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August 29, 2011

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Please find enclosed the appeal brief in the Case No. 16-CA-27783 NAACP Houston Branch and Tracie Jackson.

Signed,

/s/ Melvin Houston

Melvin Houston, Attorney
On behalf of NAACP Houston Branch

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

NAACP HOUSTON BRANCH

and

Case 16-CA-27783

TRACIE JACKSON, an Individual

**RESPONDENT NAACP'S EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

The NAACP, Respondent, hereby files its exceptions to the Administrative Law Judge's ("ALJ") Findings of Fact, Analysis of Conclusory Findings, Conclusions of Law, Remedy and Order as follows.

B. Facts

1. Statement: Although not relevant to the protected concerted activity issue, I question Douglas' recollection regarding the date he made the call and whether Smith was present. On June 14, when Smith met with the employees, she referred to the quarterly release of funds. If she knew that Douglas had procured the funds necessary to meet the payroll and that it was simply a matter of the board of directors accepting that money, I am satisfied that she would have so informed the employees thereby alleviating their expressed concerns regarding whether they were going to be paid on time. (See Facts, Pg. 4, Lines 26-32)

Exception: The ALJ's finding that Smith was not truthful when she spoke to the employees on June 14 because she did not inform them that Professor Douglas had procured the funds necessary to meet payroll is not supported by substantial evidence and was not reasonable.

2. Statement: In an action unrelated to grant costs, the committee recommended that the executive director inform all employees working under a grant that "upon expiration of the grant ... [that] they will no longer be employed ... and that they may re-apply ... if the Branch re-applies for a grant, receives such and accepts grant funds for a future grant period." (See Facts, Pg. 4, Lines 43-47).

Exception: The ALJ's finding that the action of the NAACP personnel committee was unrelated to the grant costs is not supported by substantial evidence and was not reasonable.

3. Statement: Douglas, when asked about the item relating to employee behavior, answered, "I have absolutely no idea." I doubt the veracity of the foregoing response. The recommendation relating to current employees having to reapply for their current positions was unrelated to the issues concerning grant costs. The only agenda item that could have resulted in such a recommendation was the one related to employee concerns and "their behavior." (See Facts, Pg. 4-5, Lines 48-53, Line 1).

Exception: (1) The ALJ's doubt of the veracity of the response of Professor Douglas is not supported by substantial evidence and was not reasonable; (2) The ALJ's finding that the recommendation relating to current employees having to reapply for their current positions was unrelated to the issues concerning grant costs is not supported by substantial evidence and was not reasonable; (3) The ALJ's finding that the only agenda item that could have resulted in such a recommendation was the one related to employee concerns and their behavior is not supported by substantial evidence and was not reasonable.

4. Statement: On August 2, Jackson called Jonathan Vickery, director of grants for the Texas Access to Justice Foundation. She informed him of the payroll problem that had occurred in June that affected all employees and complained individually that she had not been reimbursed for her attendance at the Texas State Bar meeting. Vickery called Dunson, who he knew was "the supervising attorney." Dunson confirmed the information that Jackson had given Vickery. (See Facts, Pg. 5, Lines 13-17).

Exception: (1) The ALJ's finding that Jackson informed Vickery of the payroll problem in June that affected all employees is not supported by substantial evidence; (2) The ALJ's finding that Dunn confirmed the information that Jackson had given to Vickery is not supported by substantial evidence.

5. Statement: Vickery, who makes it a practice not to reveal the names of complaining employees, called Smith and informed her that he had been contacted by "employees" and that it was his understanding that employees were not getting paid ... Smith then spontaneously brought up Jackson's name, stating that she was "a problem employee" who "was causing morale problems." Vickery did not question Smith regarding a personnel matter, and he did not confirm to Smith that it was Jackson who had called him. He had told Smith that he had been contacted by "employees." (See Facts, Pg. 5, Lines 22-30).

Exception: (1) The ALJ's finding that Vickery called Smith and informed her he was contacted by employees is not supported by substantial evidence; (2) The ALJ's finding that Smith spontaneously brought up Jackson's name, stating she was a problem employee causing morale problems is not supported by substantial evidence; (3) The

ALJ's finding that Vickery told Smith he had been contacted by "employees" is not supported by substantial evidence.

