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 -

LINDSEY M. WILLIAMS

Charging Party

Case No. 05-CA-095908

MEMORANDUM OF LAW IN SUPPORT OF APPEAL
SUBMITTED ON BEHALF OF LINDSEY M. WILLIAMS

The joint employer summarily terminated the employment of five staff employees, including Lindsey Williams and Richard Renner, 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. [1] The joint employer also took on five new law fellows as staff members and did so without consulting any of the existing legal staff members.

On October 9, 2012, Ms. Williams, Mr. Renner, and three other staff members confronted the founders of the joint employer. These founders – namely, Stephen Kohn, Michael Kohn, and David Colapinto – created the three organizations, which they operated together as a joint employer. Ms. Williams, Mr. Renner, and their three coworkers raised concerns about the lack of financial transparency of these organizations. The staff members

[1] 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.

pressed the founders to fulfill their promise to increase salaries to levels comparable to prevailing market rates paid to similarly skilled attorneys. The staff members additionally expressed their belief that the formation of a staff would enable the employees to secure disclosure of the financial information bearing on their compensation and related concerns. [2] The staff particularly objected to the founders' decision to conceal the joint employer's share of the $104 million award to Whistleblower Bradley Birkenfeld.

The founders persisted in refusing to disclose the amount of their windfall from the whistleblower award. The founders also questioned whether attorneys had the legal right to form a union. The founders agreed – albeit reluctantly – to hold a staff meeting to discuss these issues on October 18, 2012. The staff confirmed their concerns and willingness to attend the meeting by an email dated October 10, 2012. [3]

On October 18, 2012, the founders notified the staff of the postponement of the meeting and did so without providing any explanation or proposing a new meeting date. Having heard nothing further, the five staff members invited the five new law fellows to lunch on Friday, October 22, 2012, to discuss these same matters. The founders learned about the planned staff lunch when Mary Jane Wilmoth attempted to attend the luncheon. While walking on the way to the restaurant, Mr. Renner politely informed this key management official that she could not attend the lunch because the staff was meeting to discuss the formation of a staff union. [4] Upon learning of the existence meeting from Ms. Wilmoth, the founders collectively expressed their

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[2] 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.

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

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

distain over the fact that the 10 staff members had met for lunch to discuss unionization, among other matters. [5]

On Thursday, October 25, 2012, the founders directed Mr. Renner and Ms. Williams to attend a staff meeting at which founder Stephen Kohn announced that the meeting was the "first ever" meeting of "supervisors and managers." Mr. Renner and Ms. Williams informed the founders that they did not believe they were managers or supervisors and expressed their beliefs that the meeting had been convened to buttress the employer's legal position in the event that NLRB action was eventually necessary. [6]

On November 5, 2012, at approximately 4:30 PM, the joint employer held a staff meeting at which Stephen Kohn notified Mr. Renner and three other staff members of their immediate terminations. 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 as well as blocked access to their email accounts and electronic files.

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. [7]

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[5] 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).

[6] 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)

[7] 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).

However, on November 7, 2012, an intern overheard Estelle Kohn stating that Mr. Renner was "the reason they all got fired." [8]

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 Ms. Williams served as a supervisory and/or as a managerial employee and was thus exempt from the protection of the Act. (Decision, p. 2.). 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." (Id.). 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 Ms. Williams *actually* preformed on a day-to-day basis and attributed disproportionate significance to her nominal job title – i.e., "Director of Advocacy and Development." (Decision, p. 2). The record nonetheless shows that the joint employer devised and utilized this job title to enhance Ms. Williams' status and her apparent authority in dealings with third parties on its behalf. While responsible for overseeing the workflow and overall performance of staff employees working on *ad hoc* advocacy or development work projects, moreover, Ms. Williams never exercised supervisory authority over these individuals nor possessed any such authority.

The Regional Director also determined that Ms. Williams performed managerial responsibilities on behalf of the joint employer. The decision made reference to only one example, but did so without any discussion of what particular contracts, if any, the charging party actually negotiated or administered on behalf of the joint employer. In reality, Ms.

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

Williams' involvement in this area was limited to carrying out directives of her superiors by executing approved contracts or contract renewals as an incidental aspect of her primary job responsibilities as a staff attorney.

