

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

NAACP HOUSTON BRANCH

and

Case 16-CA-027783

TRACIE JACKSON, an Individual

**ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION TO FILE BRIEF AND EXCEPTIONS OUTSIDE OF DEADLINE**

COMES NOW Jamal M. Allen, Counsel for the Acting General Counsel, and submits this Opposition to Respondent's Motion to File Brief and Exceptions Outside of Deadline. As shall be explained in greater detail below, Counsel for the Acting General Counsel urges that the Board reject Respondent's attempt to file exceptions to the administrative law judge's decision after the deadline due date. Respondent's motion fails to articulate any grounds constituting excusable neglect that would warrant the acceptance of its untimely exceptions and the acceptance of the late-filed exceptions will cause undue prejudice to Tracie Jackson, the Charging Party. Consequently, the Respondent's motion should be rejected.

I.

On Friday, July 15, 2011¹, the Honorable Administrative Law Judge George Carson II issued his Recommended Decision and Order finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act (hereinafter the Act) by refusing to rehire Tracie Jackson in retaliation for her protected, concerted activities.

¹ All dates are 2011 unless otherwise indicated.

II.

As a courtesy on Monday, July 18, Counsel for the Acting General Counsel emailed Judge Carson's Recommended Decision and Order to all of the parties, including Respondent's counsels. A copy of the July 18 email is attached to this Motion as Exhibit 1.

III.

Judge Carson advised in his Recommended Decision and Order that if no exceptions were filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order would be adopted by the Board and all objections to them shall be deemed waived for all purposes.

IV.

On July 26, 2011, Respondent's Counsel James Douglas notified Counsel for the Acting General Counsel of his intent to file exceptions to Judge Carson's Decision. Counsel for the Acting General Counsel provided instructions to Counsel Douglas on how to obtain a copy of the Board's Rules and Regulations from the NLRB website for the purpose of filing said exceptions.

V.

Pursuant to Section 102.46, the original deadline date for the filing of exceptions herein was August 12, twenty-eight (28) days after the issuance of Judge Carson's July 15 Recommended Decision and Order.

VI.

By letter dated August 1, the parties were advised by the Board's Deputy Executive Secretary that due to a technical error in the Board's case processing system, not all of the parties were served a copy of Judge Carson's Recommended Decision and Order. Therefore, the due date for the filing of the exceptions was extended to August 29.

VII.

Respondent failed to timely file its exceptions by the extended due date. Rather, Respondent tendered its exceptions to a delivery service on August 29 and the exceptions were received at the Board's office on August 30, one day after the extended deadline date.

VIII.

On September 7, the Associate Executive Secretary of the Board issued a letter to the Respondent rejecting the receipt of Respondent's late-filed exceptions because they were untimely pursuant to Section 102.111(b) of the Board Rules and Regulations as they were neither postmarked prior to the August 29 due date, nor received in the Board's office on the due date.

IX.

On September 12, Respondent filed its Motion to File Brief and Exceptions Outside of Deadline. In said Motion, Respondent argued that its untimely exceptions should be accepted due to its "good faith" belief that service on August 30 was timely as it was done in compliance with the Federal Rules of Civil Procedure.

X.

Section 102.111(c) of the Board's Rules and Regulations specifies that untimely exceptions will be accepted only upon good cause shown based on a showing of excusable neglect and when no undue prejudice would result.

XI.

Respondent has failed to establish excusable neglect in the instant case. Respondent's reliance on the Federal Rules of Civil Procedure is misplaced as Rule 1 therein states that the rules are applicable only to civil actions in the United States district courts. The Board has previously warned against utilizing the procedural requirements under "the Federal Rules of Civil Procedure as a model for the Board" noting that "there are important differences between federal civil litigation and Board administrative process." *In re Patrician Assisted Living Facility*, 339 NLRB 1153, 1154 (2003).

In Section 6 of the NLRA, Congress specifically authorized the Board to make its own rules and regulations necessary to carry out the provisions of the Act which has resulted in the Board's Rules and Regulations. As detailed below, Respondent was repeatedly advised that the procedures herein, including those regarding the filing of exceptions to the administrative law judge's decision, are governed by the Board's Rules and Regulations.

