

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

THE MARTIN LAW GROUP, LLC

and

CASE 10-CA-078395

SHERI T. ROUSE, an Individual

**REPLY IN SUPPORT OF MOTION FOR DISMISSAL BY THE
MARTIN LAW GROUP, LLC AND MOTION TO CONVERT THIS
MATTER TO INCLUDE A MOTION FOR SUMMARY JUDGMENT**

For its Reply in support of its Motion to Dismiss, and in support of the Motion to Convert this matter to include a Summary Judgment Motion, The Martin Law Group (hereinafter “Respondent” or “Martin Law Group”) says as follows:

1. In accordance with 29 C.F.R. § 102.24, the Respondent has filed a motion for dismissal more than 28 days prior to the hearing set on September 10th and 11th, 2012. Counsel for the Acting General Counsel states this matter is not ripe for dismissal given that only the allegations in the Complaint need be construed. However, it has been overlooked by Counsel that the Court may consider extrinsic evidence such as affidavits and documents submitted thus converting the request into one for summary judgment. See, *Rovero v. Centrell Medico Daytorbo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009); and *Tacket v. M & G Polimerge USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009). Such is well within the scope of 29 C.F.R. § 102.24 which mentions both a motion for dismissal

and a summary judgment in the same regulation. In fact, the regulation does not envision a motion for judgment on the pleadings leaving only a motion to dismiss or motion for summary judgment for the Judge's consideration. Respondent specifically requests the Judge to convert this matter to include a motion for summary judgment and delay the hearing pending a ruling on the matters that are the subject of the pending motions. This request is especially appropriate when there will be a significant expense incurred in discovery such as requiring the taking of depositions given the NLRB's refusal to provide affidavits and statements of Rouse, and, given the expense and harm to the business in requiring a two day trial involving all employees when such matters are easily established by affidavit.

2. The NLRB and Rouse have not filed any affidavits in response, but rest on wholly conclusory statements and vague and incomplete assertions. Such improper and mere conclusory allegations do not preclude a motion for summary judgment. Unreasonable, improbable or conclusory allegations will not defeat a motion for summary judgment. See, Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005). Rather, there must be reasonably based evidence. See, Al-Zubaidy v. TEK Indus., Inc., 406 F.3d 1030, 1036 (8th Cir. 2005) and Calvi v. Knox County, 470 F.3d 422, 426 (1st Cir. 2006).

3. Summary judgment and a decision is due to be made on this matter prior to any hearing in this matter which will cause the respondent to cease operating its business for two days given that all employees in this small firm are significant witnesses. Fairness and equitable considerations as well as conservation of judicial resources require as much.

4. The NLRB's regulations are clearly patterned after the Federal Rules of Civil Procedure as to notice pleading. The United States Supreme Court has weighed in on the meaning of notice pleading. The standard of

review for a motion to dismiss was announced in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) and Bell Atlantic Corp v. Twombly, 550 U.S. 544 (2007). The Supreme Court held in Iqbal that to survive a motion to dismiss under 12(b)(6) “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. at 1949 *quoting Twombly* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 1949 *citing Twombly* at 556. This pleading standard was forth in Twombly, which was an anti-trust case; however, Iqbal made it clear that the standard would apply to other federal actions.

5. The motion to dismiss is proper as the complaint fails to allege sufficient factual matter:

- a. The Complaint is deficient and vague in that it fails to allege Rouse’s status. Rouse, who was as an attorney, was a supervisor. However, there are no facts to support how she could have been a mere staff employee. Nor does the Complaint dispute that Rouse was a supervisor. The NLRB was well aware of such facts before filing the Complaint as Supreme Court precedent on this issue was repeatedly provided and cited. The NLRB has ignored the facts and has failed to plead adequate facts to set out Rouse’s position with the Respondent. The vague allegations fail to allege sufficient jurisdictional requirement which must be met to meet the standards of notice pleading. The pleading fails to sufficiently frame the issues at stake. To proceed with a vague complaint is a waste of judicial resources, tax payer dollars and is punitive in nature given that the damage to the business of respondent has been made

known to the NLRB.

