

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

In the Matter of

KANAWHA HOSPICECARE, INC.

and

Case 9-CA-063109

KEIRA RANSON, AN INDIVIDUAL

**REPLY TO THE ACTING GENERAL COUNSEL'S RESPONSE TO KANAWHA  
HOSPICECARE, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A  
STAY AND MOTION FOR SUMMARY JUDGMENT<sup>1</sup>**

**Motion to Dismiss**

Even if the Acting General Counsel could issue the Complaint in this matter as the Acting General Counsel alleges in his Response, who is authorized to decide it? In his Response, the Acting General Counsel devotes much time and toner to his argument that, as a Presidential appointee, he may issue the Complaint, even in the absence of a proper quorum of the Board. First, this is just plain wrong under *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Additionally, and most importantly, this argument absolutely ignores the pragmatic quagmire at hand in this case. Even the Acting General Counsel cannot argue that the Board is not the Board. Nor could he argue that the Board's ALJ is not the Board. Given that the only entity before whom the Acting General Counsel can prosecute the Complaint is the improperly constituted Board (as more fully set forth in Hospice's Motion to Dismiss), this case must be dismissed or stayed pending resolution of the matter styled *National Association of Manufacturers, et al., v. National Labor Relations Board, et al.*, Case No. 1:11-cv-01629-ABJ

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<sup>1</sup> Hospice is, again, appearing specially and does not waive its argument that, for the reasons set forth in Hospice's Motion to Dismiss, the Board lacks the authority to hear and decide this case.

(Judge Amy Berman Jackson) pending before the United States District Court for the District of Columbia.

In his Response, the Acting General Counsel also argues that it somehow furthers the public interest for a two-member (i.e., constitutionally impotent) Board to “facilitate” the resolution of labor disputes. Response, pp. 4-5. Well the ends certainly do not justify the means. If the Board is not properly constituted due to the unconstitutional, non-recess appointments, then it has no authority to act, period. And his argument that about 98 of the cases decided prior to *New Process* were ultimately remanded to the Board after the Supreme Court’s decision, does not support his position. It highlights the fact that at least 98 parties were forced to incur unnecessary expenses, time and energy as a result of an improperly constituted Board acting in an *ultra vires* manner. The Board’s quorum issue will be resolved; this case should not proceed until that time.

#### **Motion for Summary Judgment**

It is well-settled that motions for summary judgment in matters pending before the Board are to be governed by and decided in accordance with Rule 56 of the Federal Rules of Civil Procedure and its related case law. Stephens College, 260 NLRB 1049, 1050 (1982). Accordingly, mere allegations or denials of a pleading, and broad assertions by a party alone, are not enough, as a matter of law, to create a factual dispute which will overcome a summary judgment motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Rather, the nonmoving party must present some evidence that material facts – not just any facts – are in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986), *cert. denied*, 484 U.S. 1066 (1988). The Acting General Counsel must go beyond the pleadings and, by his own affidavits,

depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue of material fact for trial. Celotex, 477 U.S. at 324.

In its response to Hospice's Motion for Summary Judgment, the Acting General Counsel has completely failed to present *any evidence* supporting its position that summary judgment should not be granted, much less the type of evidence that is required to demonstrate that a genuine issue of material fact exists. Rather, the Acting General Counsel has chosen to make only broad, conclusory statements (without any basis in law or fact) of the very type that the well-settled law dictates is insufficient to survive a motion for summary judgment. Indeed, the entirety of the Acting General Counsel's argument is that "the complaint alleges facts that, *if proven*, would constitute a violation of the Act" and that the Acting General Counsel must be provided with the opportunity to attempt to prove those allegations at a hearing. See General Counsel's Response Brief at p. 5 (emphasis added). In making this argument, however, the Acting General Counsel has conveniently ignored the critical reality that – in light of the previous sworn testimony of the Charging Party – the Acting General Counsel *can never, as a matter of law, prove the allegations contained in the Complaint*.

Specifically, it is well-settled that the "mutual aid and protection" clause in Section 7 refers to "employees' efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978); see also Tradesmen International, Inc. v. NLRB, 275 F.3d 1137, 1141 (D.C. Cir 2002). Moreover, it is axiomatic that "an employee's activity will fall outside section 7's protective reach if it fails in some manner to relate to legitimate employee concerns *about employment related matters*." Kysor/Cadillac, 309 NLRB 237, 237 n. 3 (1992) (emphasis added); Tradesmen Int'l, 275 F.3d at

1141; Eastex, 437 U.S. at 567-58. Thus, “*an essential element* before Section 7’s protections attach is a nexus between one’s allegedly protected activity and employees’ interests as employees.” Id. Simply put, in order for Elsea’s and Ranson’s Facebook postings (for which they were discharged) to be afforded protection under Section 7 of the Act, they must be related in some way to the Charging Parties’ terms and conditions of employment or an effort to change those terms and conditions of employment. Kysor/Cadillac, 309 NLRB at 237.

Keira Ranson (“Charging Party”), however, has previously testified, under oath and in a judicial proceeding, as follows:

Q: Now you mentioned that – you mentioned that you weren’t necessarily complaining about a coworker?

A: Correct.

Q: And in fact, you told – you told Ms. Robinson [Hospice’s Administrator] that you weren’t complaining about a coworker during the meeting [during which the Facebook postings were investigated]; correct?

A: That’s correct.

Q: And is that a true statement that the statement was not about a work related issue?

A: That’s correct. It was a generalized statement that was on the argument that I had with my stepmother on the way home from work.

Q: And so you were talking about your stepmother?

A: No. Talking about my ex-husband’s wife.

Q: Okay. So you weren’t – you weren’t discussing a term or condition of your employment?

A: No, I wasn’t.

