

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: December 17, 2010

TO : Wanda Pate Jones, Regional Director  
Region 27

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: First Student  
Case 27-CA-21624

524-3350-6300

524-5073-1114

This case was submitted for advice regarding whether an employee was constructively discharged when she quit after being given the Hobson's choice of joining the Union or being terminated. We conclude that the employee was not presented with a Hobson's choice, and thus was not constructively discharged, because she was aware that she had alternatives beyond foregoing her Section 7 rights or quitting. And, even if presented with a Hobson's choice, the Charging Party resigned prematurely and with a separate and overriding motivation unrelated to the alleged Hobson's choice. Thus, the allegation should be dismissed absent withdrawal.

### FACTS

First Student, Inc. ("the Employer") is a school bus transportation provider with a fleet of 60,000 school buses and 68,000 drivers nationwide. The Employer employs 160 drivers in Grand Junction, Colorado, including the Charging Party, who had been a bus driver for eighteen years. Her husband had also worked for the Employer for more than eighteen years, as a Technician (mechanic).

In February 2009, the Teamsters Local Union No. 17 ("the Union") won an NLRB election to represent the Employer's school bus drivers. After almost a year of negotiations, the Employer and the Union entered into a contract effective December 11, 2009. In February 2010,<sup>1</sup> a majority of the employees voted in a Colorado Peace Act election to have a union security agreement.<sup>2</sup>

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<sup>1</sup> Hereinafter all dates are 2010 unless otherwise stated.

<sup>2</sup> Colorado law requires that employees have a separate vote following certification by the NLRB to determine if the employees want a union security clause.

The Charging Party had been a vocal opponent of the Union and its campaign in favor of a union security clause, attending several Union meetings to ask questions in order to challenge the Union representatives. In mid-March, a Union steward gave the Charging Party a one-page form which included a "Membership Application" on the top half and a "Check-Off Authorization and Assignment" section on the bottom. The membership section provided valid notice of the General Motors right not to become a Union member<sup>3</sup> and the right to be a Beck objector.<sup>4</sup> Soon after receiving the membership application and check-off authorization form, the Charging Party contacted the Union steward to express her discomfort with its wording. The Union steward told her that if she did not sign "the card" by April 21 she would be fired.<sup>5</sup>

The Charging Party spoke with her manager about the Union's insistence that she join and he told her to contact human resources for more information. The human resources representative advised the Charging Party that if she did not become a member of the Union she would be terminated.<sup>6</sup> Thereafter, on March 26, the Charging Party contacted the Colorado Department of Labor ("CDOL") and spoke with a compliance officer who informed her that she did not have to become a member of the Union, but she would have to pay "union fees." The compliance officer also informed the Charging Party that she could have the Union's fee deducted directly from her paycheck if she chose to sign an authorization allowing for such deduction. The Charging

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<sup>3</sup> NLRB v. General Motors, 373 U.S. 734 (1963).

<sup>4</sup> Communication Workers of America v. Beck, 487 U.S. 735 (1988).

<sup>5</sup> On March 19, the Charging Party filed the charge in Case 27-CB-5238, alleging that a Union Steward told her that she had to join the Union as a condition of employment. The Region found merit to this allegation and is not seeking advice on the issue.

<sup>6</sup> On May 7, the Charging Party filed the charge in Case 27-CA-21569, alleging that the Employer's human resources representative told her that if she did not join the Union, then the Employer would terminate her. The Region found merit to this allegation and is not seeking advice on the issue.

Party received a letter memorializing her conversation with the CDOL compliance officer.<sup>7</sup>

On April 19, the Employer suspended the Charging Party [FOIA Exemptions 6, 7(C) and 7(D)

.]<sup>8</sup> [FOIA Exemptions 6, 7(C) and 7(D) .]  
On April 21, the Employer converted the Charging Party's suspension to a five-day suspension [FOIA Exemptions 6, 7(C) and 7(D) .]

The Charging Party was scheduled to return to work on April 27th. However, after hearing from other drivers that there were "rumors flying around" about what she [FOIA Exemptions 6, 7(C) and 7(D) ] had done, on April 22, the Charging Party asked the Employer for a leave of absence. She told her manager that he had taken away their livelihood and yet he wanted her to come back and safely perform her job, and that she could not do it. The Employer granted her a thirty-day leave of absence, until May 27.

