UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NAACP HOUSTON BRANCH

and **Case 16-CA-27783**

TRACIE JACKSON, an Individual

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

The NAACP Houston Branch (the "Houston Branch"), Respondent herein, file this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") and would respectfully show the Court the following:

STATEMENT OF THE CASE

On August 31, 2010, Tracie Jackson ("Jackson") lost her job as a staff attorney for the Houston Branch of the NAACP when grant money funding her salary ran out. Jackson reapplied for the position some three months later and was not hired. She sees in this some grand scheme by the NAACP to discriminate against her for her prior alleged protected concerted activity. While her pride may well have been injured, Jackson has failed to produce supporting substantial evidence that (1) she engaged in protected concerted activity, (2) the NAACP exhibited any anti-union animus for her alleged conduct; and (3) she was otherwise discriminated against for any alleged protected concerted activity. Thus, the Board should reverse the ALJ's decision and dismiss the complaint with prejudice.

RELEVANT FACTS

The Houston Branch is an unincorporated association and branch of the National Association for the Advancement of Colored People (the "NAACP"). Smith is, and has been since 2000, the Executive Director of the Houston Branch.

In May 2010, the Houston Branch hired Jackson as a staff attorney, with her salary entirely funded by a grant from the Texas Access to Justice Foundation (the "Foundation"), a non-profit organization.

In June 2010, the Houston Branch experienced some cash flow problems and informed the employees to anticipate their payroll checks to be delayed. On June 14, 2010, Jackson sent an e-mail to her Executive Director, Yolanda Smith, requesting Smith to address the employees regarding the payroll issue. Smith then met with the employees and addressed the cash flow problems and confirmed that the employees would be paid. Being unsatisfied with Smith's statements, Jackson sent an e-mail to the NAACP Board President, Scantlebury, and expressed concerns regarding her upcoming payroll check. Scantlebury responded to Jackson's e-mail and the payroll issue was timely resolved.

In August 2010, the Houston Branch adopted a policy of terminating employees whose compensation was funded entirely by grants upon the expiration of the particular grant. Per this policy, on August 31, 2010, the Houston Branch terminated Jackson's employment when the Foundation grant funding her salary expired. The Houston Branch declined to rehire Jackson when she applied for her old position again some three months later.

On a single occasion during her brief tenure, Jackson communicated to the Houston Branch her concerns regarding (1) the anticipated delay of disbursing her payroll check by the Houston Branch in June 2010. Jackson now claims the Houston Branch denied her rehire because she engaged in protected concerted activity under the National Labor Relations Act.

ISSUES PRESENTED

1. WHETHER JACKSON ENGAGED IN PROTECTED CONCERTED ACTIVITY
2. WHETHER THE DECISION NOT TO HIRE JACKSON WAS MOTIVATED BY ANTI-UNION ANIMUS
3. WHETHER THE NAACP REASON FOR NOT HIRING JACKSON WAS PRETEXT

ARGUMENTS AND AUTHORITIES

A. WHETHER JACKSON ENGAGED IN PROTECTED CONCERTED ACTIVITY

In his decision, the ALJ indicated that Jackson's protected concerted activity consisted of the following conduct: (1) informing employees of their right to file claims with the Texas Workforce Commission; (2) requesting Executive Director Smith to address the employees regarding the payroll issue; (3) sending an e-mail to the NAACP Board which noted the risk of possible legal consequences for failure to pay employees in a timely manner; and (4) speaking first at the Board meeting she attended with other employees. (See ALJ Decision, Pg. 9, Lines 21-30).

As the ALJ points out, employee activity is concerted when it is "engaged in with or on the authority of other employees," and a respondent violates the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is "motivated by the employee's protected concerted activity." *Meyers Industries (Meyers I),* 268 NLRB 493, 497 (1984). (See ALJ Decision, Pg. 9, Lines 37-41).

