

Alternative Services, Inc. and American Federation of State, County and Municipal Employees, AFL-CIO. Case 7-CA-40702

June 13, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

In this case, which began in a state forum some 11 years ago, we are presented with the threshold question of whether to grant the Respondent's motion to dismiss pursuant to Section 10(b) of the National Labor Relations Act. The Board has considered the Respondent's motion and the accompanying brief in support of the motion, the General Counsel's opposition brief, and the Respondent's supplement to its motion and brief in support of the supplement, and has decided to grant the Respondent's motion and to dismiss the complaint.¹

I. BACKGROUND

On May 19, 1994, the Charging Party filed unfair labor practice charges against the Respondent and the State of Michigan with the Michigan Employment Relations Commission (MERC). At the time, the Board applied a discretionary jurisdictional standard, which required the Board to examine, in situations where an employer provided services to or for an exempt entity, the "control over essential terms and conditions of employment retained by the employer" as well as "the scope and degree of control exercised by the exempt entity over the employer's labor relations." *Res-Care, Inc.*, 280 NLRB 670, 672 (1986), subsequently overruled by *Management Training Corp.*, 317 NLRB 1355 (1995).² Whether or

not the Board exercised jurisdiction over the employer depended on whether the employer was "capable of engaging in meaningful collective bargaining." *Res-Care*, 280 NLRB at 672. After the charges were filed, the Board, on July 28, 1995, issued *Management Training Corp.*, supra, reversing the *Res-Care* discretionary jurisdictional standard over private employers receiving government funding. However, the Board did not address whether it would retroactively apply its new jurisdictional standard. MERC held hearings on the charges between August and October 1995.

On January 12, 1996, the Michigan Court of Appeals decided *AFSCME v. Dept. of Mental Health (Quality Living Systems)*, 545 N.W.2d 363 (Mich. Ct. App. 1996), a consolidated case which included the Respondent as well as the Charging Party. The Michigan Court of Appeals found MERC's jurisdiction had been preempted. *Quality Living Systems*, 545 N.W.2d at 365. On April 16, 1996, MERC advised the parties that it would stay further proceedings in all pending group home cases, in anticipation of a response from the Board as to whether it would decline to exercise jurisdiction.³ Ten months later, the Michigan Attorney General requested that MERC close all pending joint employment group home cases. The next week, MERC rejected that request and announced that further proceedings in pending group home cases would be stayed, pending a final decision by the Board in *Summer's Living Systems*.

On March 31, 1997, the Michigan legislature amended its Public Employee Relations Act to exempt adult residential care workers from being classified as Michigan

stantially similar cases involving health care facilities and DMH. *Id.* at 699. Thus, at the time, there was a sufficient showing the Board would decline to exercise jurisdiction. *Id.* at 699-700.

³ Between May and September 1996, the Charging Party filed separate charges with Region 7, alleging that several group homes, including the Respondent, refused to bargain. On October 29, 1996, the General Counsel, through the Regional Director of Region 7, issued a complaint against the Respondent over the alleged refusals to bargain; the cases were consolidated. On January 29-30, 1997, a hearing was conducted before a Board administrative law judge in those consolidated cases under the lead caption *Summer's Living Systems*. On January 9, 1998, the judge issued his decision in *Summer's Living Systems*, recommending that the Board extend comity to elections conducted by MERC before July 28, 1995, but not to elections held afterwards. On September 25, 2000, the Board issued *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000), enfd. *Michigan Community Services v. NLRB*, 309 F.3d 348 (6th Cir. 2002). In doing so, the Board extended comity to elections conducted by MERC prior to July 28, 1995, including the election held among Respondent's employees, and found unfair labor practices in those cases where the respondent refused to bargain; as for the cases in which MERC conducted elections after July 28, 1995, the Board dismissed those charges, finding that MERC no longer had jurisdiction over the respondents in those cases. *Summer's Living Systems*, 332 NLRB at 276. The issue of retroactive application of *Management Training Corp.* was not directly addressed.

¹ On September 15, 2003, the General Counsel, the Respondent, and the Charging Party filed a joint motion to transfer proceeding with stipulated record, Case 7-CA-40702-SP. The parties agreed that the charges, the complaint, and the stipulation with exhibits constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, findings of fact, conclusions of law, and a decision by an administrative law judge. The parties also agreed that the stipulation was made without prejudice to the Respondent's motion to dismiss. We approve the stipulation and transfer the proceeding to the Board for issuance of a decision and order.