First, the February 28 Complaint and Notice of Hearing issued by the Regional Director advised Respondent that the procedure for filing exceptions is described by NLRB Form 4668 which form was attached to the Complaint and Notice of Hearing. NLRB Form 4668 states that the procedure "with respect to the filing of exceptions to the administrative law judge's decision...is set forth in the Board's Rules and Regulations." Second, as noted earlier,

Judge Carson advised in his Recommended Order and Decision that the exceptions had to be filed in compliance with the Board's Rules and Regulations. Third, on July 26, Counsel for the Acting General Counsel provided instruction to Respondent's counsel on how to obtain a copy of the Rules and Regulations for the purpose of filing exceptions to Judge Carson's decision. Finally, in the Executive Secretary's August 1 order transferring this case to the Board, Respondent was once again advised to direct its attention to the Board's Rules and Regulations for filings before the Board and notified that exceptions "must be received" in the Board's office "on or before August 29, 2011."

Despite the preceding, Respondent failed to timely file its exceptions in conformance with the Board's Rules and Regulations. The Board has previously held in the context of a Motion for Default Judgment that when a respondent has "repeatedly [been] warned in formal government documents" regarding the necessity to timely file documentation a respondent's "lack of legal sophistication" does not provide good cause for the failure to meet the applicable deadline dates. *In re Patrician Assisted Living Facility*, supra at 1154

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court defined "excusable neglect" as that phrase is used in other rules. It concluded that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Id at 392. "Consistent with *Pioneer* and [numerous Circuit Court decisions], the Board has also generally held that inattentiveness or carelessness, absent other circumstances or further explanation, will not excuse a later filing." *International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Company)*, 337 NLRB 426, 427 (2002). Based on the preceding, Respondent's willful failure to comply with the Board's Rules and Regulations, which it had repeatedly been apprised of, does not constitute

excusable neglect which would warrant the acceptance of its untimely exceptions.

XII.

In addition to failing to establish excusable neglect, granting Respondent's motion in this matter will also cause undue prejudice to the aggrieved Charging Party. Judge Carson issued his decision finding that Respondent unlawfully discharged the Charging Party on July 15. A PDF copy of Judge Carson's Recommended Decision and Order was furnished to Respondent on July 18. On July 26, Respondent notified Counsel for the Acting General Counsel of its intent to file exceptions to Judge Carson's Recommended Decision and Order. Counsel for the Acting General Counsel informed Respondent of the necessity to file such exceptions in conformance with the prescripts of Section 102.46 of the Board's Rules and Regulations.

Rather than expeditiously file said exceptions within the 28 days allotted under the original due date for the exceptions, Respondent chose to delay filing its exceptions to take advantage of the "technical error" in the Board's servicing of Judge Carson's Recommended Decision and Order. Respondent chose to take advantage of the extended due date although Counsel for the Acting General Counsel had already provided to Respondent a copy of Judge Carson's Recommended Decision and Order and instructions on how to file exceptions thereto on July 18 and July 26 respectfully.

Clearly, Respondent's delay in filing said exceptions was not a result of any error in the Board's service of Judge Carson's Recommended Decision and Order. Respondent simply chose to delay the filing of its exceptions in order to increase the passage of time before it ultimately must remedy its unlawful conduct herein including offering reinstatement and back pay to the Charging Party, and the posting of a notice to employees to cure the coercive effects

of its unlawful conduct on the remaining employees. By accepting Respondent's late-filed exceptions, the Board will simply provide a mechanism for Respondent to achieve its ulterior objectives; delaying compliance with the decision and order. Hence, any further delay in providing a remedy for Respondent's unlawful activity simply serves to further effectuate Respondent's unlawful conduct against the Charging Party, the employee whose Section 7 rights were wantonly violated by Respondent and who has been waiting more than seven (7) months after the issuance of the Judge's Decision for a remedy.

XIII.

In sum, Respondent was repeatedly notified that the proper procedure for the filing of exceptions was governed by the Board's Rules and Regulations; as such Respondent's reliance on the Federal Rules of Civil Procedure constitutes careless and negligent conduct, which should not be excused. Moreover, acceptance of the late-filed exceptions will prejudice the Charging Party by providing further undue delay in providing a remedy to the Charging Party for Respondent's unlawful activity against her.