The test as to whether an employer has violated section 8(a)(1) is whether the employer's questions or statements tend to be coercive under the totality of the circumstances, not whether the employees were in fact coerced. *TRW-United Greenfield Div. v. NLRB,* 637 F.2d 410, 415-16 (5th Cir.1981) (citing *Sturgis Newport Bus. Forms, Inc. v. NLRB,* 563 F.2d 1252, 1256 (5th Cir.1977)

First, there is no evidence that Jackson's informing other employees of their right to file claims with the Texas Workforce Commission is protected concerted activity in this case. There is also no evidence that the other employees engaged in with or gave Jackson the authority to advise them of their right to file claims with the Texas Workforce Commission. Thus, Jackson's conduct here does not rise to the level of protected concerted activity. Furthermore, there is no evidence that the NAACP was aware that Jackson informed the other employees of their right to file claims with the Texas Workforce Commission. Therefore, there was no violation of the Act.

Second, there is no evidence that the other employees engaged in with or gave Jackson authority to request Smith to address the employees regarding the payroll issues. Although Smith did address the employees in meeting as requested and Jackson made comments therein (See ALJ Decision, Pg. 9, Lines 26-27), there is no evidence that the other employees authorized or participated in the request. Therefore, Jackson's conduct here does not rise to the level of protected concerted activity.

Third, Jackson sending an e-mail to the NAACP Board which noted the risk of possible legal consequences for failure to pay employees in a timely manner is not evidence of protected concerted activity in this case. There is no evidence that the other employees engaged in with or gave Jackson the authority to send the e-mail.

Therefore, Jackson's conduct here does not rise to the level of protected concerted activity.

Fourth, the mere fact that Jackson spoke first at the Board meeting is not evidence of protected concerted activity in this case. There is no evidence that Jackson spoke on behalf of anyone other than herself. It is apparent that each employee spoke on their own behalf regarding their need to receive their payroll check on time. Therefore, Jackson's conduct here does not rise to the level of protected concerted activity.

Based on the foregoing, the ALJ's findings and conclusions that Jackson engaged in protected concerted activity are not supported by substantial evidence in the record. Accordingly, the ALJ's decision must be reversed.

B. Whether Anti-Union Animus Motivated the Decision not to hire Jackson

In his Decision, the ALJ stated the NAACP bore animus toward Jackson based on the following conduct: (1) Executive Director Smith told Director of Grants Jonathan Vickery that Jackson was a problem employee; (2) Smith informed paralegal Fields that his job was safe if he stayed out of this stuff; (3) 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; (4) when the personnel committee met on June 29, one of the agenda items was, the concerns of the grant employees and their behavior; and (5) the 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." (See ALJ Decision, Pg. 9, Lines 32-43)

Indications of discriminatory motive may include expressed hostility toward the protected activity, abruptness of the adverse action, timing, pretextual reason, disparate treatment, departure from past practice, and/or the employer's inability to adhere to a consistent explanation for the action. *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001); *Dynabil Industries*, 330 NLRB 360 (1999); *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000).

First, Smith's discussion with Vickery does not rise to the level of anti-union animus. (See Smith Testimony, Trial Transcript, Pg. 129, Lines 12-25). There is no evidence of any expressed hostility toward Jackson's alleged protected activity in Smith's discussion with Vickery. Furthermore, Jackson did appear to cause problems by contacting Vickery and complaining about her being informed that she might not receive her payroll check on time. (See Vickery Testimony, Trial Transcript, Pg. 102, Lines 2-12). It is clear from this testimony that Jackson only complained about herself and not the other employees. (See id).

Second, Smith's alleged statement to Fields that his job would be safe if he stayed out of this stuff does not rise to the level of anti-union animus. Although Smith denies she made this statement, there is no evidence of anti-union animus in this statement.

Third, there is no evidence of any anti-union animus in NAACP President Scantlebury's response e-mail to Jackson. (See ALJ Decision, Pg.3, Lines 36-47). In her response e-mail, Scantlebury informed Jackson that she was also concerned about the payroll issues and she would address the Board about the overall financial

condition. (See id). Scantlebury then informed Jackson that the Board was discussing alternative solution, but legal threats were inappropriate. (See id).

Fourth, there is no evidence of any anti-union animus by the personnel committee of the NAACP. Without any supporting testimony, the ALJ speculates that listing agenda item itself is evidence of anti-union animus.(See ALJ Analysis, Pg. 9, Lines 37-38). No one from the personnel committee was called to testify at trial regarding the agenda item which stated concerns of the grant employees and their behavior. Thus, there is no evidence that the agenda item was even discussed by the personnel committee. Therefore, the mere listing of the agenda item is not evidence of any anti-union animus by the personnel committee.