6. Statement: On September 25, Dunson, who had been terminated on August 31 when her grant expired, attended a banquet at the Missouri City Branch of the NAACP. At the banquet she had a brief conversation with Johnny Gentry, assistant treasurer of the Houston Branch whom Jackson had called on June 14 regarding the pay issue. Gentry asked Dunson whether "that girl called the grant funders." Dunson answered that she had, and Gentry then stated, "That girl was causing problems." "That girl" had to have been Jackson. No other female employee had taken the lead with regard to the employees' concerns, and Smith had referred to Jackson when speaking with Vickery. Gentry also told Dunson that she had "stirred up a whole lot of trouble as well" Gentry did not testify, and I fully credit the testimony of Dunson. (See Facts, Pg. 5 Lines 31-40)

Exception: The ALJ's finding is based on hearsay. Furthermore, there is no supporting substantial evidence for the ALJ's finding that (1) that girl had to be Jackson is not supported by substantial evidence; (2) The ALJ's finding that no other female employee had taken the lead with regard to the employees' concerns; (3) Smith had referred to Jackson when speaking with Vickery; and (4) Gentry also told Dunson that she had "stirred up a whole lot of trouble as well.

7. Statement: On August 10, Smith spoke privately with paralegal Fields. She called him into her office and stated that she "wanted me to stay out of what was going on in the office," and that "my job would be safe." Fields informed his supervisor,

Dunson, of this conversation. He also told administrative assistant Flores. Flores told Fields that Smith had a similar conversation with her. (See Facts, Pg.5, Lines 47-50).

Exception: (1) The ALJ's finding that Smith stated she wanted Fields to stay out of what was going on in the office and his job would be safe is not supported by substantial evidence; (2) The ALJ's finding that Flores told Fields that Smith had a similar conversation with her is not supported by substantial evidence.

8. Statement: Smith did not dispute the foregoing testimony. (See Facts, Pg. 6, Line 35.

Exception: The ALJ's finding is a misstatement of the facts and is not supported by substantial evidence.

9. Statement: Consistent with the representations that Smith had made to Fields and Flores, both were offered employment. (See Facts, Pg.6, Lines 43-44).

Exception: The ALJ's finding is a misstatement of the facts and is not supported by substantial evidence.

10. Statement: The board of directors had not seen such a need in May, when Smith interviewed Jackson alone even though attorney Dunson was on the staff. Although Douglas referred to "the board," Smith acknowledged that the request for Douglas to participate was made by Scantlebury. (See Facts, Pg. 7, Lines 3-6).

Exception: The ALJ's finding the board of directors had not seen such need for an attorney to interview other attorneys in May when Smith interviewed Jackson alone is not supported by substantial evidence. The ALJ's finding that Smith misrepresented that the board requested Douglas to participate in the interview process is not supported by substantial evidence.

11. Statement: In early November, Beverly Spencer, who had no experience with the NAACP, was hired for that position. There is no evidence that there was any announcement of a reopening of the application process. The record does not establish when Spencer applied. Douglas testified that Spencer "came later." Spencer did not testify. (See Facts, Pg. 7, Lines 21-23).

Exception: The ALJ's finding that there is no evidence that there was any announcement of a reopening of the application process regarding Spencer's position is not supported by substantial evidence.

12. Statement: Although the position was vacant at the time Jackson's application was actually received, she was not called for an interview. (See Facts, Pg. 7, Lines 30-31).

Exception: The ALJ's finding that Jackson was not called for an interview is not supported by substantial evidence.

13. Statement: Although Douglas was involved in the September interviews because "we did not have a lawyer on staff," he participated in the November interviews because Spencer, the newly hired legal advocacy program director, "had no experience with the NAACP." (See Facts, Pg. 7, Lines 45-47).

Exception: The ALJ's finding that Professor Douglas participated in the interviews because Spencer had no experience with the NAACP is a misstatement of the facts and not supported by substantial evidence.

14. Statement: Kenya Harrold was hired for the position. The record does not establish that Harrold had 5 years of employment law experience. The firm, at that time, did not practice employment law. Harrold acknowledged that she "worked on some

tort cases early on, like my first and second year of employment," ... She later appeared to amend that answer, referring to "the first year." (See Facts, Pgs. 7-8, Lines 47 & 1)

Exception: The ALJ's finding that the record did not establish that Harrold had 5 years of employment law experience is a misstatement of the record and is not supported by substantial evidence and is not reasonable.

