leave the premises immediately and blocked their access to their email accounts and electronic files – not the actions of an employer suffering a layoff due to economic constraints. The next day, the employer publicly claimed the "layoff" was necessary due to lack of funding.[20] In light of the Birkenfeld award and the Founders' statements at the September 17, 2012, staff meeting, this reason is patently false.

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[17] In an email sent to the founders after the October 25th meeting, Ms. Williams expressed her belief that she was not a supervisor or manager. (Declaration of Lindsey Williams January 11, 2013, pp. 21-22, ¶¶44-45)

[18] Declaration of Erik Snyder, 11/13/2012, p. 7, ¶ 17. See also Declaration of Timothy Cheng, 12/07/2012, p. 5, ¶ 18(b).

[19] Declaration of Lindsey Williams, 01/11/2013, pp. 28-29, ¶¶ 58-60 and page 10, ¶ 24; Declaration of Richard Renner, 01/11/2013, pages 28-29, ¶¶ 112-121 and p. 11, ¶ 34; Declaration of Erik Snyder, 11/13/2012, p. 8, ¶ 21; Declaration of Owen Dunn, 11/12/2012, pp. 4-5, ¶ 27; Declaration of Timothy Cheng, 12/07/2012, p. 7, ¶ 23.

[20] http://legaltimes.typepad.com/blt/2012/11/significant-layoffs-made-at-national-whistleblowers-center.html

The joint employer, acting through Stephen Kohn, notified Ms. Williams of her termination by leaving a voicemail message at approximately 6:00 PM. In the message, Mr. Kohn informed Ms. Williams that the "layoff" was necessary due to a lack of funding. [21] However, on November 7, 2012, an intern overheard Estelle Kohn stating that Mr. Renner was "the reason they all got fired."[22]

The Dismissal of the Unfair Labor Practice Charge by Region 5

Ms. Williams and Mr. Renner filed a combined unfair labor practice charge with Region 5 in which they alleged that their terminations violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act. In the dismissal notification, the Regional Director ruled that Mr. Renner was a managerial employee. (Decision, p. 1.) [23] In the alternative, the Regional Director ruled that the joint employer had discharged the charging party because it changed "its business operations to function substantially without employees." (Decision, p. 2.) As discussed in greater detail below, these determinations are factually and legally erroneous.

As a threshold matter, the Regional Director completely failed to discuss the nature and extent of the job duties and responsibilities that Mr. Renner *actually* preformed on a day-to-day basis and attributed disproportionate significance to his nominal job title – i.e., "Legal Director" of NWC and "Director" of the Fund. (Decision, p. 1). The record nonetheless shows that the joint employer devised and utilized this job title to enhance Mr. Renner's status and his apparent

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[21] See **http://legaltimes.typepad.com/blt/2012/11/significant-layoffs-made-at-national-whistleblowers-center.html.** Ms. Williams was absent from work at the time of the termination meeting due to a previously scheduled medical appointment. (Declaration of L. Williams January 11, 2013, p. 27, ¶55 and pp. 28-29, ¶60).

[22] See email from Chioma Chukwu, 11/07/2012.

[23] In a separate dismissal notification, the Regional Director ruled that Ms. Williams served as a supervisory and managerial employee and was thus exempt from the protection of the Act. (Decision, p. 2.)

authority in dealings with third parties on its behalf. In reality, Mr. Renner never exercised supervisory authority over other employees, and had no actual managerial responsibility. [24]

Discussion

I. THE GENERAL COUNSEL SHOULD REVERSE ON APPEAL THE REGIONAL DIRECTOR'S DISMISSAL THE UNFAIR LABOR PRACTICE CHARGE FILED BY RICHARD RENNER.

A. The Regional Director's Determination That Mr. Renner Was A Managerial Employee Runs Counter to the Record Evidence And Established Case Law.

