

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

UNITED STATES POSTAL SERVICE

and

Case 28-CA-096422

FILIMON PINO, an Individual

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

Pursuant to Section 102.24(b) of the Board's Rules and Regulations Counsel for the Acting General Counsel (General Counsel) respectfully files this opposition to Respondent United States Postal Service's Motion to Dismiss or for Summary Judgment (Motion) filed on June 14, 2013. Contrary to Respondent's contentions, the General Counsel has sufficiently pled claims supporting violations of the Act and has presented genuine issues of material fact which preclude summary judgment.

I. BACKGROUND

On January 15, 2013,¹ Filimon Pino (Pino) filed a charge alleging that Respondent unlawfully retaliated against him by refusing to renew his yearly employment contract and later refusing to re-hire him because he filed a grievance against Respondent and engaged in activities on behalf of National Association of Letter Carriers, Branch 504 (Union). Pino later amended the charge on March 28, to include allegations that Respondent threatened employees with not renewing their employment contracts because they filed grievances and engaged in union activities. On March 29, a Complaint and Notice of Hearing (Complaint) issued alleging, in pertinent part, that Respondent violated Section 8(a)(1) and (3) of the Act when it threatened its

¹ All dates refer to calendar year 2013, unless otherwise noted.

employees for engaging in union activity in October 2012, and when it discriminated against Pino in October and November 2012, for engaging in union activity.

On April 11, Respondent filed its Answer and Affirmative Defenses (Answer) denying the commission of any unfair labor practices. On June 14, Respondent filed its Motion with an attached Affidavit of Eric Martinez (Martinez), claiming that the Complaint should be dismissed because the General Counsel has failed to make a *prima facie* case. Specifically, relying on Martinez' attached affidavit, and a five-page "statement of facts," Respondent claims that Postmaster Martinez was unaware of Pino's union activity and thus, Pino's union activity "could not have played a part in Mr. Martinez's decision not to renew Mr. Pino's employment." In its Motion, Respondent also alleges that summary judgment is appropriate because Martinez' affidavit shows "that several *Wright Line* elements of the General Counsel's claim are not present." Finally, Respondent asserts that the collective-bargaining agreement covering Pino allowed Respondent to terminate him at the end of his appointment "without justification". Motion at 10.

II. ARGUMENT

A. Respondent's Motion to Dismiss is improper because the General Counsel's pleadings sufficiently state a claim.

Respondent's Motion to Dismiss rests on the claim that the "Complaint will not withstand a *Wright Line* analysis." However, "the Board . . . has adopted a system of notice pleading." *Smith Industrial Maintenance Corp.*, 355 NLRB No. 217 (2010); see also *In re Golden Stevedoring Co.*, 335 NLRB 410, 435 (2001). A complaint must only "contain . . . a clear concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." 29 C.F.R. § 102.15(b). "The

General Counsel is not required to describe the evidence he will offer to prove the unfair labor practice.” *Smith Industrial Maintenance Corp.*, 355 NLRB No. 217 (2010); see also *In re Golden Stevedoring Co.*, 335 NLRB at 435 (“the complaint need not contain a wealth of detail about the facts which the government intends to prove at trial”). Also, in considering a motion to dismiss, “the Board construes the Complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief.” *Detroit Newspapers*, 330 NLRB 524, 524, n. 7 (2000). Finally, in ruling on a motion to dismiss for failure to state a claim, it is not appropriate to look outside the pleadings themselves and consider additional facts alleged by the moving party. *The Boeing Co.*, 2011 WL 2597601 (citing *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88-89 (6th Cir. 1997)).

Here, Paragraphs 5 and 6 of the Complaint satisfy the Board’s minimal pleading requirements, and, accepted as true, set forth claims supporting violations of the Act. A discharge or other adverse action against an employee violates the Act if anti-union animus was a motivating factor for the adverse action taken. See *Wright Line*, 251 NLRB 1083, 1089 (1980). The Complaint clearly states that union activity was the reason Respondent took adverse action against Pino. For example, Paragraph 5 of the Complaint, in part, states that Martinez, “in his office . . . threatened its employees . . . *because* they engaged in union activities.” (emphasis added). In addition, Paragraph 6 of the Complaint, in part, states that “Respondent failed to rehire . . . and failed to hire (Pino) . . . *because* the named employee of Respondent formed, joined, and assisted the Union” (emphasis added). Accordingly, General Counsel’s Complaint sufficiently states a claim as it alleges that employees’ union activity was a

motivating factor in Respondent's actions. Therefore, Respondent's Motion to Dismiss should be denied.

B. Respondent's Motion for Summary Judgment is improper.

1. Standard for Summary Judgment.

Respondent misapprehends the course of authority to consider a summary judgment request. That power is grounded in the Board's Rules and Regulations and not in the Federal Rules of Civil Procedure, as Respondent would argue. *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 495 (1966) enfd. 379 F.2d 517 (7th Cir. 1967) cert. denied 389 U.S. 1041 (1968); *Clark's Dept. Store*, 175 NLRB 337, 340 (1969). Simply because the Federal Rules contain a summary judgment provision does not make those rules "applicable when a motion is made for summary judgment pursuant to the authority of the Board's Rules and decisions." *Id.* In fact, the Board has no provision comparable to Rule 56(e) under which a moving party can set forth its version of the facts and the other party must either admit or controvert with specific facts. *KIRO, Inc.*, 311 NLRB 745, 746 (1993). Indeed, the Board has noted "that it would be impracticable for the Board to follow Rule 56(e) because unlike Federal courts, the Board has never allowed prehearing discovery." *Id.* at 746 n.4.