15. Statement: She graduated from law school in 2004, and began working for a law firm in Kansas City, Missouri, in September 2004. She moved to that firm's offices in Houston in 2005. The firm, at that time, did not practice employment law. Harrold acknowledged that she "worked on some tort cases early on, like my first and second year of employment," noting that her undergraduate degree was in biology and that she did a lot of product liability work. She later appeared to amend that answer, referring to "the first year." The record does not reflect when the firm actually became involved in employment law. Insofar as it did so after Harrold's "first and second year of employment," Harrold would have had a little over 4 years of employment law experience when she applied for the Houston Branch position in 2010. If the firm began practicing employment law in late 2005, Harrold may have barely had the required 5 years of experience, but the record does not establish that she did. The firm at which Harrold worked was a defense firm, thus Harrold had no experience representing plaintiffs. She recalled working on between 7 and employment cases as part of a team of attorneys. As a younger associate she was doing "most of the grunt work." (See Facts, Pg. 8, Lines 1-14).

Exception: (1) The ALJ's finding the firm did not practice employment law in 2005 is not supported by substantial evidence; (2) The ALJ's finding that Harrold later appeared

to amend her answer, referring to the first year is not supported by substantial evidence; (3) The ALJ's finding that the record does not establish that Harrold had 5 years of employment law experience is not supported by substantial evidence and is not reasonable; (4) The ALJ's finding that Harrold had no experience representing plaintiffs is not supported by substantial evidence; and (5) The ALJ's finding that Harrold recalled working on between 7 and 10 employment cases is a misstatement of the facts and is not supported by substantial evidence.

C. Analysis and Concluding Findings

1. Statement: Jackson engaged in protected concerted activity and the Respondent was fully aware of her activity. Jackson, due to her background in employment law, took the lead in the employees' effort to be paid on time. (See Analysis, Pg. 9, Lines 21-23).

Exception: The ALJ's conclusory finding that Jackson engaged in protected concerted activity and she took the lead in the employees' effort to be paid on time is not supported by substantial evidence and is a misinterpretation of the law.

2. Statement: The Respondent bore animus towards Jackson's activity. (See Analysis, Pg. 9, Lines 21-22).

Exception: The ALJ's conclusory finding is not supported by substantial evidence and is a misinterpretation of the law.

3. Statement: She [Jackson] expressed the concern of the employees in her e-mail to the board of directors, noting the risk of "possible legal consequences that can arise when an employer fails to pay its employees in a timely manner. (See Analysis, Pg. 9, Lines 27-30)

Exception: The ALJ's conclusory finding is not supported by substantial evidence.

4. Statement: The Respondent bore animus towards Jackson's activity. Executive Director Smith told Director of Grants Jonathan Vickery that Jackson was "a problem employee," and informed paralegal Fields that his job was safe if he "stayed out of this stuff." The board of directors also bore animus towards Jackson's protected activities. When responding to the e-mail that Jackson sent to the board of directors, President Scantlebury characterized Jackson's reference to legal consequences as a threat. When the personnel committee met on June 29, one of the agenda items was, "the concerns of the grant employees and their behavior." Animus on the part of the board is further confirmed by the undenied testimony of Dunson that, when she confirmed to Johnny Gentry, the assistant treasurer of the board of directors, that "that girl," Jackson, had called the funders, he stated, "That girl was causing problems." I find that the protected concerted activity in which Jackson engaged was a substantial and motivating factor in the failure of the Respondent to rehire her. (See Analysis, Pg. 9, Lines 32-43).

Exception: (1) The following ALJ's conclusory findings are not supported by substantial evidence and misinterprets the law: (1) the Respondent bore animus towards Jackson's activity; (2) Executive Director Smith told Director of Grants Jonathan Vickery that Jackson was "a problem employee," and informed paralegal Fields that his job was safe if he "stayed out of this stuff; (3) The board of directors also bore animus towards Jackson's protected activities; (4) When responding to the e-mail that Jackson sent to the board of directors, President Scantlebury characterized Jackson's reference to legal consequences as a threat; (5) Animus on the part of the board is further confirmed by the

undenied testimony of Dunson that, when she confirmed to Johnny Gentry, the assistant treasurer of the board of directors, that "that girl," Jackson, had called the funders, he stated, "That girl was causing problems; and (6) the finding that the protected concerted activity in which Jackson engaged was a substantial and motivating factor in the failure of the Respondent to rehire her.