Since its inception, the National Labor Relations Act ("NLRA" or "Act") conferred rights to employees covered by the Act to organize and to engage in concerted activities, including collective bargaining, and to be free from employer interference restraint or coercion in the pursuit of these activities. 29 USC 157. In amending the Act in 1947, Congress added language to clarify that the term "'employee' . . . shall not include . . . any individual employed as a supervisor." 61 Stat. 137-138, codified at 29 U.S.C. § 152(3). Congress did not create any exclusion of managerial employees.

Whether an employee is a supervisor or manager must be determined on the basis of record evidence in light of the aforementioned determinants of supervisory status. *See*, *e.g.*, *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB* , 445 F.2d 237, 243, 144 U.S. App. D.C. 167 (D.C. Cir. 1971) ("[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority."). The status under the Act "is determined by an individual's duties, not by his title or job classification." *Chicago Metallic Corp*., 273 NLRB 1677 (1985).

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[24] Mr. Renner's 2/25/2013 affidavit, p. 2, inadvertently states that he became Director of NWC around the Spring of 2012. Mr. Renner actually received the title of Director of the National Whistleblower Legal Defense and Education Fund ("the Fund"), although this change in title made no practical difference in his job duties. Declaration of Richard Renner, 01/11/2013, page p. 10, ¶ 32.

> It is well settled an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.

Id. at 1688-89.

The burden of proving an employee's status, in turn, lies with the party asserting the existence of such status. *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 710-11 (2001). The test for determining if an employee acts as an employer's agent is whether, under all the circumstances, "the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426 (1987).

While the NLRA contains no textual references to the term "managerial" employee, the legislative history of the 1947 amendments supports the conclusion that Congress intended to exclude true managerial employees from the definition of "employee" under the Act despite not having done so explicitly. *See, e.g*., *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974) (buyers purchasing on behalf of the enterprise were not deemed to be managerial employees because they failed to exercise sufficient discretion to be aligned with management).

For this reason, among others, the Supreme Court emphasized there that the job title assigned to an employee is not a critical factor in the determination of whether or not a particular employee is a managerial employee in stating:

> Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management.

Bell Aerospace, 416 U.S. at 290, n. 19.

As the term has evolved, managerial employees are deemed to be those individuals who "formulate and effectuate management policies by expressing and making operative decisions of their employer." *NLRB v. Yeshiva Univ*., 444 U.S. 672, 682–83 (1980). Rather, the focus by the

NLRB and the courts is on whether the employee "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id*.

To be aligned with management, the employee's duties must be "outside the scope of duties routinely performed by a similarly situated professional." *Nurses United*, 338 NLRB 837, 840 (2003). As the D.C. Circuit aptly explained in same context: "The Supreme Court has made it clear that employees whose decision making is limited to the routine discharge of professional duties in projects to which they are assigned are not managers under the Act." *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827 (D.C. Cir. 2004).

While the concept of a managerial employee is similar in purpose and can apply to executive personnel who may or may not have direct supervisory responsibility, the managerial exclusion has a far more limited scope than the supervisory exclusion. Even when an employee is not deemed to be a supervisor under Section 2(3) of the Act, this individual may still be regarded as a managerial employee if he or she possesses or exercises management authority.

To be sure, this determination is dependent on the particular facts of the case. For example, staff physicians and dentists – without more – are not generally considered to be managerial employees. *Third Coast Emergency Physicians*, 330 NLRB 756 (2000); *Montefiore Hosp. & Med. Ctr*., 261 NLRB 569 (1982). The same rationale holds true with respect to staff attorneys because most staff attorneys and associates have no involvement in the management of the law firm or in the organization that employs these individuals. Staff attorneys who work for a corporation, non-profit organization, or law firm are not ordinarily deemed to be "managerial employees" under *Bell Aerospace* and progeny.

Accordingly, the Regional Director erred in concluding that Mr. Renner was a managerial employee because of the titles he held. The employer has a natural interest in using inflated titles to impress customers, vendors and volunteers that they are talking to someone with authority.

