

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

Advice Memorandum

DATE: February 25, 2011

TO : Richard L. Ahearn, Regional Director
Region 19

Linda L. Davison, Officer in Charge
Subregion 36, Portland

FROM : Barry J. Kearney, Associate General Counsel 524-5079-2819
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SUBJECT: Oregon AFL-CIO 596-6867-8700
Case 36-CA-10725 601-5025-3354
625-3333-2050

This Section 8(a)(1) and (3) case was submitted for advice as to whether the Employer violated the reinstatement terms of an informal settlement agreement or the Act by offering a new position to the Charging Party but hiring someone else when the Charging Party refused to confirm in writing that the new position satisfied the requirements of the settlement agreement.

We conclude that the position offered was not substantially equivalent to the Charging Party's former position as required by the settlement agreement; therefore, the Employer has not fulfilled its obligation under the terms of the agreement. We further conclude, however, that the Employer did not violate the settlement agreement or the Act when it hired another because that decision was motivated by lawful considerations.

FACTS

The Employer hired the Charging Party on April 7, 2008 as a Political Organizer, a temporary position funded for one year. The Employer then terminated the Charging Party on July 1, 2008. The Charging Party filed an unfair labor practice charge alleging that she was discharged for engaging in protected concerted activity, and the Region found merit to the charge. On April 8, 2009, the Employer entered into an informal settlement agreement with the Region. By that time, the position of Political Organizer no longer existed; therefore, the settlement agreement required, among other things, that the Employer place the Charging Party on a preferential hiring list for her former position as a Political Organizer and/or any substantially equivalent position.

On March 16, 2010, the Employer offered the Charging Party a Campaign position, which the Charging Party agreed

to accept but indicated that she did not believe that the position was a substantially equivalent position under the settlement agreement. In response, the Employer indicated that the job offer was conditioned upon the Charging Party conceding that the Campaign position satisfied the terms of the informal settlement agreement. When the Charging Party refused, the Employer treated her refusal as a rejection of the offer and filled the position with a less experienced individual for substantially less pay than that offered to the Charging Party. The Employer asserts that it only offered the Campaign position to the Charging Party because it did not want to violate the terms of the informal settlement agreement by not offering the position, and that it would not have offered the position if it did not believe the position met the agreement's requirements.¹

ACTION

We conclude that the Campaign position was not substantially equivalent to the Political Organizer position, and therefore the Employer has not fulfilled its obligation under the terms of the agreement, but the Employer did not violate the agreement or the Act when it hired someone else for the position because the Employer has met its Wright Line burden.² Therefore, the Region should dismiss the instant charge.

A. The Campaign Position Is Not Substantially Equivalent to the Political Organizer Position

In determining what constitutes substantially equivalent employment, the Board uses an objective appraisal, considering among other things, fringe benefits such as retirement and health benefits; seniority for the purposes of vacation, retention and promotion; distance between the location of the job and the employee's home; and working conditions.³ Based on the following reasons, we conclude that there are significant enough differences between the Political Organizer position and the Campaign position that they are not substantially equivalent.

¹ The Charging Party filed, and withdrew after the Board's investigation, an earlier charge accusing the Employer of violating the terms of the settlement agreement based on its handling of another vacancy.

² Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

³ See e.g., Little Rock Airmotive, Inc., 182 NLRB 666 (1970), enfd. in part 455 F.2d 163 (8th Cir. 1972).

First, as a Political Organizer, the Charging Party was based out of Salem, Oregon, and her work territory consisted of the Salem area and surrounding Mid-Willamette Valley area. However, the Campaign position was located in Portland, approximately 50 miles from the Salem office. The Board has held that requiring such a change in commuting distance makes the new job not substantially equivalent.⁴

Second, the Campaign position has absolutely no fringe benefits. On the other hand, the Political Organizer position benefit package included health insurance, vacation pay, sick leave, car insurance, and pension. The Charging Party estimates the monetary value of these benefits at approximately \$1,600 a month and there is no evidence that the Employer made any offer to offset the discrepancy. The Board has held that when a position offered does not have the same benefits as the former position held by an employee, the new position is not substantially equivalent.⁵

Finally, the Political Organizer position was a bargaining unit position with contractual protections and rights whereas the Campaign position is not.

Thus, we conclude that the Campaign position is not substantially equivalent to the Political Organizer position.

B. The Employer Did Not Violate the Terms of the Settlement Agreement by Filling the Campaign Position with Someone Other Than the Charging Party

We also conclude that there has been no evidence presented to support the allegation that the Employer violated the terms of the settlement agreement. There is nothing in the settlement agreement that requires the Employer to create a position for the Charging Party. The settlement agreement only requires the Employer to make an offer to the Charging Party for her former position or a substantially equivalent position.