Fifth, Linda Dunson's hearsay statement which Johnny Gentry allegedly made at a banquet that "That girl" Jackson was causing problems by calling the funders, Vickery, is not evidence of anti-union animus by the NAACP. Gentry did not testify at trial. There is no evidence that Gentry made the statement to anyone other than Dunson or the NAACP authorized or ratified Gentry's statement. Therefore, Gentry's alleged statement is not evidence of any anti-union animus by the NAACP.

Based on the foregoing, the ALJ's findings and conclusions that anti-union animus motivated the NAACP's decision not to hire Jackson are not supported by substantial evidence in the record. Accordingly, the ALJ's decision must be reversed.

C. Whether the NAACP's Reason for Not Hiring Jackson is Pretext

In his Decision, the ALJ stated that the NAACP must show that Jackson would not have been rehired in the absence of her protected concerted activity and it failed to do so. (See ALJ Decision, Pg. 9, Lines 45-48)

Action taken by an employer is pretext when the reason for the action did not exist or the employer did not rely upon it and there is no remaining basis for finding that the employer would have taken the adverse action in the absence of the employee's protected activity. *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB at 1084 (1980).

Professor Douglas testified that he recommended the hiring of Keenya Harrold for the staff attorney position instead of Jackson because he felt that the depth of her experience and the quality of her experience was much greater. He also felt that intellectually, Harrold was far superior than Jackson, and those were the two basic reasons: one, her intellectual capability. (See Douglas Testimony, Trial Transcript, Pg. 274, Lines 19-23).

Professor Douglas further testified that he hired people in a lot of legal positions all over the country and he looked at quality over seniority because professionals are not hired based on seniority but on the quality the work that they can do. (See id). He then made it clear that really look at the quality of the person, rather than the length of time they've been there. (See Id. at Pg. 275, Lines 11-20).

Based on the criteria Professor Douglas used for evaluating applicants for the NAACP staff attorney position, he concluded that Harrold was better qualified for the position than Jackson. There is no evidence that Professor Douglas' explanation for hiring Harrold instead of Jackson was false or pretext. Professor Douglas clearly explained the rationale for his decision which rationale he relied upon in making the decision. Based on his testimony, Professor Douglas would have made the decision to hire Harrold instead of Jackson in the absence of Jackson's alleged protected activity.

Therefore, there is no evidence that Douglas' legitimate, non-discriminatory reason for not hiring Jackson is pretext.

Based on the foregoing, the ALJ's findings and conclusions that the NAACP did not show Jackson would not have been rehired in the absence of her protected concerted activity are not supported by substantial evidence in the record. Accordingly, the ALJ's decision must be reversed.

Respondent's Exceptions

A. Facts

Exception 1: 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. (See Facts, Pg. 4, Lines 26-32). Here, there is absolutely no evidence that Smith was not truthful in her statements to the employees. Thus, the ALJ's finding has no factual support. *See Tellepsen Pipeline v. N.L.R.B*, 320 F.3d 554 (5th Cir. 2003).

Exception 2: 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. (See Facts, Pg. 4, Lines 43-47). In his own findings, the ALJ stated that the agenda of the meeting related to the status of grants and employees working under the grants, and the payroll issues. (See Facts, Pg. 4, Lines 36-37).

Exception 3: (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. (See ALJ Facts, Pg. 4-5, Lines 48-53, Line 1). Again, In his own findings, the ALJ stated that the agenda of the meeting related to the status of grants and employees working under the grants, and the payroll issues. (See Facts, Pg. 4, Lines 36-37).

Exception 4: (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. (See ALJ Facts, Pg. 5, Lines 13-17). Vickery testified that complained of not getting paid herself (See Victory Testimony, Trial Transcript, Pg. 102, Lines 2-12). Thus, this finding is without supporting evidence.

Exception 5: 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. (See ALJ Facts, Pg. 5, Lines 22-30). Vickery's testified that he believed Smith brought up Jackson's name and he inferred that the morale problems related to Jackson. (See Vickery Testimony, Trial Transcript, Pg. 105-106).