See Transcript from Workforce WV hearing (attached hereto as Exhibit A at pp. 42-43. In short, the Charging Party unequivocally testified that she was not engaged in protected activity because she was not even discussing a term or condition of her employment (much less acting to try to affect change to such a term or condition). This prior testimony is fatal to the Acting General Counsel's allegations that the Charging Party engaged in concerted, protected activity. In other words, and contrary to its representations in its Response, the Acting General Counsel *can never prove, as a matter of law, that the Charging Party engaged in protected activity in light of the undisputed evidence that has been submitted to the Board.*

Likewise, the Acting General Counsel can never prove that Penny Elsea ("Elsea"), even assuming *arguendo* that she was engaged in protected activity (and she was not), acted in a concerted fashion. As the Board has repeatedly held, an activity is concerted when an employee acts "with or on the authority of other employees and not solely by and on behalf of the employee himself." Meyers Industries (Meyers I), 268 NLRB 493, 497 (1984), revd. sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand Meyers Industries, 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In this case, the Complaint clearly indicates that Elsea and the Charging Party are the *only* individuals that the Acting General Counsel alleges to have acted in concert:

Ranson and Penny Elsea engaged in concerted activities *with each other* for the purposes of mutual aid and protection by posting on Facebook their complaints about a coworker's adverse impact on their terms and conditions of employment.

See Complaint at ¶ 4 (emphasis added). In light of the Charging Party's undisputed testimony that she was not discussing any term or condition of work, however, Elsea could not possibly have been acting "with or on the authority of" the Charging Party. Accordingly, there is no

“mutual aid,” no “concerted activity” and no Section 7 protection because one of the two people involved in the activity the Acting General Counsel claims to be concerted has admitted, after taking an oath, that her Facebook posting was NOT a complaint about work and had absolutely nothing to do with any term or condition of employment. Simply put, the *only* party that was possibly attempting to affect change to a term or condition of employment was Elsea.<sup>2</sup> Because Elsea, at best, acted alone, the Acting General Counsel can never prove that she was engaged in concerted, protected activity.

At the end of the day, the only way for the Acting General Counsel to avoid summary judgment is to present specific evidence which contradicts the sworn testimony of the Charging Party that indicates that there is a genuine issue of material fact relating to the Charging Party seeking to affect some term or condition of her employment. He simply cannot do so – the Acting General Counsel had the opportunity to present such evidence in his response and completely failed to produce even a scintilla of evidence indicating that summary judgment should not be granted.<sup>3</sup> Implicitly acknowledging his inability to present any actual evidence demonstrating the existence of a material fact, the Acting General Counsel has instead only set forth conclusory appeals to the Board asking, essentially, that the Board ignore the great weight of the law governing summary judgment and indulge the Acting General Counsel’s personal desire to proceed to a hearing that he cannot possibly win. The Board should not be swayed. Stated plainly, there are no genuine issues of material fact that would support continuing to the

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<sup>2</sup> Hospice continues to dispute that Elsea was engaged in protected activity.

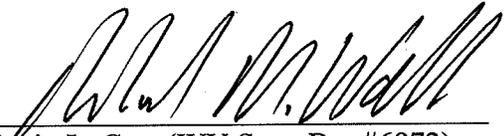
<sup>3</sup> In its Motion for Summary Judgment, Hospice urged the Board to conduct an *in camera* review of the affidavits obtained by the Board agent in this matter which would, presumably, address the very issue of what the Charging Party was actually discussing in her Facebook post (and whether she was attempting to affect change to a term or condition of her employment). It is telling that the Acting General Counsel has not offered to provide the evidence contained in those affidavits in his response to the motion for summary judgment and it makes one wonder whether anything contained therein could dispute any of the statements the Charging Party made in her sworn testimony.

Board's trial processes, at great expense to the taxpayer, in this case<sup>4</sup>. The uncontroverted evidence in the record – indeed the only evidence in the record – demonstrates that there was no protected and/or concerted activity and that Hospice is entitled to summary judgment in its favor, as a matter of law.

Respectfully submitted,

KANAWHA HOSPICECARE, INC.

By: Spilman Thomas & Battle, PLLC



Kevin L. Carr (WV State Bar #6872)  
Richard M. Wallace (WV State Bar #9980)

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<sup>4</sup> Counsel for the Acting General Counsel actually represented to the Administrative Law Judge assigned to this case, in a telephonic hearing on February 10, 2012, that there were no virtually factual disputes in this case. So even the Acting General Counsel does not appear to believe that there are any genuine issues of material fact. As a result, it is even more clear that this is the type of case that must be disposed of by summary judgment.

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**CERTIFICATE OF SERVICE**

I, Kevin L. Carr, being duly sworn, do hereby certify that I have served a true and exact copy of the **“Reply to the Acting General Counsel’s Response to Kanawha HospiceCare Inc.’s Motion to Dismiss, or in the Alternative, for a Stay and Motion for Summary Judgment”** by regular United States Mail this 10th day of February, 2012, addressed as follows:

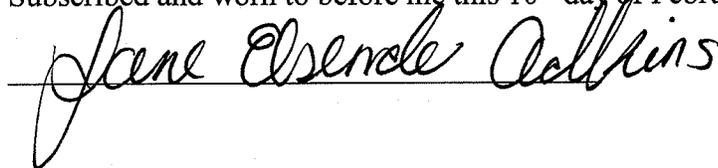
Ms. Keira D. Ranson  
2510 Lincoln Ave  
St. Albans, WV 25177-3244

Service was made upon Counsel for the Acting General Counsel via e-mail at Kevin.luken@nlrb.gov.



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Subscribed and sworn to before me this 10<sup>th</sup> day of February, 2012.



[SEAL]