Discussion

I. THE REGIONAL DIRECTOR DISMISSAL THE UNFAIR LABOR PRACTICE CHARGE FILED BY LINDSEY WILLIAMS SHOULD BE REVERSED ON APPEAL BY THE GENERAL COUNSEL.

A. The Regional Director's Determination That Ms. Williams Was A Supervisory 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).

In adopting Section 2 (3) of the Act, however, Congress utilized specific language to embody this exclusion by stating as follows:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

61 Stat. 138, codified at 29 U.S.C. § 152(11).

Whether an employee is a supervisor 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 of a

supervisor under the Act "is determined by an individual's duties, not by his title or job classification." *Chicago Metallic Corp*., 273 NLRB 1677 (1985).

> 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 supervisory 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).

When the evidence in the record is read in light of the foregoing governing legal principles, the Regional Director's determination that Ms. Williams was a supervisor within the meaning of Section 2(3) of the Act is erroneous. Ms. Williams included detailed descriptions of her job responsibilities in two declarations submitted to the Region, which so far as the record shows remain uncontroverted. These day-to-day responsibilities included the following principal activities:

- Drafting press releases, action alerts, and blog postings
- Handling press inquiries and conducting interviews, if assigned
- Updating the NWC and the Honesty Without Fear Websites
- Drafting blog postings for the Whistleblower Protection Blog
- Establishing and maintaining contact with Congressional offices with regard to legislative issues and individual cases pertaining to whistleblower interests
- Writing and submitting letters of inquiry, proposals, and reports to foundations
- Writing and submitting the application for the Combined Federal Campaign ("CFC")
- Drafting email and regular mail requests for individual donations
- Serving as Executive Producer of a weekly "Honesty Without Fear" online radio program

- Processing and shipping orders from the NWC's online store

(Declaration of Williams January 11, 2013, Page 4, ¶8).

As this summary of duties and responsibilities makes clear, the joint employer never conferred any supervisory authority or expressly required Ms. Williams to perform *any* of the enumerated supervisory functions set forth in Section 2(3) of the Act. The charging party had no authority whatsoever to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other staff employees and/or to effectively recommend any such personnel action. (Declaration of Williams, 01/11/2013, page 4, ¶ 9 and Declaration of Williams, 03/04/2013, page 14 and 16).

Contrary to the findings made by the Regional Director (Decision, p. 2), the founders retained and routinely exercised the right to supervise and direct all aspects of the work performance rendered by the five staff attorneys, including the charging party. The founders additionally relied upon two closely aligned managerial/supervisory employees – namely, Estelle Kohn and Mary Jane Wilmoth – to provide necessary management assistance regarding all aspects of the joint employer's business activities.

The Regional Director likewise had no factual basis for finding that Ms. Williams "effectively recommended the hiring of employees." While Ms. Williams recommended the hiring of Owen Dunn, for example, the joint employer declined to act on her recommendation because Estelle Kohn had initially opposed the hiring. Mr. Dunn was later hired after Ms. Kohn changed her mind and specifically recommended his hiring. Thus, Ms. Kohn – a valued managerial employee and sister of two of the founders – and not Ms. Williams was the staff member who possessed the authority to effectively recommend the hiring of attorneys and other staff members.

Similarly, Ms Kohn and/or one or more of the founders solicited her opinion regarding the hiring of Meryl Grenadier and Phil Barrett, the joint employer did not act upon the charging

party's positive endorsements until Ms. Kohn's expressed her concurrence. (Declaration of Williams, 03/04/2013, p. 9). Ms. Williams thus lacked the ability to "effectively recommend" the hiring of staff attorneys because Ms. Kohn and/or the founders retained and/or exercised unfettered authority to block or accept any endorsement or recommendation made by the charging party.

NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994) is highly instructive on the basic question of whether Ms. Williams possessed or exercised supervisory authority. In that case, the Supreme Court ruled that a licensed nurse does not exercise supervisory authority in the interest of the employer "if it is incidental to the treatment of patients." *Id*. While expressly recognizing that certain nominally supervisory judgments may be performed without a sufficient degree of judgment or discretion to warrant a finding of supervisory status, the Supreme Court added that "the degree of judgment . . . may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." *Id*. at 714; *accord, Hospital General Mennonite v. NLRB*, 393 F. 3d 263, 268 (1st Cir. 2004). *See also*, *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 720 (2001) (The NLRB has the necessary expertise to distinguish between employees who "direct the manner of others' performance of discrete tasks from employees who direct other *employees*." 532 U.S. at 720 (emphasis in original)).