⁴ See Tualatin Electric, Inc., 331 NLRB 36, 40 (2000) (offer of reinstatement at location 40 miles further from discriminatee's home made position not substantially equivalent).

⁵ See Marchese Metal Industries, 313 NLRB 1022, 1032 (1994) (reinstatement offer that did not include contractual benefits such as medical plan and payment into annuity fund made position not substantially equivalent).

The Board has held that an employer that has an obligation to offer reinstatement to substantially equivalent positions has no legal obligation to apprise the employees of nonequivalent jobs or to allow them to bid on such jobs.⁶ In Diamond Walnut Growers, Inc., after strikers had agreed to an unconditional return to work, the employer posted several regular and seasonal job openings but did not inform the returning strikers about the posting. The General Counsel alleged that the employer violated Section 8(a)(3) of the Act because it failed to notify the strikers about the openings and this amounted to discrimination based on the employees' status as former-strikers.⁷ The Board disagreed because the posted positions were not substantially equivalent to the striking employees' former jobs.⁸ Thus, since the Campaign position is not substantially equivalent to the Political Organizer position, the Employer had no legal obligation to offer the position to the Charging Party.

Requiring the Employer to offer the Campaign position to the Charging Party would create two reinstatement rights for the Charging Party, a result not required by Board law. In Rose Printing Co., the Board held that in striking a balance between the rights of the employer and returning strikers, the employer should not be required to offer positions to strikers that they were not required to accept.⁹ The Board reasoned that to require the employer to do so would grant strikers two reinstatement rights - the right to any job that they qualified for and the right to transfer to their former job or an equivalent job when one of those positions becomes available.¹⁰

Because the Employer has not had a Political Organizer position or a position substantially equivalent to offer the Charging Party since the signing of the settlement agreement, the Employer has not violated the terms of the settlement agreement. Instead, the Employer simply has not yet fulfilled its obligation under the terms of the agreement.

⁶ Diamond Walnut Growers, Inc., 340 NLRB 1129, 1130 (2003).

⁷ Ibid.

⁸ Ibid.

⁹ 304 NLRB 1076, 1078 (1991).

¹⁰ Id. at 1079.

C. The Employer Did Not Violate the Act By Hiring Someone Else For the Campaign Position

Although the Employer had no obligation to offer the Charging Party the Campaign position, it could not refuse to offer her that position for a discriminatory reason.¹¹

In Section 8(a)(3) cases, the General Counsel has the burden of persuading the Board by a preponderance of the evidence that the employer unlawfully discriminated against protected union activity by taking an adverse action based at least in part on anti-union animus.¹² The General Counsel can establish a prima facie case of unlawful discrimination under Section 8(a)(3) by showing the existence of protected activity, employer knowledge of that activity, and union animus culminating in an adverse personnel action. Once the General Counsel has made that showing, the employer can avoid liability only by proving by a preponderance of the evidence that its actions were also motivated by legitimate, non-discriminatory concerns that would have caused it to take the same action even absent any unlawful motivation.¹³

Here, we conclude that even assuming that the General Counsel could make a prima facie case, the Employer has presented a Wright Line defense for its actions. The Employer originally offered the Campaign position to the Charging Party in an attempt to make sure that it was not violating the terms of the settlement agreement since the Charging Party had accused the Employer of violating the terms of the settlement agreement regarding another position. After making the offer and later learning that the Charging Party did not believe that the Campaign position was substantially equivalent to the Political Organizer position, the Employer clarified to the Charging Party that it did not wish to make her an offer of employment to fill the Campaign position unless she believed the position fulfilled its obligation under the terms of the agreement. It was only after the parties failed to agree that the Campaign position constituted a substantially equivalent position under the settlement agreement that the Employer hired another individual to fill the Campaign position.

¹¹ See, e.g., Rose Printing Co., 304 NLRB at 1078.

¹² Wright Line, 251 NLRB at 1089.

¹³ Ibid.

Moreover, there is no evidence that the Employer refused to hire the Charging Party and instead hired the other individual for any reason other than sound business judgment - the fact that the position could be filled with a less experienced, less skilled individual for substantially less pay.

Thus, we conclude that the Employer has met its Wright Line burden of showing that its hiring decision was based upon legitimate, non-discriminatory concerns and not the Charging Party's protected activity.

Accordingly, absent withdrawal, the Region should dismiss the charge.

B.J.K.