For purposes of the NLRA, however, it is the actual exercise of authority, and not the title, that determines an employee's status. Moreover, the Regional Director focused on Mr. Renner's role as a Board Member without addressing how and why Mr. Renner had resigned from the Board[25] on October 23, 2012 – before he was terminated for engaging in concerted activity. The Joint Employer never invested Mr. Renner with any direct reports [What does invested with direct reports mean?], or even the authority to charge any expense.[26] Even for his most important role of picking cases for amicus participation and submitting amicus briefs, he had to get approval from one of the Founders for each individual decision.[27] When the Founders wrote in Mr. Dunn's contract that Mr. Renner would be one of his supervisors, the Founders thereafter never informed Mr. Renner of this role or responsibility.[28] The Founders ran the show, not Mr. Renner.

When these established legal principles are applied to the facts of the pending case, it should be apparent that the Regional Director erred in ruling that Mr. Renner served a managerial employee and was thereby excluded from the protections of the Act. Rather, the record makes it clear that he served as a staff attorney responsible for conducting advocacy, representation and related initiatives on behalf of the joint employer and had no significant responsibility to fashion or effectuate policies on behalf of the joint employer. Indeed, it is apparent that when the opportunity arose to include Mr. Renner in the important decisions of whether and how to expand, what to do with the newly available funds from the Birkenfeld award, and how to manage the staff, the Joint Employer completely excluded Mr. Renner. Mr. Renner was not even permitted to know the amount the Joint Employer received from the

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[25] Declaration of Richard Renner, 01/11/2013, p. 21, ¶¶ 78, 80.

[26] Declaration of Richard Renner, 02/25/2013, p. 7.

[27] Declaration of Richard Renner, 02/25/2013, p. 7.

[28] Declaration of Richard Renner, 02/25/2013, p. 10.

Birkenfeld award. The Joint Employer itself drew the line between those who had managerial authority and those who did not. It drew that line so that Mr. Renner was not a manager.

II. THE REGIONAL DIRECTOR ERRED BY FAILING TO ADDRESS HIGHLY PROBATIVE EVIDENCE THAT SUPPORTED A FINDING THAT THE JOINT EMPLOYER VIOLATED SECTION 8 (a)(3) AND SECTION 8 (a)(1) OF THE ACT.

Supplemental Statement of Facts

As set forth in substantial detail in affidavits and other documentation provided by Mr. Renner and the other charging party, Lindsey Williams, the founders the joint employer – namely, Michael Kohn, his brother Stephen Kohn, and a mutual college friend, David Colapinto – left another whistleblower organization, the Government Accountability Project (GAP), to establish the National Whistleblowers Center and a private law firm, Kohn, Kohn & Colapinto, LLP (KKC).[29] These same individuals subsequently created the National Whistleblower Legal Defense and Education Fund ("Fund") to further the mutual interests of these organizations by providing health insurance and performing other functions that supported and/or benefited all three organizations.[30] As such, these organizations were interrelated and intertwined and operated as a joint employer of the attorney staff members.

Over time, the founders hired attorneys to represent whistleblowers and to perform work activities on behalf of any or all of the organizations and often did so interchangeably to maximize the resulting advantage the joint employer and/or its founders. For example, the Fund paid the salary of attorney Timothy Cheng, even though he worked for the KKC law firm. A NWC Public Interest Law Fellow, Owen Dunn, also performed work for the KKC law firm. [31]

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[29] Declaration of Richard Renner, 01/11/2013, p. 5, ¶ 12.

[30] Declaration of Richard Renner, 01/11/2013, p. 5, ¶ 13.

[31] See Declaration of Timothy Cheng, 12/07/2012, p. 5, ¶ 18(d) and Declaration of Owen Dunn, 11/12/2012, p. 1, ¶ 8.