Because its rules do not provide for pre-trial discovery, the Board has held that summary judgment proceedings are governed by the Board's Rules and Regulations, and not by the Federal Rules of Civil Procedure. *Id.* Thus, it is well settled that the General Counsel is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *Id.* at 746; *United States Postal Service*, 311 NLRB 254, 254 n. 3 (1993). Instead, the General Counsel can simply rely upon the unfair labor practice allegations in the Complaint, Respondent's denial of these allegations in its Answer, and general

averments that factual issues exist requiring a hearing. *KIRO, Inc.*, 311 at 745-746, 745 n.3; *United States Postal Service*, 311 NLRB at 254 n.3. Accordingly, because Respondent has denied the substantive allegations in the Complaint regarding threats to employees and Pino not being hired, and has also proposed its own alternative version of events, genuine issues of material fact exist and summary judgment is inappropriate.

2. Respondent's Motion for Summary Judgment relies on inadmissible evidence.

In a Motion for Summary Judgment, the moving party has the burden of supporting its motion with admissible evidence. *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 n.4 (1979). The adverse party has no obligation to respond until the moving party has met this burden. *Id.* at n.3. In support of its Motion, the Respondent has not produced any admissible evidence to sustain its assertions that Martinez was unaware of Pino's union activity and that Pino's union activity was not a motivating factor in Martinez' decision not to rehire him. Accordingly, the General Counsel has no obligation to respond and, on its face, Respondent's Motion is deficient and must be denied.

In support of its Motion, Respondent only offers the Affidavit of Eric Martinez. Rule 801(c) of the Federal Rules of Evidence states that "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A document submitted to assert the truth of its written content is hearsay and inadmissible. Fed. R. Evid. 801(c). Respondent's attached affidavit is submitted for the truth of the matters therein, namely that Martinez had no knowledge of Pino's or other employees' union activity.² Therefore, the affidavit is inadmissible hearsay.

² Respondent further argues that notwithstanding Martinez's knowledge of Pino's union activity, the "current CBA provides for management's rights to terminate [Pino] upon the completion of his . . . appointment without justification." Motion at 10. In support, Respondent relies on Martinez's affidavit which includes apparent

3. Factual issues exist, precluding Respondent's Motion for Summary Judgment.

In the Complaint, the General Counsel alleges that Respondent violated the Act by threatening employees for union activity and by taking adverse action against Pino for his union activity. Compl. ¶¶ 5–6. In its Answer, Respondent denies these allegations. Answer ¶¶ 5–6. Notwithstanding Martinez' inadmissible affidavit, again, Respondent denies the allegations set forth in the Complaint in its Motion. “[A] simple denial of unlawful conduct is sufficient to raise a material question, without requiring [General Counsel] to come forward with affidavits or other evidence.” *Lake Charles Memorial Hospital*, 240 NLRB at 1331 n.3. Accordingly, here, there are issues of fact and Respondent's Motion must be denied.

Even if all or part of the evidence submitted by Respondent is admissible and sufficient for the purposes of summary judgment, the General Counsel intends to show, among other things, that:

1. Pino's work performance was not the reason for the adverse action;
2. Respondent's statements and assertions regarding its reasons for not rehiring Pino are inconsistent and pretextual; and
3. Respondent, through Martinez, told Pino that his union activity was the reason he was not rehired.

The foregoing outline of evidence, supplemented with other facts and contentions of the General Counsel, will establish that Respondent has violated Section 8(a)(1) and (3) of the Act as alleged. The General Counsel's recitation of evidence is in dispute with Respondent's version of the facts and raises obvious and significant conflicts. Many of these conflicts will turn on the

language from the CBA. However, these referenced statements are also inadmissible hearsay as the affidavit statement is offered to prove the truth of the matter asserted. Moreover, Martinez's written declaration testifying to the terms of the contract is inadmissible because he did not participate in the actual contract negotiations. See *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Products, Inc.*, 212 F.3d 373, 382 (7th Cir. 2000) (where testimony from the company president regarding a contract was struck because the president was not a direct party to the negotiations and so, lacked personal knowledge).

credibility of witnesses, and can only be resolved by an Administrative Law Judge after a full hearing of the evidence submitted by the parties. Consequently, Respondent's Motion for Summary Judgment should be denied.

III. CONCLUSION

As discussed, Respondent's assertion that the General Counsel has failed to state a claim is without merit. Furthermore, the evidence that Respondent relies on to support its Motion regarding the motivation for its adverse actions is inadmissible. Thus, Respondent's denials of the Complaint allegations are sufficient to preclude summary judgment. Additionally, there are significant factual disputes as General Counsel plans to introduce evidence at trial disputing the assertions set forth in Respondent's Motion. Based on the foregoing, the General Counsel respectfully requests Respondent's Motion to Dismiss or for Summary Judgment be denied.

Dated at Phoenix, Arizona, this 21st day of June 2013.

/s/ David T. Garza
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT in UNITED STATES POSTAL SERVICE, Case 28-CA-096422, was served by E-Gov, E-Filing, regular mail, and E-Mail on this 21st day of June 2013, on the following:

Via E-Gov, E-Filing:

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