

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**MERCHANTS BUILDING MAINTENANCE, LLC**

**and**

**Case 28-CA-22660**

**ELIZABETH CASTRO, an Individual**

**and**

**Case 28-CA-22282**

**AXEL CARMONA, an Individual**

**ACTING GENERAL COUNSEL'S  
BRIEF IN SUPPORT OF EXCEPTIONS**

**I. INTRODUCTION**

Counsel for the Acting General Counsel's (General Counsel) limited Exceptions focus on the ALJ's failure to find and conclude that Respondent refused to consider for hire or hire Norma Garcia (Garcia) in violation of Section 8(a)(1) of the Act and to provide an appropriate remedy for her. In essence, this case involves a class of approximately 22 employees who engaged in protected concerted activities and were then retaliated against because of such activities. Specifically, these employees -- janitors employed by a school district's contractor -- concertedly complained about their working conditions during one academic year and, as a result, were refused rehire during the next school year. Though the ALJ found that Respondent failed and refused to consider for rehire or to rehire 21 alleged discriminatees and provided an appropriate remedy for such individuals, the ALJ did not include Garcia among them. It is respectfully submitted that the record evidence and related findings of the ALJ supports a finding and conclusion that Garcia is one of those who engaged in such protected conduct and is entitled to the remedies recommended by the ALJ for the other 21

discriminatees. To the extent that it is necessary to do so, as discussed more fully below, General Counsel respectfully moves to amend the Order Consolidated Cases, Consolidated Complaint and Notice of Hearing (the Complaint) in this matter to specifically allege Norma Garcia as an alleged discriminatee.

## **II. STATEMENT OF FACTS**

### **1. Background**

Respondent is engaged in the business of providing janitorial services and has offices and contracts with various school districts throughout the United States, including an office in Santa Fe, New Mexico, where it has a contract with the District to provide janitorial services for 32 school district facilities including Santa Fe High School (SFHS) and Capital High School. (ALJD 2; GCX 1(e); 7; 8) During the 2008-2009 contract year, alleged discriminatees Blanca Silva, Elizabeth Castro, Axel Carmona, Blanca Ibarra, Valentin Estrada, other alleged discriminatees, and Garcia, all worked for Respondent as custodians at SFHS. The ALJ found that Silva was only a supervisor until December 2008, and Castro was at no time a supervisor. The ALJ found that Respondent did not rehire 21 of these individuals for the 2009-2010 year. The ALJ did not specifically exclude Garcia from the list of discriminatees, but merely failed to specifically include her in such findings and conclusions.

### **2. Garcia's Concerted Activities and Respondent's Retaliation Against Employees**

Based on the ALJ's findings and other credible record testimony, it is evident that Garcia engaged alongside the other discriminatees in the protected conduct that resulted in the retaliation at issue in this case. More specifically, as to the protected conduct itself, the ALJ found that there was "no dispute that employees who signed the various 2008 and 2009 letters or who otherwise supported the activities of the [group of employees] were engaged in the

concerted protected activity of protesting work-related issues to the Respondent.” (ALJD 15:9-11) In fact, Respondent admitted that employees had engaged in protected concerted activity.

The record shows that Garcia was one of the employees who were engaged in protected concerted activity. The employees drafted numerous letters, complaining about terms and conditions of employment, to both Respondent and the District, and also met with District officials to further press their concerns. (ALJD 3) Discriminatee Lillian Lopez testified that Garcia was a member of and present with the group of employees during the December 2008 meeting with Respondent’s supervisors where employees were told that if they continued complaining to the District, it “would result in a loss of the contract and a consequent loss of jobs.” (ALJD 4:48-52; Tr. 434) Garcia testified that she was among the employees who met with District Superintendent Bobbie Gutierrez to voice such complaints and concerns. (Tr. 408) Her testimony was corroborated by discriminatee David Segovia. (Tr. 257)