Exception 6: 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; and (4) Gentry

also told Dunson that she had "stirred up a whole lot of trouble as well. (See ALJ Facts, Pg. 5 Lines 31-40). The ALJ's inference is speculation and not supported by substantial evidence. There is no evidence that Gentry mentioned the name Jackson.

Exception 7: (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. (See Facts, Pg.5, Lines 47-50). The statement regarding Flores is hearsay. There is no evidence that any protected concerted activity was taking place in the office or what was specifically referred to by the statement.

Exception 8: The ALJ's finding that Smith did not dispute the statement made by Fields is a misstatement of the facts and is not supported by substantial evidence. (See Facts, Pg. 6, Line 35). The record shows that Smith did dispute the statement. In his own findings, the ALJ stated that Smith replied bye-mail on September 3, stating that she did not recall making any statement relating to Fields' hours not being cut and explaining that the audit was awaiting approval. In the e-mail, Smith denied having told Fields that if he "stayed out of the stuff' that he could retain his employment, that she discouraged all employees from involving themselves in office distractions. (See Facts, Pg. 6, 27-31).

Exception 9: The ALJ's finding that consistent with the representations that Smith had made to Fields and Flores, both were offered employment is a misstatement of the facts and is not supported by substantial evidence. (See Facts, Pg.6, Lines 43-

44). As stated above, there is no supporting substantial evidence that Smith made any representations to Flores and Fields.

Exception 10: 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. (See Facts, Pg. 7, Lines 3-6). There is no evidence is the record that board of directors were aware that Smith interviewed Jackson in May; thus, the ALJ's finding is speculative at best. Furthermore, there is no evidence that Smith made any such misrepresentation regarding Douglas' participation in the interview process.

Exception 11: 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. (See Facts, Pg. 7, Lines 21-23). The record reflects that Dunson applied for the position and was rejected; thus, there is evidence in the record regarding the reopening of Spencer's position. (See Facts, Pg. 7, Lines 18-19).

Exception 12: The ALJ's finding that Jackson was not called for an interview is not supported by substantial evidence. (See Facts, Pg. 7, Lines 30-31). The ALJ's on findings show that Jackson was interviewed by Professor Douglas, Smith and Spencer (See Facts, Pg. 7, Lines 43-46).

Exception 13: 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. (See Facts, Pg. 7, Lines 45-47). Professor Douglas testified

Exception 14: 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. (See Facts, Pgs. 7-8, Lines 47 & 1). The record reflects that Harrold worked as a labor and employment attorney for five years, from 2005 to 2010. (See Harrold Testimony, Trial Transcript, Pg. 93).

Exception 15: (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. (See Facts, Pg. 8, Lines 1-14). The record reflects that Harrold recalls working on between 7 to 10 trials, not cases. (See Harrold Testimony, Trial Transcript, Pg. 94). Harrold was never asked how many employment cases she worked on as an employment attorney. (See id). There was no evidence to support a conclusions that (1) the firm did not practice employment law in 2005, (2) Harrold amended her answer, (3) Harrold did not have 5 years of employment law experience, and (4) Harrold had no experience representing plaintiffs, as defense firms do represent clients at times who are plaintiffs.

B. Analysis of Conclusory Findings

Exception 1: 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. (See Analysis, Pg. 9, Lines 21-23). There is no evidence that Jackson engaged in any protected concerted activity. (See Analysis above, Section A).

Exception 2: The ALJ's conclusory finding that Respondent bore animus towards Jackson's activity is not supported by substantial evidence and is a misinterpretation of the law. (See Analysis, Pg. 9, Lines 21-22). There is no evidence that Respondent bore any anti-union animus toward Jackson. (See analysis above, Section B).

Exception 3: The ALJ's conclusory finding 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 is not supported by substantial evidence. (See Analysis, Pg. 9, Lines 27-30). As stated above, Jackson did not express any concern for other employees in this e-mail.

Exception 4: (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. (See Analysis, Pg. 9, Lines 32-43). As addressed above, none of the conclusory findings are supported by substantial evidence.