The management and organizational structure of the joint employer is very fluid and unconventional. The founders declined to require staff members to maintain time and attendance records showing their work hours and/or how much time each employee worked for each entity. Similarly, the joint employer declined to hire support staff, which is typical of a non-profit corporation or a law office. The founders instead used college and law student interns to provide clerical and paraprofessional support working as unpaid volunteers or for college credit. [32]

The joint employer also refrained from instituting a formal disciplinary system, establishing and maintaining standard operating procedures, or requiring staff and volunteers to work on regular or scheduled days and hours. It likewise refrained from utilizing personnel records to show accruals and uses of sick or vacation time by staff members and/or to conduct regular performance evaluations.

The founders instead made all key personnel and other decisions that affected the operations of the joint employer. These decisions included, but were not limited to, who is to be hired, what programs were to be initiated, when program policies or practices needed to be changed, and how internal and external disputes were to be resolved. While the founders may have asked on occasion for input from key staff members, including Ms. Williams or Mr. Renner, the founders more often than not ignored any such input or opinions because they retained final authority to decide all matters that concerned or related to the three intertwined organizations.

After the founders expanded the scope and activities of these inter-related entities, the joint employer hired Estelle Kohn, the sister of Michael and Stephen Kohn, to serve as Deputy Director of NWC. In this role, she recruited and selected interns and attorney staff for all entities of the joint employer. Estelle Kohn also served as Director of the Fund's Attorney Referral

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[32] See Declaration of Timothy Cheng, 12/07/2012, p. 5, ¶ 18(g).

Service (ARS). Ms. Kohn additionally performed duties for KKC, such as setting up client consultations. It was clear that her position, influence, and authority flowed from her relationship to her brothers, who created a position for her and supported her exercises of authority on their behalf. As such, Ms. Kohn was a managerial employee and/or a supervisor. [33]

The joint employer also employed Mary Jane Wilmoth as Managing Partner of KKC, Co-Treasurer of the NWC, and Trustee of the Fund. Ms. Wilmoth handled the books, health insurance, payroll, and the financial relationship among the entities. She was also a managerial and/or confidential employee. The three founders, together with Estelle Kohn and Mary Jane Wilmoth, served as the core or key management officials of the joint employer and made all critical decisions regarding the terms and conditions of employment of staff members. [34]

The joint employer's successful representation of UBS banking whistleblower, Bradley Birkenfeld, changed the dynamics of the organization and work relationships. By 2010, it became widely known that the Birkenfeld's disclosures of fraud and mismanagement at UBS would create a windfall to the US government and thereby added a substantial amount of money to the federal treasury. The IRS also launched an amnesty program that offered U.S. citizens the opportunity to self-report previously undisclosed income from Swiss bank accounts and thereby avoid prosecution. In the end, the IRS collected about $5 billion through this program, and UBS additionally paid a substantial fine to the U.S. government.

Under the IRS whistleblower bounty program, Birkenfeld thereupon became eligible to receive an award of over $1 billion. This prospect of receiving a huge recovery, in turn, motivated Ms. Williams, Mr. Renner and the remainder of the paid staff to continue working for the joint employer at sub-market wages. Fully aware of this long simmering area of discontent,

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[33] Declaration of Lindsey Williams, 03/04/2013, p. 2.

[34] Declaration of L. Williams, 03/04/2013, p. 2.

Stephen Kohn made routine allusions to providing retroactive salary increases to the staff based on market rates applicable to the professional services that they rendered as attorneys. These payments would have entailed substantial increases over wages paid to Ms. Williams ($63,000) and Mr. Renner ($50,000), especially since Renner had worked for the joint employer for a 15-month period during 2010 and 2011 without receiving any compensation whatsoever based on the founders' assurances that they would make up this and other shortfalls in compensation when the whistleblower cases started to pay off.