By letter dated April 30, the Union notified the Employer that five employees, including the Charging Party, had failed to make application to the Union. The Union requested the termination of these five employees unless it received their applications within seven days. The Employer promptly sent a letter, dated May 3, to each of the listed employees stating, in pertinent part:

Friday I received notification from the [Union] that they have not received an application for membership from you as of this date. There are four options available to you:

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<sup>7</sup> In addition to contacting the CDOL compliance officer a second time to confirm the information contained in the letter, the Charging Party had previously conducted her own research to obtain information about open and closed shop arrangements, which she printed out and distributed at a Union meeting prior to the Colorado Peace Act election in February.

<sup>8</sup> [FOIA Exemptions 6, 7(C) and 7(D)

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1. Apply for membership in [the Union]
2. Voluntarily resign your employment with First Student
3. Termination of your employment with First Student after final notification from the [Union]
4. Contact [Employee] #21 for an alternative solution

I need to know your course of action by May 7, 2010.

Employee #21 was a Beck objector, and the Charging Party knew he was not a Union member. According to the Charging Party, when she contacted him he explained that the Charging Party had to fill out a form stating that the Employer could deduct Union dues from her paycheck. The Charging Party later spoke with employee #21 again and was allegedly told she could pay the dues to a charity rather than to the Union, but that she did have to become a Union member.

On or about May 7, the Charging Party went to speak with her manager and explained that she was forced to resign. Her manager told her that the Union had extended the deadline to May 27, but the Charging Party stated that she "wouldn't be coming back to work [because] there was too much going on and too many people talking" so she was going to resign. On her exit form, she wrote that her reason for leaving was "union related."

#### **ACTION**

We conclude that the Charging Party was not presented with the Hobson's choice of foregoing her Section 7 rights or quitting, because she was aware that she had other alternatives available to her, and thus, she was not constructively discharged. And, even if she ultimately would have been presented with a Hobson's choice, the Charging Party quit prematurely because, given the repeated postponement of the Union's alleged deadline to join or be terminated, she was not yet confronted with the dilemma of quitting or foregoing her Section 7 rights. Further, the Charging Party resigned not because she was being asked to forego her rights under the Act, but because she was upset about the Employer's decision to suspend her [FOIA Exemptions 6, 7(C) and 7(D) ] and the resultant rumors circulating at her workplace.

A constructive discharge is not a discharge at all but a resignation which the Board treats as a discharge because

of the circumstances that surround it.<sup>9</sup> One example of a constructive discharge arises when an employer presents an employee with "the Hobson's choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act."<sup>10</sup> In such instances, the choice must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his or her part.<sup>11</sup>

The Board has declined to find a constructive discharge where an employee knew there were alternatives available other than quitting his/her job or abandoning his/her Section 7 rights. In Masdon Industries, Inc.,<sup>12</sup> unrepresented employees engaged in a strike to protest their wages and working conditions. While on the picket line, employees began signing union authorization cards. In a meeting with its employees, the employer told the employees that he would close the plant and move it to another town before he would recognize the union. The Board declined to find a constructive discharge based, in part, on evidence showing that a union representative had informed employees that they had alternative courses of action available to them, including returning to work. And, a number of the strikers did return to the job. The choice between quitting and foregoing rights protected under the Act was not clear and unequivocal.

The Board will also decline to find a constructive discharge where an employee quits his or her employment prematurely in anticipation of a Hobson's choice. In White-Evans Service Co.,<sup>13</sup> the Board found that the eight bargaining unit employees who did not report to work on the day after the Union's contract expired were constructively discharged because the employer gave them the Hobson's choice of either resigning or continuing to work without their chosen bargaining representative. The Board declined to find a constructive discharge of one employee who decided to leave for other employment three weeks prior to the expiration of the agreement, finding that employee's

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<sup>9</sup> ComGeneral Corp., 251 NLRB 653, 657 (1980).

<sup>10</sup> White-Evans Service Co., Inc., 285 NLRB 81 (1987).

<sup>11</sup> Multimatic Products, Inc., 288 NLRB 1279, 1348 (1988); Superior Sprinkler, Inc., 227 NLRB 204, 208-210 (1976).

<sup>12</sup> 212 NLRB 505, 505-506 (1974).