Exception 5: 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. (See Analysis, Pg. 9, Lines 45-48). As stated above, there was no protected concerted activity.

Exception 6: The ALJ's conclusory finding of persuasive evidence that Respondent's failure to hire Dunson and Jackson was because of protected concerted activity is not supported by substantial evidence and is a misinterpretation of the law. (See ALJ Analysis, Pg. 9-10, Lines 50-52, Line 1). The ALJ's speculative findings are not supported by substantial evidence and there was no motivated animus and no protected concerted activity.

Exception 7: 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. (See Analysis, Pg. 10, Lines 14-18).

Exception 8: The ALJ's conclusory findings that 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 is not supported by substantial evidence. (See Analysis, Pg. 10, Lines 21-25). As stated above, the finding is baseless.

Exception 9: 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. (See Analysis, Pg. 10, Lines 29-37). As stated above, these findings are baseless.

Exception 10: The ALJ's conclusory finding that Professor Douglas did not honestly conclude that Harrold was better qualified for the position than Jackson is a misstatement of the facts and not supported by substantial evidence. (See Analysis, Pg. 10, Lines 42-45). As stated above, the testimony of Professor Douglas contradicts this finding.

Exception 11: The ALJ's conclusory finding that Jackson had earned a masters degree in labor and employment law is a misstatement of the facts and not supported by substantial evidence. (See Analysis, Pg. 11, Lines 3-5). The ALJ's own finding states that Jackson received this degree in 1993 before she graduated from law school in 1995, so it could not have been a master's degree in labor and employment law. (See Facts, Pg. 8, Lines 16-24).

Exception 12: 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. (See Analysis, Pg. 11, Lines 7-12). The ALJ's speculative inferences regarding Smith's reason for adding another applicant are not supported by substantial evidence

Exception13: The ALJ's conclusory finding that Douglas did not inquire whether Harold declined a position with the firm that acquired the "practice group," or whether she was not offered a position is a misstatement of the facts and not supported by substantial evidence. (See Analysis, Pg. 11, Lines 18-19). There is no evidence regarding the entire substance of the interview of Harrold by Professor Douglas; thus, this finding is based on impermissible inferences and speculation.

Exception 14: 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. (See Analysis, Pg. 11, Lines 23-30). The

ALJ's impermissible inferences and speculation regarding Harrold's ability and capability is not supported by substantial evidence.

Exception 15: The ALJ's conclusory finding 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 is a misstatement of the facts and not supported by substantial evidence. (See Analysis, Pg. 11, Lines 33-36). There is no evidence that Professor Douglas did not consider Jackson's experience. As stated above, Professor Douglas testified that he considered quality over seniority in making hiring decisions.

Exception 16: 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. (See Analysis, Pg. 11, Lines 39-42). There is no evidence in the record that Smith and the board of directors directed Professor Douglas to discriminate against Jackson in the hiring process. The ALJ's inferences are impermissible and not supported by substantial evidence.

Exception 17: 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. (See Analysis, Pg. 11, Lines 44-50). There is no evidence in the record that the NAACP brought Professor Douglas in to disguise its intent to discriminate against Jackson. There is evidence in the record that Spencer was just hired and the Board felt comfortable with Professor Douglas overseeing the hiring of attorneys. There is also evidence in the record that Professor Douglas honestly believed that Harrold was better qualified for the position. (See Douglas Testimony, Trial Transcript, Pg. 274-275, Lines 19-23; 11-20).

Exception 18: 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. (See Analysis, Pg. 11, Lines 50-52). As stated above in Sections A, B & C, the ALJ's conclusory findings are not supported by substantial evidence.

CONCLUSION

Tracie Jackson lost her job with the Houston Branch. Not because of some involvement in alleged protected concerted activity. Not because any anti-union animus. Not because the NAACP discriminated against her in the hiring process. Tracie Jackson lost her job simply because, as she admits, the grant money funding her position expired. The Board should therefore reverse the ALJ's decision and dismiss this case with prejudice.

FAX COVER SHEET

TO: Ms. Alisa Jones (202) 273-1946 direct.

Please find attached the corrected certificate of service in case: Tracie Jackson v. NAACP.

Thanks,
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DATED: August 29, 2011

Respectfully submitted,

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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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