The record, including Garcia’s testimony and other testimony and documentary evidence, also establishes that she, along with other employees, prepared and sent letters to Respondent dated June 16, June 22, and August 11. (Tr. 403-414; GCX 3, 4, 9) In fact, the ALJ specifically found that Garcia was one of the employees who signed the June 22 letter that employees drafted and submitted to Respondent -- a letter which complained of threats made by Respondent’s supervisor Oscar Arellano. (ALJD 7-8; GCX 3)

The ALJ, in also finding that Respondent committed various Section 8(a)(1) violations, including threats to employees, specifically found that on June 22, supervisor Arellano, as he was distributing employees’ final paychecks to employees, unlawfully

threatened to refuse to rehire several employees -- including Garcia. (ALJD 7; 15) Such threats became the subject of the employees' June 22 letter.

As to the issue of eligibility for rehire, but for Respondent's unlawful conduct, the ALJ specifically concluded that "[e]mployees employed by Respondent as of June 12 when the Respondent notified employees that its contract with the School District had ended were entitled to be considered for hire and to be rehired." (ALJD 19:23-25) The fact that Garcia was employed by Respondent as of June 12 is established by her testimony and Respondent's employment records. (Tr. 403-431; RX 4, 20)

Despite the evidence showing that Garcia was one of the discriminatees in this case, when setting forth the names of those employees whom Respondent unlawfully failed and refused consider for rehire or to rehire, Garcia's name was omitted. (ALJD 19)

### **III. THE BOARD SHOULD FIND THAT THE ALJ'S FINDINGS AND CONCLUSIONS APPLICABLE TO THE SPECIFICALLY NAMED DISCRIMINATEES ALSO APPLY TO GARCIA**

#### **1. The Record Establishes that Garcia is a Discriminatee**

Though the record establishes, as set forth above, that Garcia was a fully-engaged participant in the protected conduct at issue in the case, the ALJ, citing *St. John's Community Services--New Jersey*, 355 NLRB No. 70, fn. 3 (2010), appropriately rejected Respondent's argument that the General Counsel must prove that each alleged discriminatee engaged in protected activity. The ALJ concluded that, under the Board's test in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel is not required to prove that each specific individual employee engagement in protected concerted activity where employer action against employees is based on

protected group activity known to the employer. (ALJD 18:1-19) As detailed above, Garcia was part of the group of employees who engaged in protected concerted activity.

Moreover, the ALJ's legal and factual analyses in finding that Respondent unlawfully retaliated against the named discriminatees by failing to consider them for rehire or to rehire them for the subsequent school year results in the same conclusions when applied to Garcia. (ALJD at 16-17, applying *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3d Cir. 2002), *Wright Line*, *supra*.<sup>1</sup>

## **2. Respondent's Failure to Meet its Burden Generally Also Applies to Garcia**

Based upon credibility determinations and the lack of documentation "in a situation where documentation could reasonably be expected," the ALJ properly found that Respondent failed to demonstrate that it would have refused to rehire the alleged discriminatees in the absence of the alleged discriminatees' protected activity. (ALJD 14:34-45; 19) Specifically, the ALJ discredited Respondent's witnesses' testimony, and found that there was no credible evidence that Respondent attempted to notify any of the 2008-2009 employees, but for Estrada, to tell them that work was available under the 2009-2010 contract. (ALJD 14) Such

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<sup>1</sup> In addition to the ALJ's findings that the discriminatees' interest in continuing their employment was genuine; that there was actually work available for which they were qualified; and that Respondent's animosity toward the discriminatees' protected conduct resulted in their not being offered such work -- all of which is equally applicable to Garcia -- the record shows that Garcia was in the same position as the other alleged discriminatees in other respects, as well, including: (a) the failure of some employees' failure to submit applications was as a result of Respondent's misleading assurances that employees would be contacted for employment for the 2009-2010 school year (ALJD 19:1-10); (b) Respondent's conduct made the completion of applications for the subsequent school year not only futile, but impossible, by failing or refusing to contact Garcia and other discriminatees after they had expressed their interest in continued employment (see *Sunland Construction Co.*, 311 NLRB 685 (1993) ( the submission of an "actual application is not required" where "applying would be futile"); *Wild Oats Markets, Inc.*, 344 NLRB No. 86, slip op at 2, fn. 8 (2005) (Board found that an individual's failure to submit an application would not necessarily disqualify her from inclusion within the class where the individual can show that submitting an application would have been futile)); (c) Respondent was aware of employees' interest in continued employment (ALJD 18 25-36); and (d) Garcia's interest in continued employment was genuine (as communicated to Respondent in the employees' August 11 letter which states that employees were waiting to be called to go to work (GCX 9)).

