

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

**COHEN OPHTHALMOLOGY &
CONSULTING, INC.**

and

Case 28-CA-086143

MARINA Z. SANCHEZ, an Individual

**ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

On November 13, 2012, Cohen Ophthalmology & Consulting, Inc. (Respondent) filed a Motion for Summary Judgment or Dismissal for Lack of Jurisdiction (Respondent's Motion), by which Respondent seeks the dismissal of the Complaint and Notice of Hearing (Complaint) in the captioned matter. By its Motion, Respondent asserts that the Board lacks jurisdiction in this matter and that the Charging Party, Marina Sanchez (Sanchez or the Charging Party), the alleged discriminatee in this matter, was not an employee within the meaning of Section 2(11) of the National Labor Relations Act (the Act) at the time of the alleged unfair labor practices were. For the reasons set forth below, including the fact that Respondent's Motion simply highlights the factual and legal disputes that are framed by the pleadings and warrant a hearing before an administrative law judge of the Board, it is respectfully submitted that Respondent's Motion should be dismissed in its entirety.¹

¹ In addition to the substantive bases upon which the Board should dismiss Respondent's Motion, the Board should also reject Respondent's Motion as untimely. Under the Board's Rules, at Section 102.24(a), "all motions for summary judgment or dismissal made prior to the hearing shall be filed in writing with the Board." Section 102.24(a) further provides that "all motions filed with the Board, including motions for summary judgment or dismissal, shall be filed with the Executive Secretary of the Board" and that such motions shall be filed with the Board no later than 28 days prior to the scheduled hearing. In this case, Respondent filed its Motion on November 13, 2012 (exactly 28 days prior to the start of the hearing) with the Division of Judges in San Francisco, not with the Executive Secretary. Counsel for the Acting General Counsel (General Counsel) understands that at some point,

I. Background

The Complaint issued on September 28, 2012, alleges that Respondent violated Section 8(a)(1) of the Act by maintaining overly-broad and discriminatory work rules; issuing unwarranted discipline to the Charging Party; reducing the Charging Party's wages; and constructively discharging the Charging Party. The hearing in this matter is scheduled to commence on December 11, 2012. On October 12, 2012, Respondent filed its Answer to the Complaint, whereby it denied that it was an employer within the meaning of the Act or that it committed any unfair labor practices, and affirmatively asserts that the Charging Party is and was a supervisor within the meaning of the Act.

II. The Board's Legal Standard Regarding Summary Judgment

It is well settled that summary judgment is appropriate only if it is affirmatively established that: (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to a judgment as a matter of law." *Stephens College*, 260 NLRB 1049, 1050 (1982), *Conco Chemicals Company*, 275 NLRB 39, 40 (1985). Section 102.24(b) of the Board's Rules provides that the Board, in its discretion, may deny motions for summary judgment where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition, and/or response indicate on their face that a genuine issue may exist.

III. Respondent's Motion, Rather Than Establishing the Absence of Genuine Issues of Material Fact, Highlights the Issues Framed by the Pleadings

Respondent, an ophthalmology practice in Tucson, Arizona, asserts that it does not meet the Board's jurisdictional standards and, as a result, the Board does not have jurisdiction

the Division of Judges forwarded Respondent's Motion to the Office of the Executive Secretary of the Board. Inasmuch as it appears that Respondent's Motion may have been untimely filed, General counsel respectfully submits that Respondent's Motion should be dismissed on procedural grounds, as well as on the substantive bases discussed in this Opposition.

to hear this matter. Rather than provide support for its Motion, Respondent's assertions simply highlight the fact that there exist factual disputes that warrant a hearing before an administrative law judge of the Board.

More specifically, the Complaint alleges that Respondent is an employer under the Act and that the Board has jurisdiction of this matter based on Respondent's impact on interstate commerce. Respondent, by its Answer, denies same, though it admits that during the relevant 12-month period, in its business operations as a medical practice, it received gross revenues of over \$250,000 annually.² By its Motion, Respondent also asserts, but does not establish, a variety of other facts and figures regarding its impact on interstate commerce and status as an employer. Rather than settle the issue, Respondent's Motion, as well as the pleadings, amplify the need for a hearing in this matter. General Counsel understands and is prepared to submit into evidence sufficient proof that Respondent is, in fact, an employer under the Act and that the Board does, in fact, have jurisdiction in this case. As a result, General Counsel respectfully requests that Respondent's Motion, insofar as it seeks summary judgment on the issue of whether the Board may assert jurisdiction in this case, be dismissed.

By its Motion, Respondent also asserts that the Charging Party is a supervisor within the meaning of Section 2(11) of the Act and, therefore, that summary judgment should be granted on that basis. By its Motion, Respondent asserts that the Charging Party was a "back office supervisor" at the time of her discharge and submits various personnel forms with its Motion regarding the Charging Party's status. Contrary to Respondent's claims, General Counsel intends to establish at hearing that the Charging Party was, in fact, an employee

² Respondent admits in its Answer and states in its Motion that it is engaged in providing ophthalmology care and treatment and, in the course of its business operations described in the Complaint, it receives gross revenues in excess of \$250,000. As a result, it would be appropriate for the Board to grant summary judgment in favor of the General Counsel on the issue of whether Respondent is an employer within the Board's jurisdiction.

within the meaning of the Act at the time of the alleged unfair labor practices. Specifically, the General Counsel intends to offer documentary and testimonial evidence in support of the Complaint allegations, including the fact that the Charging Party should be afforded the protection of the Act as an employee within the meaning of the Act. Again, Respondent's conclusory declarations are insufficient to confer supervisory status on an employee and merely amplify the warrant for a hearing before an administrative law judge so as to allow the parties to present their evidence in support of their respective positions on these issues. Such a hearing would allow the administrative law judge to make the necessary credibility resolutions, evaluate the evidence presented, and prepare a decision and recommended order. Accordingly, Respondent's request for summary judgment in this regard should be denied.

IV. Conclusion

Based on the foregoing, the General Counsel respectfully requests that Respondent's Motion be denied in its entirety.

Dated at Detroit, Michigan, this 19th day of November 2012.

/s/ Jennifer Y. Brazeal
Jennifer Y. Brazeal
Counsel for the Acting General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226
(313) 226-3275
Jennifer.Brazeal@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT in COHEN OPHTHALMOLOGY & CONSULTING, INC., Case 28-CA-086143 was served by E-Gov, E-Filing, and E-Mail on this 19th day of November 2012, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

David L. O'Daniel, Attorney at Law
Monica M. Ryden, Attorney at Law
Gordon & Rees, LLP
111 West Monroe Street, Suite 1600
Phoenix, AZ 85003-1736
Email: dodaniel@gordonrees.com
Email: mryden@gordonrees.com

Ms. Marina Z. Sanchez
5388 South Stockwell Road
Tucson, AZ 85746-3930
Email: mzsanchez75@yahoo.com

/s/ Nicholas J. Brown
Nicholas J. Brown
Labor Management Relations Aid
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Telephone: (602) 640-2199