5. Statement: Insofar as the General Counsel established that the protected concerted activity in which Jackson engaged was a substantial and motivating factor in the failure of the Respondent to rehire her, it was incumbent upon the Respondent to show that Jackson would not have been rehired in the absence of her protected concerted activity. The Respondent did not do so. (See Analysis, Pg. 9, Lines 45-48).

Exception: The ALJ's conclusory findings the GC established protected concerted activity that motivated Respondent's decision not to hire Jackson is not supported by substantial evidence and is a misinterpretation of the law.

6. Statement: The failure of the Respondent to hire Dunson, who had been on the staff for 2 years, and Jackson, who had been on the staff for almost 4 months, and replacing them with employees who had no experience with the NAACP is persuasive evidence that the failure of the Respondent to hire them was because of their participation in protected concerted activity. (See Analysis, Pg. 9-10, Lines 50-52, Line 1).

Exception: The ALJ's conclusory finding of persuasive evidence that Respondent's failure to hire was because of protected concerted activity is not supported by substantial evidence and is a misinterpretation of the law.

7. Statement: Jackson, who was fully qualified, was not interviewed or rehired. Although purportedly reopened, there is no evidence of any announcement of

the availability of that single position. There is no evidence that the application process for the legal advocacy program director position was reopened. (See Analysis, Pg. 10, Lines 14-18).

Exception: The ALJ's conclusory findings are not supported by substantial evidence that (1) Jackson was not interviewed, (2) there is no evidence of any announcement of availability for the position, and (3) there is no evidence that the application process for the legal advocacy program director position was reopened. **[Look at Smith's Testimony].**

8. Statement: The Respondent herein took the unprecedented action of involving Douglas in the interview process purportedly because, at the time, we did not have a lawyer on staff, and the board just felt that that there needed to be a lawyer involved. The board of directors had not seen such a need in May, when Smith interviewed Jackson alone even though Director Dunson was on the staff. (See Analysis, Pg. 10, Lines 21-25).

Exception: The ALJ's conclusory findings are not supported by substantial evidence.

9. Statement: Harrold was hired. Douglas testified that "the depth of her [Harrold's] experience and the quality of her experience was much greater" than that of Jackson. I do not credit Douglas regarding his alleged assessment of the depth and quality of experience of Harrold as compared to Jackson. She [Harrold] had no experience in mediation. She [Harrold] had worked on between 7 and 10 employment cases as part of a team of attorneys doing "most of the grunt work." She [Harrold] had no experience with the NAACP. (See Analysis, Pg. 10, Lines 29-37).

Exception: The following conclusory findings of the ALJ were not supported by substantial evidence and were misinterpretations of the law: (1) I do not credit Douglas regarding his alleged assessment of the depth and quality of experience of Harrold as compared to Jackson; (2) She [Harrold] had no experience in mediation; (3) She [Harrold] had worked on between 7 and 10 employment cases as part of a team of attorneys doing most of the grunt work; and (4) She [Harrold] had no experience with the NAACP.

10. Statement: How Douglas could honestly conclude that Harrold's depth and quality of experience performing grunt work with a team of attorneys at a large law firm as compared to Jackson's experience in several different forums is incomprehensible. I do not credit that testimony. (See Analysis, Pg. 10, Lines 42-45).

Exception: The ALJ's conclusory finding is a misstatement of the facts and not supported by substantial evidence.

11. Statement: Jackson had earned a masters degree in labor and employment law. Douglas did not address Jackson's academic credentials which included the masters degree as well as certification in mediation and training in arbitration. (See Analysis, Pg. 11, Lines 3-5).

Exception: The ALJ's conclusory findings are misstatements of the facts and not supported by substantial evidence.

12. Statement: Notwithstanding Smith's claim that she relied upon the recommendations of Douglas, he testified that she "wanted to look at somebody we already interviewed ... [s]o there were actually three people" in the November interviews. The Respondent, prior to those interviews, would not have known whether Harrold was suitable. Jackson was the only other applicant. I question whether Smith's action,

including an applicant who had previously been rejected, was taken in order to assure that the position would be awarded to someone other than Jackson. (See Analysis, Pg. 11, Lines 7-12).

Exception: The ALJ's conclusory findings are a misstatement of the facts and not supported by substantial evidence that (1) the Respondent, prior to those interviews, would not have known whether Harrold was suitable. Jackson was the only other applicant; and (2) I question whether Smith's action, including an applicant who had previously been rejected, was taken in order to assure that the position would be awarded to someone other than Jackson.