findings apply in equal measure to an analysis as to whether Garcia was unlawfully retaliated against by Respondent.

#### **IV. GENERAL COUNSEL’S MOTION TO AMEND COMPLAINT SHOULD BE GRANTED**

To the extent that Garcia’s omission from the ALJD’s list of alleged discriminatees was caused by the inadvertent failure to include Garcia among the discriminatees listed in the Complaint, as set forth above, and to the extent that it is necessary to allow the Board to grant General Counsel’s Exceptions in this matter, General Counsel moves to amend the Complaint to include and specifically name Garcia as an alleged discriminatee.

The Board’s Rules provide that a complaint may be amended subsequent to a hearing. Specifically, Section 102.17 provides as follows:

Amendment.---Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing by the regional director issuing the complaint; as the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

General Counsel’s motion to amend the Complaint is appropriate and just. Though Respondent may assert a lack of due process, such an assertion lacks merit. Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense. The Board has long held, with court approval, that it “may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.”

*Kenmore Electric Company, Inc. et al.*, 355 NLRB No.173, slip op.7 (2010), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir.1990). The “closely connected” element of the *Pergament* test requires both a close congruence between

the complaint allegation and the unalleged violation found by the Board, and that the respondent had sufficient notice of the conduct found unlawful. *Kenmore Electric Company*, supra.

The dual requirements of *Pergament* are easily satisfied here, as the issue of whether to include Garcia as a discriminatee is closely connected, both factually and as a matter of law, to similar allegations in the Complaint. The Complaint lists over 20 alleged discriminatees, virtually all of whom comprise a class that engaged in the same protected conduct and suffered the same unlawful retaliation by Respondent as did Garcia. Garcia signed a letter or letters with other discriminatees and attended one or more of the same protest meetings as did the other discriminatees. There is no doubt that the underlying issues and allegations regarding Garcia, as more fully discussed above, are part and parcel of those related to the other discriminatees considered by -- and Section 8(a)(1) violations found by -- the ALJ.

Moreover, the record establishes that Respondent had notice of the issue of whether Garcia was considered an alleged discriminatee. Notice does not mean that a respondent must be advised of the legal theory upon which the General Counsel intends to proceed but rather, “notice must inform the respondent of the acts forming the basis” of the violation ultimately found, so that it can “prepare a defense . . . and fashion[] an explanation of events that refutes the charge of unlawful behavior.” *Pergament*, supra, 920 F.2d at 135. The ultimate issue is the same when considering the specifically alleged discriminatees or Garcia, i.e., whether Respondent unlawfully failed and refused to consider for rehire or to rehire these employees because they engaged in protected concerted activities. Inasmuch as Respondent treated these employees as a class, and considering the fact that Garcia was presented as a witness and

examined as were other alleged discriminatees, Respondent was on notice, from the outset of and throughout the underlying proceeding, that the legality of its hiring practices -- as applied to a class of employees -- was the ultimate issue in the case. Respondent's defenses to the allegations involving the specifically named discriminatees are the same as they would have been had the Complaint not inadvertently failed to specifically name Garcia among more than a score of other discriminatees. Thus, Respondent was afforded an ample opportunity to prepare its defense.

