



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 05
BANK OF AMERICA CENTER, TOWER II
100 S. CHARLES STREET, STE 600
BALTIMORE, MD 21201

Agency Website: www.nlr.gov
Telephone: (410)962-2822
Fax: (410)962-2198

April 25, 2013

Mr. Richard Renner
921 Loxford Ter
Silver Spring, MD 20901-1126

Re: National Whistleblower Center, National
Whistleblower Legal Defense & Education Fund, and
Kohn, Kohn, and Colapinto, LLP, A Joint Employer
Case 05-CA-095886

Dear Mr. Renner:

We have carefully investigated and considered your charge that National Whistleblower Center, National Whistleblower Legal Defense & Education Fund, and Kohn, Kohn, and Colapinto, LLP, a Joint Employer has violated the National Labor Relations Act.

Decision to Dismiss in Part: You filed an unfair labor practice charge against the Employer on January 7, 2013. The charge alleges, in part, that since about early October 2012, the Employer restrained and coerced its employees because of their protected concerted and/or their union activities by creating an impression of surveillance among its employees of their protected concerted and/or union activities. The charge also alleges that on or about November 5, 2012, the Employer terminated your employment because of your protected concerted and/or union activities. Based on that investigation, I have concluded that further proceedings are not warranted with regard to the above allegations.

With regard to the first allegation, the investigation revealed insufficient evidence to establish that the Employer created an impression of surveillance of employees.

With regard to your termination, the investigation disclosed that you held the titles of Legal Director of the National Whistleblower Center and Director of the National Whistleblower Legal Defense and Education Fund while you were employed by the Employer. Additionally, you served on the National Whistleblower Center's Board of Directors as its secretary until about October 23, 2012. In your capacity as a member and secretary of the Board of Directors, *inter alia*, you attended meetings of the Board of Directors, drafted minutes of those meetings, voted on and proposed resolutions, and approved the Center's annual budgets. As Director of the National Whistleblower Legal Defense and Education Fund, you were held out to the public, including the District of Columbia Bar, as a managerial employee. Moreover, your own resume also supports the conclusion that you were a managerial employee of the Employer.

Although the Act makes no specific provision for “managerial employees” under Board policy, this category of personnel has been excluded from the protection of the Act. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *Ford Motor Co.*, 66 NLRB 1317 (1946); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1948). See also *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

The totality of the evidence uncovered by the investigation establishes that you were a managerial employee and therefore not protected by the Act. As such, the Employer’s conduct with regard to your termination does not violate the Act.

Assuming, *arguendo*, you were an employee as defined in the Act, your termination does not violate the Act because in about November 2012, the Employer changed its business operations to function substantially without employees. See: *Textile Workers v. Darlington Co.*, 379 U.S. 263, 268 (1964); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981); *Noblit Bros.*, 305 NLRB 329 (1992); *Dubuque Packing Co.*, 303 NLRB 386 (1991).

Though some of the above-noted cases confronted allegations arising under Section 8(a)(5) of the Act, the theory of all are analogous to the circumstances presented in your case. As the Employer changed its business operations in a manner comparable to a change in the business model, a partial shut-down, or a relocation of a business, its conduct with regard to the termination of its employees does not violate the Act. Accordingly, further proceedings are not warranted with regard to above allegations, and I am refusing to issue complaint with regard to them.

The allegation alleging that the Employer restrained and coerced its employees because of their protected concerted and/or their union activities by threatening and intimidating employees, remains outstanding and will be the subject of a separate communication.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlr.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency’s website at www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **May 9, 2013**. If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other documents you want us to consider through the Agency’s website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than May 8, 2013.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before May 9, 2013**. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Wayne R. Gold

Wayne R. Gold
Regional Director

Enclosure

cc General Counsel
Office Of Appeals
Franklin Court Building
National Labor Relations Board
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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Case Name(s).

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)