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-095908**
RICHARD R. RENNER	:	
Charging Party	:	

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

A recent opinion issued by the Supreme Court in *Vance v. Ball State University*, No. 11–556 (June 24, 2013) provides significant guidance as to one of the principal issues raised by this appeal. In addressing directly the scope of the supervisor exclusion contained in the National Labor Relations Act, 29 U. S. C. §152(11) ("NLRA"), the majority of the Court in footnote 7 observed as follows:

> … The National Labor Relations Board (NLRB) and the lower courts, however, have consistently explained that supervisory authority is not trivial or insignificant: If the term "supervisor" is construed too broadly, then employees who are deemed to be supervisors will be denied rights that the NLRA was intended to protect. *E.g.*, *In re Connecticut Humane Society*, 358 NLRB No. 31, *33 (Apr. 12, 2012); *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F. 3d 298, 305 (CA6 2012); *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F. 3d 960, 963 (CADC 1999). Indeed, in defining a supervisor for purposes of the NLRA, Congress sought to distinguish "between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). *Cf. NLRB v. Health Care & Retirement Corp. of America*, 511 U. S. 571, 586 (1994) (HCRA) (GINSBURG, J., dissenting) ("Through case-by-case adjudication, the Board has sought to distinguish individuals exercising the level of control that truly places them in the ranks of management, from highly skilled employees, whether professional or technical, who perform, incidentally to their skilled work, a limited supervisory role"). Accordingly, the NLRB has interpreted the NLRA's

> statutory definition of supervisor more narrowly than its plain language might permit. *See, e.g.*, Connecticut Humane Society, supra, at *39 (an employee who evaluates others is not a supervisor unless the evaluation "affect[s] the wages and the job status of the employee evaluated"); *In re CGLM, Inc*., 350 NLRB 974, 977 (2007) ("'If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of the company where to park his car' " (quoting *NLRB v. Security Guard Serv., Inc*., 384 F. 2d 143, 151 (CA5 1967)))….

In the following paragraph of the same footnote, the majority added:

> To be sure, the NLRA may in some instances define "supervisor" more broadly than we define the term in this case. But those differences reflect the NLRA's unique purpose, which is to preserve the balance of power between labor and management, see HCRA, supra, at 573 (explaining that Congress amended the NLRA to exclude supervisors in order to address the "imbalance between labor and management" that resulted when "supervisory employees could organize as part of bargaining units and negotiate with the employer"). That purpose is inapposite in the context of Title VII, which focuses on eradicating discrimination. An employee may have a sufficient degree of authority over subordinates such that Congress has decided that the employee should not participate with lower level employees in the same collective-bargaining unit (because, for example, a higher level employee will pursue his own interests at the expense of lower level employees' interests), but that authority is not necessarily sufficient to merit heightened liability for the purposes of Title VII. The NLRA's definition of supervisor therefore is not controlling in this context.

As should be apparent from this footnote, the adoption of an overly broad definition of the term "supervisor" under the National Labor Relations Act defeats the purpose of the NLRA by unnecessarily disenfranchising rank-and-file employees from the exercise of Section 7 rights . Footnote 7 draws a careful distinction between the concept of a supervisor under NLRA and Title VII to foster the different policies underlying these enactments and, as such, footnote 7 provides significant support for the position advanced by the charging parties in this appeal.

The joint employer, by its conduct, permitted key executive personnel (namely, the founding partners, managing partner Wilmoth, and deputy director Estelle Kohn) to have access to critical information, such as the $104 million Birkenfeld award, and to exercise true managerial and/or supervisory authority. In contrast, the rank-and-file staff members, including Renner and Williams, lacked access to key information and had no real supervisory authority and/or managerial responsibilities to act on behalf of the joint employer.

When Renner, Williams and three other rank-and-file staff members proceeded to engage in concerted activities to gain limited access to critical information through collective action instituted to gain improvements in wages and working conditions, the joint employer swiftly fired all five staff members. When the realities of the modern workplace and the basic purposes underlying the NLRA, it should be apparent that the reliance by the joint employer of nominal titles and/or *de minimis* authority conferred by the joint employer for fund-raising purposes are not the controlling factors in determining protected status. The rationale and reasoning relied upon by the majority of the Supreme Court in *Vance v. Ball State University* provide strong support for this very same conclusion.

For the reasons set forth above, the charging parties urge the Office of Appeals to give careful consideration to the views regarding supervisory status set forth by the majority in *Vance* in evaluated the evidence submitted by the charging parties and conclusions reached by the Regional Director in dismissing their ULP charges challenging their respective terminations by the joint employer.

Respectfully submitted,

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