In August 2012, word spread among the staff that Birkenfeld was about to receive his first award from the IRS in the amount of $104 million. Stephen Kohn and the other two founders sternly advised the staff not to disclose the impending award to anyone and to wait until after NWC made a formal announcement at a press conference. [35] While the staff complied, the founders reneged on their earlier promises to make retroactive payments and prospective wage adjustments to the staff. Despite further inquiry, the founders also refused to provide any concrete information as to how much money the Birkenfeld case brought into the joint employer, while at the same time claiming that the joint employer could not afford to make the promised pay raises.

The legal staff members responded by engaging in protected, concerted activities. (Supra, pp. 1-3). The founders countered by stifling the protected, concerted activity on the part of the staff members and by suppressing their incipient effort to form a staff union. These efforts culminated the founders simultaneously discharging the Charging Party and four coworkers, including Lindsey Williams, who co-filed the pending unfair labor practice charge.

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[35] Even before the press conference held to announce this whistleblower award, the founders and Estelle Kohn hired five recent law graduates, while conspicuously declining to consult or involve Ms. Williams or Mr. Renner in the hiring process. The founders likewise failed or neglected to inform these new attorneys of their purported conferral of supervisory status and/or managerial authority upon Williams or Renner. Declaration of L. Williams, 01/11/2013, p. 11, ¶ 25.

In dismissing the ULP charges filed by Mr. Renner and Ms. Williams, the Regional Director sidestepped addressing the obvious violations of Section 7 rights based on the foregoing evidence. In addition to the reasons previously discussed for reversing this determination, we now demonstrate that two additional grounds for reversal exist on the basis of two related, but independent, theories of violation of the Act.

A. The Discharge Violates Section 8 (a)(3) and Section 8 (a)(1) of the Act Because When Considered Under the *Wright Line* Standard Long Applied By The Board In Discriminatory Discharge Cases.

Under Section 7 of the Act, employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and protection." To be protected under Section 7, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection." *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962).

During the investigation, the joint employer claimed that it laid off or terminated Mr. Renner for reasons other than his protected concerted activities and his prominent role in the incipient union organizing campaign. In these circumstances, the Board traditionally uses the analytical framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*., 662 F. 2d 899 (1st. Cir. 1981), *cert. denied* 455 U.S. 989 (1982) to evaluate the legal sufficiency of the justification for the discharge asserted by the employer. *See also, NLRB v. Transp. Management Corp*. 462 U.S. 393 (1983); *Elko General Hospital*, 347 NLRB 1425, 1426-1427 (2006).

Under the *Wright Line* standard, a *prima facie* case requires the presentation of evidence that establishes (1) the existence of union and/or protected concerted activity; (2) employer knowledge of that activity; (3) employer animus towards the union and/or the protected concerted activity; and (4) the institution of adverse employment action, which was motivated at least in part by its animus toward the union and/or protected concerted activity. *Farmer Bros*.,

303 NLRB 638, 649 (1991); *T.K. Harvin & Sons, Inc.,* 306 NLRB 510, 527-528 (1995). Motive is a question of fact and the Board may infer discriminatory motivation from either direct or circumstantial evidence, and on the basis of the record taken as a whole. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001).

Once the charging party establishes a *prima facie* case that the protected conduct was a motivating factor in the employer's action against the employee, the burden shifts under *Wright Line* to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. If the reasons proffered by the employer are not supported by credible evidence and therefore deemed to be pretextual, the Board finds that the employer has not met its burden and that the employer's motivation is unlawful. *BMD Sportswear Corp*., 283 NLRB 142 (1987).

The employer cannot meet its burden merely by showing that it had a legitimate reason for taking the adverse action. Rather, it must "persuade" that the trier-of-fact "by a preponderance of the evidence" that the action would not have taken place in the absence of the protected conduct. *Roué Bertrand Dupont*, Inc., 271 NLRB 443 (1984), *Hotel Del Coronado*, 345 NLRB 306, 307 (2005). If the employer fails to carry its burden of persuasion, a violation will be found. *Brono Wine Co*., 256 NLRB 53 (1981). As discussed below, the joint employer failed to present evidence sufficient to satisfy its evidentiary burden under *Wright Line*.