The second element of the *Pergament* test is whether the legality of Respondent's hiring practices was fully litigated. The record shows that all the key issues surrounding the Section 8(a)(1) refusal to consider for rehire and refusal to rehire allegations were fully litigated. This is demonstrated by the documentary and testimonial evidence introduced at the hearing by Respondent on its hiring practices -- evidence which the ALJ considered in finding that Respondent violated Section 8(a)(1) by failing and refusing to consider for hire and hire employees because they engaged in protected concerted activities. Although discredited, in whole or in part, by the ALJ, Respondent presented several witnesses in defense of its hiring practices, its reasons for not considering or hiring the employees at issue, and to the Section 8(a)(1) allegations generally. (ALJD 10:13-51-12:15, 14:13-45) See *Desert Aggregates*, 340 NLRB 289, 293 (2003) (noting, among other factors, that the "Board has concluded that where the respondent's witnesses testified to facts giving rise to the unalleged violation, ...the 'fully litigated' requirement is met"). The issues regarding all the discriminatees, including Garcia, were fully litigated, and Respondent's motivation was the same as to all of them.

In any event, as discussed above, the record shows that specific aspects of the case related to Garcia were, in fact, litigated. Garcia testified about her protected concerted activities, corroborated the testimony of discriminatee Alma De Lara in regard to threats made by Respondent's supervisor Arellano, and was cross-examined by Respondent's counsel at the hearing on May 21, 2010. (Tr. 403-429; see also the testimony of DeLara at Tr. 460; ALJD 6, 8). Respondent's counsel never challenged her status as an employee and did not take a position that would reflect a denial that she was a potential discriminatee. The inclusion of Garcia among the group of discriminatees found in this matter is appropriate inasmuch as Respondent's failure to rehire her is inextricably connected to its treatment of the other discriminatees, involves the identical underlying legal theory and factual framework, and is subject to the same defenses. *Redd-I, Inc.*, 290 NLRB 1115, 118(1988); *Precision Concrete*, 337 NLRB 211 (2001).

In addition, it is important to note that the unfair labor practice charges are such that they clearly put Respondent on notice as to the allegations and issues at hand. Specifically, the charge in Case 28-CA-22660 (GCX 1(a)), dated August 27, 2009, states in pertinent part:

Since November 25, 2008, the employer has denied and/or withheld work opportunities and benefits and refused to consider for rehire Elizabeth Castro *and other similarly situated employees* in retaliation for their protected activities. Additionally, the employer threatened not to rehire employees unless they agreed to waive in writing statutory rights that protect them as employees. (GCX 1(a); emphasis added.)

Similarly, the charge in Case 28-CA-22882 states in pertinent part:

Within the last six months, the employer had denied and/withheld work opportunities and benefits and refused to consider for rehire Axel Carmona, Blanca Ibarra and Valentin Estrada *and other similarly situated employees* in retaliation for protected concerted activities. (GCX 1(n); emphasis added.)

Based on the foregoing, including the fact that Respondent was afforded due process and that the proposed amendment is factually and legally related to the allegations of the timely-filed charges (see *Redd-I, Inc.*, supra) and those set forth in the Complaint, it is respectfully submitted that, to the extent necessary to allow the Board to grant General Counsel's Exceptions, that the motion to amend the Complaint should be granted.

**V. GARCIA SHOULD BE PROVIDED A FULL REMEDY LIKE THAT PROVIDED TO OTHER DISCRIMINATEES**

As discussed more fully above, it is respectfully submitted that the record establishes that Garcia was, like the other 21 discriminatees found by the ALJ, unlawfully denied consideration for employment and refused rehire by Respondent. It follows that the Board should provide an appropriate remedy for such violations, including by including Garcia in the remedies afforded the other named discriminatees in the ALJ's recommended order.

**VI. CONCLUSION**

Based upon the foregoing and the record evidence considered as a whole, General Counsel respectfully requests that the Board grant the instant Exceptions, find that Respondent unlawfully failed and refused to consider for rehire and hire Garcia, and to provide an appropriate remedy for Garcia.

Dated at Phoenix, Arizona, this 4<sup>th</sup> day of January 2011

Respectfully submitted,

/s/ William Mabry III

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in MERCHANTS BUILDING MAINTENANCE, LLC, Cases 28-CA-22660 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 4<sup>th</sup> day of January 2011, on the following:

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