<sup>13</sup> 285 NLRB at 81-82.

resignation to be premature. The Board stated that, "although resigning in the face of [a Hobson's] choice is one thing, 'quitting in anticipation that such may take place later on is an entirely different matter.'"<sup>14</sup> The Board reasoned that the employee "was not confronted with the dilemma of either quitting or forgoing union representation at the time he left."<sup>15</sup>

Further, the Board will not find a constructive discharge where the employer's unlawful restriction is not the true reason for the employee's decision to quit. In Easter Seals,<sup>16</sup> an employee was disciplined for speaking critically about the employer to a fellow employee, rather than abiding by the company's rule requiring employees to take all complaints directly to a manager. She subsequently resigned, allegedly because she was concerned that she would be discharged for continuing to engage in Section 7 activity. The Board, affirming the ALJ, found no constructive discharge because the employee's decision to resign "was not based on her concern that she was faced with a 'Hobson's choice' dilemma, but rather was based on her hurt feelings arising from her perception that she had been treated unfairly."<sup>17</sup>

Here, we conclude that the Charging Party was not constructively discharged because (1) she was not presented with a Hobson's choice but, in fact, she had alternatives other than foregoing protected rights under the Act or resigning, and she was aware of those alternatives; (2) even if she was presented with a Hobson's choice, she quit prematurely; and (3) her true motive for quitting was not the alleged Hobson's choice, but her discontent with being

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<sup>14</sup> Id. at 82 (quoting Marquis Elevator Co., 217 NLRB 461, 461 (1975)). See also ComGeneral Corp., 251 NLRB at 658 ("It is not a constructive discharge to quit in anticipation of the mere possibility that one might be discharged").

<sup>15</sup> White-Evans, 285 NLRB at 82.

<sup>16</sup> 345 NLRB 836 (2005).

<sup>17</sup> Easter Seals, 345 NLRB at 839. Cf. Shoppers Drug Mart, Inc., 226 NLRB 901, 916 (1976) (where constructive discharge was analyzed under theory of intolerable working conditions, Board declined to find a violation where an employee admitted he would have quit irrespective of the employer's unlawful actions).

the subject of gossip over her [FOIA Exemptions 6, 7(C) and 7(D)] safety violations and the Employer's associated disciplinary action.

As to the Charging Party's alternatives, the Union's application for membership clearly states that employees have the right to be nonmembers and to object to paying the full amount of Union dues. The Charging Party therefore had, on the face of the form, the accurate information stating that she was not required to join the Union. In addition, the Charging Party conducted research—including a call to the state department of labor—which informed her that, while she would have to pay Union fees, she did not, in fact, have to be a full member or pay full Union dues. The Charging Party also spoke to a fellow employee who she knew was not a Union member. From this conversation, at the very least, she should have understood that, like him, she could be a nonmember of the Union without losing her job.<sup>18</sup> This evidence demonstrates that, like the employees in Masdon, supra, the Charging Party had alternatives to abandoning her Section 7 rights or her employment, she was aware of her alternatives, and, having spoken with an employee who had retained his employment despite refusing to join the Union, she had proof that those alternatives could apply to her situation. Thus, we conclude that the Charging Party was not presented with a Hobson's choice.

Moreover, even if the Charging Party ultimately would have been presented with a Hobson's choice, she had not yet been forced to forego her Section 7 right to refrain from Union membership and, thus, her resignation was premature. The Union had extended the deadline for membership numerous times, a fact that the manager reminded the Charging Party of as she tendered her resignation, and the Charging Party quit almost three weeks before the latest deadline. Therefore, she resigned prematurely before she was forced to make any decision to join the Union.<sup>19</sup>

Finally, we conclude that, regardless of whether the Employer presented the Charging Party with a Hobson's

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<sup>18</sup> The Charging Party's statement that the employee, himself a nonmember of the Union and a Beck objector, told her she would be required to join the Union and pay full Union dues is inherently incredible. And, even if he did state that misinformation, the Charging Party knew that he had not joined the Union and yet he remained employed.

<sup>19</sup> White-Evans, 285 NLRB at 82 (Board finds no constructive discharge where employee quit three weeks before facing an actual dilemma).

choice, she did not resign because she was forced to choose between joining the Union and quitting her job. Instead, she had another overriding motivation: her discontent over being disciplined [FOIA Exemptions 6, 7(C) and 7(D)

] and the fact that everyone was gossiping about it. On April 22, when the Employer formally suspended her, the Charging Party instead requested a leave of absence because of "rumors flying around" about what she [FOIA Exemptions 6, 7(C) and 7(D)] had done and noting her inability to safely perform the functions of her job in that environment. This request for leave occurred prior to receiving the Employer's letter advising that she needed to look into her alternatives regarding the Union or be terminated. And, the explanation for her resignation, that there was "too much going on and too many people talking," shows that her true reason for resigning was not that she would otherwise be forced to join the Union.

Therefore, since we conclude that the Employer did not constructively discharge the Charging Party, the Region should dismiss this charge, absent withdrawal.

B. J. K.