1. Protected Activities

On the days preceding the mass discharge of Mr. Renner, Ms. Williams, and three other attorney staff members, along with five newly hired legal fellows, openly engaged in protected, concerted activities. These staff members also communicated the nature of their concerns and their plan to form a staff union to the founders and/or to key managerial employees of the joint employer. Since these matters have been already discussed in this memorandum as well as in the

original submission made by the charging parties to the Region 5, the details of these activities will not be reiterated herein in the interest of brevity.

2. Knowledge on the Part of the Joint Employer

The joint employer has not denied knowledge of the concerted, protected activities undertaken by Mr. Renner and Ms. Williams, including their leadership in the incipient efforts to form a union – all of which that took place immediately before the terminations of all five staff members involved in the effort to form a staff union. These factual matters were likewise discussed in affidavits and other documentation submitted by the charging parties during the investigation and are incorporated by referenced in this memorandum.

3. Unlawful Animus

The joint employer revealed its animus in the direct statements made by its founders and management officials and by adverse and hostile employment actions taken in response to the protected, concerted activity and incipient union organizing. Animus was also revealed by the timing and nature of the terminations, and by the joint employer's resort to shifting and pretextual reasons to justify the adverse employment actions.

4. Inability on the Part of the Joint Employer to Demonstrate that it Would Have Taken the Same Actions in the Absence of Knowledge of The Protected Activity and Incipient Union Organizing Activity.

As already discussed, the joint employer must show that it would have taken the same action that culminated in the mass discharge of its staff attorneys, including Mr. Renner, even in the absence of knowledge that the attorneys had engaged in concerted, protected activity under Section 7 of the Act. So far as the record shows, the joint employer has entirely failed to make this showing.

Conversely, the Regional Director erred by accepting at face value the assertion made by the joint employer that the terminations of the five staff members were based on legitimate

business necessity. The joint employer did not shut down its operations. It is still in the same business performing the same advocacy activities and providing legal representation. The joint employer provides these services through the same intertwined organizations, at the same place, and continues to utilize attorneys and staff members, such as Felipe Bohnet-Gomez, Pia Winston and Chioma Chuckwu, to perform its work.

In summary the joint employer blatantly violated Section 7 rights, including terminating Mr. Renner and Ms. Williams in an ill-disguised but successful effort to stifle ongoing efforts to form a staff union. As such, this course of action provides a valid basis for a ruling that the terminations were unlawful under *Wright Line*. This conclusion is particularly appropriate here, moreover, in light of the substantial body of evidence that the charging parties presented to establish that the employer's *post hoc* justification for the discharges is make-weight and pretextual in nature. *See, e.g.*, The Developing Labor Law, 2003 Supplement, Rosen *et al*. Ed. (BNA 2003), 105-06 (The Board continues to determine the lawfulness of partial closings and run away shops based on the motive underlying the employer's decision.) Additionally, as we now demonstrate, this defense is legally insufficient to overcome evidence of the inherently destructive nature of the joint employer's actions on the exercises of Section 7 rights by the terminated and remaining staff attorneys of the joint employer. (Id.)

B. The Discharges of Mr. Renner and Ms. Williams, Who Acted Spokespersons for the Terminated Staff Attorneys, Violates Section 8 (a)(3) and Section 8 (a)(1) of the Act Because Their Terminations Had An Inherently Destructive Effect On The Exercises of Section 7 Rights By the Staff Members of the Joint Employer.