- b. Under the summary judgment standard which requires providing more than mere conclusory allegations it is noteworthy that no proof is filed notwithstanding numerous affidavits being filed reflecting that Rouse is indeed a supervisor under the definition of the Act. The Act is not applicable, therefore. On this issue, there is no genuine issue of material fact as neither the NLRB nor the charging party has provided the first affidavit or shred of evidence to counter this well established fact.
- c. It is established by the affidavit of Guy Martin that an attorney hired and acting in a capacity as an attorney is required ethically to be a supervisor and to supervise staff. The affidavits further reflect that this is not a multi-level organization but a small law firm with two levels of employees, attorneys and staff. The overwhelming evidence again reflects that Rouse was an attorney and a supervisor.
- d. In paragraph seven of the Complaint, it states that there was a rule to discourage concerted activity when in fact there is no allegation reflecting that any concerted activity took place, nor is there an allegation that Rouse was terminated for engaging in concerted activity with any particular individual. No one else was terminated for the same “concerted” activity. The complaint fails under the Iqbal and Twombly standard.
- e. Additionally, the Complaint is inaccurate in paragraph two which states that The Martin Law Group, LLC is an Alabama corporation. David P. Martin is the sole member of an LLC rather than a corporation.

- f. The NLRB also fails to allege facts reflecting that the sole reason for Rouse's termination was some concerted activity without setting out facts supporting this and again without specifying how the activity was in fact "concerted".
- g. For the NLRB to proceed nonetheless in the face of overwhelming evidence of Rouse's status and without proper allegations of "concerted activity" turns the procedures here into a punitive proceeding. Such is unwarranted and it is incumbent upon the NLRB to adequately plead facts that state a plausible claim and to produce some shred of evidence contrary to the numerous affidavits. The Complaint as it is provided is unintelligible, and the evidence in support is non-existent.

6. Counsel for Acting General Counsel states that the allegations regarding the fact that there was no concerted activity involved are based on hearsay statements; however, Counsel does not point to any statement in any affidavit to reflect support for the conclusory allegation made. It is not incumbent on an administrative law judge to parse the record to find the basis of Counsel's allegations.

7. Despite the fact that there are several unrebutted affidavits reflecting that Rouse would have been terminated irrespective, the NLRB provides nothing in response. There is no question of fact when a mere conclusory allegation is all that is proffered. Counsel for Acting General Counsel relies on a bare conclusory assertion that it is hearsay that Rouse abused her time reporting. Counsel also asserts that somehow there is a question of fact, without proffering the first piece of evidence. Again, not one contrary affidavit has been provided nor has Counsel pointed to any specific allegation to support the conclusory assertions.

8. The Respondent's rule requiring attorneys to work on professional matters during working hours for which compensation is sought and to not seek compensation for work on personal matters is also the rule of The United States Government. The United States Government requires of Counsel for Acting General Counsel as well as any other employees in the executive branch of government to use honest effort to perform official duties in essence barring the use of official time for personal activities. The allegations that Rouse used work time and reported it as time to be paid while performing personal activities is based directly on observation by employees as well as credible evidence as noted in the affidavits. A review of Rouse's time reported reflects that indeed she charged more for the hours worked than she actually could have worked repeatedly and regularly. Again, it is not incumbent on an administrative law judge to parse through affidavits and ascertain whether affidavits may have hearsay in them or not. Rather it is incumbent on Counsel for Acting General Counsel to point out what she objects to as hearsay rather than make naked assertions. The affidavits soundly support this allegation and indeed did form a part of the basis for Rouse's termination.

9. The NLRB claims that Rouse should be entitled to back wages and reinstatement of her job given these undisputed facts. However, aside from the clearly demonstrated pattern and practice of misconduct documented in the affidavits provided, on April 6, 2012, Rouse filed an Alabama State Bar complaint and a Mississippi State Bar complaint against David P. Martin as owner of The Martin Law Group, LLC. The bar complaints stated false and malicious matters. Thereafter, Rouse filed a second bar complaint and then drafted a bar complaint for her husband to sign and her minor son and filed them as well. The Alabama State Bar refused to take any action on any of these matters nor did the Mississippi State Bar take any action. Had Rouse been

reinstated prior to that date, it defies rational thinking to maintain that Rouse would not have been terminated for her actions. The NLRB's refusal to exercise proper discretion and account for workplace relations between attorneys in a small law firm is bewildering.

10. Furthermore, the NLRB turns a blind eye to evidence that Rouse wasted resources and acted in an unauthorized manner in making over 1,054 copies when she was directly forbidden from doing so. The United States Government has a similar rule at § 2635.704 in which it states that an employee has a duty to protect and conserve government property and shall not use such property, or allow its use, for other than authorized purposes. The term "property" includes office supplies as well as printing and reproduction facilities. If the United States Government has a rule against making unauthorized copies, then how on earth can the NLRB turn a blind eye to such evidence which was also a basis for Rouse's termination?

WHEREFORE, the premises considered, the Complaint is due to be dismissed for its deficient pleading and as there is no evidence to support this Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on August 13, 2012 and that copies were electronically served on the following parties by electronic mail:

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