13. Statement: Douglas did not inquire whether she declined a position with the firm that acquired the "practice group," or whether she was not offered a position. (See Analysis, Pg. 11, Lines 18-19).

Exception: The ALJ's conclusory finding is a misstatement of the facts and not supported by substantial evidence.

14. Statement: The NAACP was hiring an advocate for persons who did not have the ability to advocate on their own behalf. Although Harrold had never represented plaintiffs, Douglas discounted her lack of experience stating that it did not matter "which side of the fence you're batting from." Harrold had never "batted." Harrold had never been the sole attorney responsible for presenting a case on behalf of a group or individual. She had no experience as a single advocate in the trenches. Her experience with the law firm involved working as a member of a team of attorneys doing grunt work. (See Analysis, Pg. 11, Lines 23-30).

Exception: The ALJ's conclusory findings are misstatements of the facts and not supported by substantial evidence that (1) The NAACP was hiring an advocate for persons who did not have the ability to advocate on their own behalf; (2) Although Harrold had never represented plaintiffs, Douglas discounted her lack of experience stating that it did not matter which side of the fence you're batting from; (3) Harrold had never "batted; (4) Harrold had never been the sole attorney responsible for presenting a case on behalf of a group or individual; (5) She had no experience as a single advocate in the trenches; and (6) Her experience with the law firm involved working as a member of a team of attorneys doing "grunt work.

15. Statement: Douglas was asked, "Did you ever review the work that she did for the Branch from the time that she was there?" He answered, "No." Douglas, an academician, did not consider or give credit to Jackson for her practical experience and history of representing persons claiming discrimination against them for unlawful reasons. (See Analysis, Pg. 11, Lines 33-36).

Exception: The ALJ's conclusory finding is a misstatement of the facts and not supported by substantial evidence.

16. Statement: The foregoing admissions by Douglas, that he made no assessment of Jackson's abilities or even review her performance in the very position for which she was applying, establish that the refusal to hire Jackson for her former position was a foregone conclusion dictated by Executive Director Smith at the direction of the board of directors. (See Analysis, Pg. 11, Lines 39-42).

Exception: The ALJ's conclusory finding that the admissions by Douglas establish that the refusal to hire Jackson for her former position was a foregone conclusion dictated by

Executive Director Smith at the direction of the board of directors is a misstatement of the facts and not supported by substantial evidence.

17. Statement: I find that the Respondent brought Douglas into the interview process in an attempt to give the Respondent a nondiscriminatory basis for refusing to rehire Jackson. I find that the attempt failed. Notwithstanding Spencer's lack of experience with the NAACP, there is no evidence that she could not have competently determined which applicants had the experience necessary to serve as the employment law staff attorney for the Houston Branch. As discussed above, Jackson was more qualified than Harrold for the position that the Respondent was seeking to fill. (See Analysis, Pg. 11, Lines 44-50).

Exception: The ALJ's conclusory findings are misstatements of the facts and not supported by substantial evidence that (1) the Respondent brought Douglas into the interview process in an attempt to give the Respondent a nondiscriminatory basis for refusing to rehire Jackson and the attempt failed; (2) Notwithstanding Spencer's lack of experience with the NAACP, there is no evidence that she could not have competently determined which applicants had the experience necessary to serve as the employment law staff attorney for the Houston Branch; and (3) Jackson was more qualified than Harrold for the position that the Respondent was seeking to fill.

18. Statement: The Respondent has not shown that Jackson would not have been hired in the absence of her protected concerted activities. The Respondent, by refusing to hire Jackson because of her protected concerted activities, violated Section 8(a)(1) of the Act. (See Analysis, Pg. 11, Lines 50-52).

Exception: The ALJ's conclusory findings are not supported by substantial evidence and are misinterpretations of the law that (1) the Respondent has not shown that Jackson would not have been hired in the absence of her protected concerted activities; and (2) the Respondent, by refusing to hire Jackson because of her protected concerted activities, violated Section 8(a)(1) of the Act.

19. Respondent specifically excepts, in its entirety, to each statement in the ALJ's Conclusions of Law, Remedy and Order (See Decision, Pgs 12-13).

DATED: August 29, 2011

Respectfully submitted,

/s/ James M. Douglas

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CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on the following individuals and parties by regular mail on August 29, 2011.

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DATED: August 29, 2011

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I certify that a true copy of the NAACP Exceptions and Brief in Support were served on the following individuals and parties by e-mail on August 29, 2011.

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