Egregious employer conduct, which is inherently destructive of Section 7 rights, may be deemed to violate Section 8 (a)(3) and Section 8 (a)(1) of the Act without regard to the motivation of the employer based on the inherently "discriminatory or destructive nature of the conduct itself." *NLRB v. Erie Resistor Corp*., 373 US 221, 228 (1963). Not only is it

unnecessary to present proof of antiunion motivation in these circumstances, but also a violation may be found to exist "if it can reasonably be concluded that the employer's discriminatory conduct was inherently destructive' of important employee rights…." *NLRB v. Great Dane Trailers*, 388 U. S. 26, 34 (1967).

> The conduct *does* indeed speak for itself – it is discriminatory and does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended.

Erie Resistor Corp., 373 US at 228 (emphasis in original).

Employer action is inherently destructive of employee rights where, as here, the action involved mass terminations that had a definitive and irrevocable impact that rendered completely futile further employee exercises of rights protected by Section 7. *Contractor Services*, 324 NLRB 1254 (1997); *Anchor Concepts*, 323 NLRB 742 (1997), *enforcement denied*, 160 F. 3d 55 (2d Cir. 1999); *Caterpillar, Inc*., 322 NLRB 674, 675 (1996).[36]

As discussed, the five discharged staff attorneys had engaged in protected, concerted activity directed to securing comparable pay and organized a lunch meeting with new hired attorneys to discuss the formation of a staff union to achieve this and related goals. Not surprisingly, the charging parties in these related cases – Richard Renner and Lindsey Williams – served as the leaders of these and related concerted activities.

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[36] There is no rule of law that says only members of a protected class can suffer retaliation. Title VII, for example, protects men from retaliation when they help female employees pursue discrimination claims to achieve equality. *Kendall v. Cobb County*, 14 F.Supp.2d 1342 (N.D. Ga. 1998). Similarly, a white manager who hires and promotes blacks is protected by Title VII because of her right to a racism-free workplace and also because her actions express "opposition" to unlawful discrimination. *Chandler v. Fast Lane, Inc*., 868 F.Supp. 1138 (E.D. Ark. 1994). In *Thompson v. North American Stainless*, LP, 131 S.Ct. 863 (2011), the Supreme Court made clear that workers can be in the "zone of interests" protected by the law even when it was a family member who engaged in protected activity, not the plaintiff. Now would be a good time for the Board to revisit the "zone of interests" of the NLRA to bring it into alignment with *Thompson*.

As earlier discussed, the five existing staff attorneys held an informal staff lunch off-premises on October 22, 2012, and invited five newly hired staff attorneys. When a key member of management tried to invite herself to the lunch, she was pointedly informed that she was not welcome given the nature and purpose of the lunch – information that was promptly relayed to her superiors. After the attorneys held the lunch to discuss the formation of a staff union, along with other matters of mutual concern, the joint employer summarily discharged the five staff members who took the initiative to set up the lunch and to invite the newly hired to attorneys to attend and participate in the discussion.

The impact of this showing of economic force by the joint employer was nothing short of stunning. The mass terminations immediately stifled all concerted activity by eliminating any further ability on the part of the five terminated staff attorneys to exercise Section 7 rights in the workplace. At the same time, the firings sent an undeniable message to the remaining legal fellows to desist from engaging in further concerted activity or suffer the same fate. [37]

Conclusion

For all of the reasons discussed in this memorandum and in the joint statement of position earlier submitted by both charging parties, Mr. Renner urges the Office of Appeals to reverse the Regional Director's dismissal of the portion of the ULP charge in which he challenged his termination on ground that this employment action was unlawful under Sections 8 (a)(3) and Section 8 (a)(1) of the Act. In addition, charging party urges the Office of Appeals to remand the charge for further investigation with specific instructions for Region 5 to conduct an independent follow-up investigation to determine whether a complaint should be issued on the basis on any and all violations of the Act discussed in this memorandum.

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[37] This alternative theory of violation also negates the underlying basis for the Regional Director's finding that the discharges were lawful because they flowed from the joint employer's decision to change the direction and manner by which it conducted business. See discussion, supra, at pp. 18-19.

Respectfully submitted,

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