Consequently, the Counsel for the Acting General Counsel urges that Respondent's Motion to File Brief and Exceptions Outside of Deadline be rejected.

DATED at Houston, Texas, this 7th day of February, 2012.



JAMAL M ALLEN
Counsel for the Acting General Counsel
National Labor Relations Board
Region 16
Mickey LeLand Federal Building
1919 Smith Street
Suite 1545
Houston, TX 77002-8051

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Counsel for the Acting General Counsel's Opposition to Respondent's Motion to File Brief and Exceptions Outside of Deadline has been served upon each of the following by electronic correspondence this 7th day of February, 2012:

National Labor Relations Board
Attn: Lester A. Heltzer, Executive Secretary
1099 14th Street, N.W., Room 11602
Washington, DC 20570
(Via e-filing)

Melvin Houston, Esq.
Melvin Houston & Associates
1776 Yorktown Drive, Suite 600
Houston, Texas 77066
Via E-Mail : mhouston@gotellmel.com
melhouston2001@yahoo.com

James M. Douglas
Executive Vice President
Distinguished Professor
Texas Southern University
3100 Cleburne Street
Houston, Texas 77004
Via E-Mail: jdouglas@tmslaw.tsu.edu

Salvador Benavidez, Esq.
Frye and Associates, PLLC
2990 Richmond Avenue, Suite 400
Houston, Texas 77098
Via E-Mail: sbenavidez@liberatinglaw.com



JAMAL M. ALLEN
Counsel for the Acting General Counsel
National Labor Relations Board
Region 16 - Resident Office
Mickey Leland Federal Building
1919 Smith Street, Suite 1545
Houston, Texas 77002

Allen, Jamal

From: Allen, Jamal
Sent: Monday, July 18, 2011 7:40 AM
To: melhouston2001@yahoo.com; douglasj@tsu.edu; sbenavidez@liberatinglaw.com; 'mhouston@gotellmel.com'
Subject: NAACP Administrative Law Judge Decision
Attachments: Houston Branch of the NAACP ALJD.pdf



Houston Branch of
the NAACP AL...

Dear Sirs:

Please find attached to this email a PDF copy of Judge Carson's decision in Case No. 16-CA-27783 regarding the Houston Branch of the NAACP. Judge Carson issued the attached decision last Friday which was subsequently posted on the NLRB's website.

Please note that currently my office is experiencing some technical difficulties with our phone line, therefore, if you have questions regarding this matter, please correspond with me via email.

Sincerely,

Jamal M. Allen

-----Original Message-----

From: Allen, Jamal
Sent: Thursday, June 16, 2011 6:55 PM
To: melhouston2001@yahoo.com
Cc: douglasj@tsu.edu; sbenavidez@liberatinglaw.com
Subject: FW: NAACP Post-Trial Brief, 16-CA-027783

Dear Mr. Houston:

Earlier today I attempted to serve you a copy of the General Counsel's post-trial brief by the email address listed on your firm's website (mhouston@gotellmel.com). This evening I received your brief which was transmitted to me from a Yahoo email account. Therefore, I'm forwarding to you the email I sent earlier today which includes a PDF copy of the General Counsel's post trial brief.

Sincerely,

Jamal M. Allen
National Labor Relations Board
1919 Smith Street, Suite 1545
Houston, Tx 77002

From: Allen, Jamal
Sent: Thursday, June 16, 2011 4:23 PM
To: 'mhouston@gotellmel.com'; 'Salvador Benavidez'
Cc: Gonzales, Lisa
Subject: NAACP Post-Trial Brief, 16-CA-027783

Dear Parties:

Please find attached to this email a PDF copy of the post-trial brief filed today by the General Counsel with the Division of Judges.

Sincerely,

Jamal M. Allen

Field Attorney

National Labor Relations Board

1919 Smith Street, Suite 1545

Houston, Texas 77002-8051

phone (713) 209-4879

fax (713) 209-4890

Sincerely,

Jamal M. Allen

Field Attorney

National Labor Relations Board

1919 Smith Street, Suite 1545

Houston, Texas 77002-8051

phone (713) 209-4879

fax (713) 209-4890