² The *Res-Care* discretionary standard was applied in *AFSCME v. Louisiana Homes, Inc. (Louisiana Homes II)*, 511 N.W.2d 696 (Mich. Ct. App. 1993), a case in which the Michigan Department of Mental Health (DMH) argued that MERC lacked jurisdiction because of Federal preemption. *Louisiana Homes II*, 511 N.W.2d 696, 697 (Mich. Ct. App. 1993), app. denied 521 N.W.2d 607 (Mich. 1994), cert. denied 513 U.S. 1077 (1995). The *Louisiana Homes II* court indicated that the *Res-Care* question in the case—whether the group home retained enough control of the home's employees terms and conditions of employment—was at least arguably covered by the NLRA. *Louisiana Homes II*, 511 N.W.2d at 698-699. However, the *Louisiana Homes II* court also indicated the Board declined to exercise jurisdiction in sub-

state employees and under MERC jurisdiction. M.C.L. Sec. 423.201(e). Seven months later, group home providers, including the Respondent, requested that MERC dismiss pending cases on preemption grounds. MERC dismissed the underlying case on November 10, 1997, citing lack of jurisdiction due to preemption, as the practices at issue were arguably subject to the National Labor Relations Act and there had been no showing that the Board would decline to exercise jurisdiction.⁴

On February 24, 1998, the Charging Party filed the instant charge with the Regional Office of the Board. The Respondent filed a motion to dismiss, arguing the charge was untimely under Section 10(b). On May 29, 1998, the Regional Director for Region 7 dismissed the charge, and the Charging Party appealed to the Acting General Counsel. The Acting General Counsel granted the Charging Party's appeal in part and remanded to Region 7 on September 10, 1998. On February 9, 2001, the Charging Party filed an amended charge—with new claims added—with the Board. The Regional Director for Region 7 issued a complaint for the present matter on February 13, 2001. On May 23, 2001, the Respondent filed with the Board a motion to dismiss based on Section 10(b); the Respondent filed a supplement to its motion to dismiss on November 2, 2002.

II. DISCUSSION

Section 10(b) states that “[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” The Board recognizes that the 6-month limitations period of Section 10(b) does not begin to run until the charging party has “knowledge of the facts necessary to support a ripe unfair labor practice.” *St. Barnabas Medical Center*, 343 NLRB No. 119, slip op. at 3 (2004) (quoting *Leach Corp.*, 312 NLRB 990, 991 (1993), enf. 54 F.3d 802 (D.C. Cir. 1995)). However, the Board has never held—nor has it previously been asked to decide—whether this doctrine of equitable tolling applies to a situation, as here, where a charging party excusably does not know of the existence of a cause of action before the Board and timely files charges in a non-Board state forum which, at the time of the filing, had competent jurisdiction over the matter.

⁴ On November 19, 1997, the Charging Party requested that MERC reconsider its dismissal of the present case; MERC denied the request on December 30, 1997.

Assuming, arguendo, that the doctrine of equitable tolling applies in this circumstance, we hold that it does not excuse the failure of the Charging Party to file the instant charges with the Board until February 1998. The doctrine requires the exercise of reasonable diligence on the part of a charging party. *Ohio & Vicinity Regional Council of Carpenters (Schaefer Group)*, 344 NLRB No. 37 (2005); *R.G. Burns Electric*, 326 NLRB 440, 441 (1998). Here, in the exercise of reasonable diligence, the Charging Party should have known by March 31, 1997, at the very latest, that MERC clearly lacked jurisdiction and the Charging Party's proceedings before MERC would be dismissed.⁵ The Charging Party should have thus filed its charges with the Board in a timely manner thereafter. It did not do so until February 1998. In light of this delay, we grant the Respondent's motion and dismiss the complaint.

ORDER

IT IS ORDERED that the stipulation is approved and made a part of the record herein.

IT IS FURTHER ORDERED that the joint motion to transfer proceeding with stipulated record is granted, and that the above entitled proceeding is transferred to and continued before the Board in Washington, D.C., for the purpose of making findings of fact and conclusions of law and for the issuance of a Decision and Order.

The complaint is dismissed.

⁵ We need not decide whether the Charging Party should have known at an even earlier date that MERC clearly lacked jurisdiction. Arguably, that date is July 28, 1995, when the Board decided *Management Training Corp.* Furthermore, the Michigan Court of Appeals clearly indicated in *Quality Living Systems*, decided on January 12, 1996, that there was no longer a sufficient showing that the Board would refuse to assert its jurisdiction in group home cases and that MERC no longer had jurisdiction on ground of Federal preemption. *Quality Living Systems*, 545 N.W. 2d at 371. Also, it seems from the Charging Party's subsequent actions that it knew that MERC no longer had jurisdiction over its claims, as the Charging Party filed the *Summer's Living Systems* charges with the Board during the summer of 1996. Likewise, a complaint in that case issued on October 29, 1996, and a hearing was conducted in the consolidated cases on January 29–30, 1997. Finally, the Charging Party was put on clear notice that MERC lacked jurisdiction on March 31, 1997, when the Michigan legislature amended its Public Employees Relations Act specifically to exempt adult residential care workers from being classified as Michigan state employees and under MERC jurisdiction. Even if we were to toll Sec. 10(b) through the most recent of these dates—March 31, 1997—the Charging Party failed to bring the instant charges to the Board for nearly 11 full months—almost double the time provided by Sec. 10(b).