Viewed in this light, it should be evident Ms. Williams was engaged in the exercise professional authority in providing direction and guidance to less experienced attorneys and others assigned to projects for which she was responsible. In these interactions, Ms. Williams merely provided professional direction and/or served as a work coordinator or lead person to ensure the proper performance of whatever advocacy or other project to which these staff members had been assigned. This professional guidance was a necessary incident of the charging party's activities as a licensed professional and did not require the exercise of any

independent judgment or true supervisory authority. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. at 576-580. [9]

B. The Regional Director's Determination That Ms. Williams Was A Managerial Employee Is Contrary To The Record Evidence And Not Supported By The Established Case Law.

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).

In emphasizing in *Bell Aerospace* 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, the Supreme Court observed:

> 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.

Id., 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

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[9] Illustrative of these circumstances is the memorandum sent by Stephen Kohn to the charging party on October 24, 2011 in which he set forth exactly how Ms. Williams should oversee Owen Dunn's work on a particular project. The existence of and the particular wording used in this memorandum underscores the fact that Ms. Williams lacked authority to exercise *independent* judgment over the supervision of Mr. Dunn. Declaration of Lindsey Williams, 01/11/2013, p. 18, ¶ 38.

Similarly, Ms. Williams sent numerous emails to fellow staff members in which she merely relayed management directives from superiors and/or carried out work coordination responsibilities. In one email, for example, the charging party sent an email regarding the hiring of an independent contractor to enter and time records from information provided by staff members. Significantly, Mary Jane Wilmoth made an initial review of the draft and corrected and approved the draft email before authorizing Ms. Williams to send out the final version to the staff members. (Declaration of L. Williams, 03/04/2013, pp. 15-16).

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 explained: "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 individual 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 Ms. Williams was a managerial employee because she "negotiated and executed contracts." The charging party only signed contracts on behalf of the joint employer when expressly directed by Stephen Kohn or other management officials or when the involved renewal of previously negotiated contracts.

During all times pertinent, moreover, Ms. Williams lacked the authority to independently negotiate or sign contracts on behalf of the NWC or the Fund. (Declaration of L. Williams, 03/04/2013), p. 19).

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 Ms. Williams served a managerial employee and was thereby excluded from the protections of the Act. Rather, the record makes it clear that she served as a staff attorney responsible for conducting advocacy, development and related initiatives on behalf of the joint employer and had no responsibility to fashion or effectuate policies on behalf of the joint employer. (Declaration of L. Williams, 03/04/2013, p. 19).

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 Ms. Williams and the other charging party, Richard Renner, 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). 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. 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. [10]

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. [11]

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.

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

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

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 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. [12]

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. [13]

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.

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

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

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, 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. [14] 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

[14] 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 Williams, 01/11/2013, p. 11, ¶ 25.

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 of her coworkers, including Richard Renner, who co-filed the pending unfair labor practice charge.

In dismissing the ULP charge filed by 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 Ms. Williams for reasons other than her protected concerted activities and her 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 Ms. Williams, Mr. Renner, 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 Ms. Williams and Mr. Renner, 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 Ms. Williams, 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's actions in blatantly violated Section 7 rights, including terminating Ms. Williams and Mr. Renner in an ill-disguised but successful effort to stifle ongoing efforts to form a staff union, provide a valid basis ruling that the terminations were unlawful under *Wright Line*. This conclusion is particularly appropriate here 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 Discharge of Ms. Williams, Who Acted as One of the Spokespersons for the Terminated Staff Attorneys, Violates Section 8 (a)(3) and Section 8 (a)(1) of the Act Because The Termination 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).

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 – Lindsey Williams and Richard Renner – served as the leaders of these and related concerted activities.

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. [15]

[15] 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 change the direction and manner by which it conducted business. See discussion, supra, at pp. 17-18 .

Conclusion

For all of the reasons discussed in this memorandum and in the joint statement of position earlier submitted by both charging parties, Ms. Williams urges the Office of Appeals to reverse the Regional Director's dismissal of the portion of the ULP charge in which she challenged her 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.

Respectfully submitted,

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