

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

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**MEZONOS MAVEN BAKERY, INC.,**

**Respondent**

**and**

**PUERTO RICAN LEGAL DEFENSE  
AND EDUCATION FUND**

**Charging Party**

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**Case No. 29-CA-25476**

**BRIEF TO THE BOARD UPON REMAND  
FROM THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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## **PRELIMINARY STATEMENT**

Counsel for the General Counsel (“ General Counsel”) hereby submits the following brief as allowed by the National Labor Relations Board (“Board”) pursuant to a remand in *Palma v. NLRB*, 723 F. 3d 176 (2d Cir. 2013) (“Palma”), affirming in part and remanding in part *Mezonos Maven Bakery*, 357 NLRB No. 47 (2011).

Conditional reinstatement is an appropriate remedy where, as here, the issue is not barred by any rule or doctrine of waiver or estoppel, such remedy is in harmony with the Immigration Reform and Control Act of 1986 (“IRCA”) and prior case law, and is, as well, particularly appropriate for the facts of this case.

## **BACKGROUND**

On February 2, 2005, pursuant to a formal settlement stipulation, the Board issued an unpublished Decision and Order which ordered Mezonos Maven Bakery, Inc. (“Employer”) to, *inter alia*, “offer [the Employees] unconditional reinstatement . . . except that [the Employer] may avail itself of a compliance proceeding and therein attempt to establish that one or more of the [Employees] is not entitled to an unconditional offer of reinstatement[.]” Stipulation, Case No. 29-CA-25476 (May 2004). On March 15, 2005, the United States Court of Appeals for the Second Circuit enforced the Board’s consent Order. The General Counsel thereafter issued a compliance specification. During this subsequent proceeding, the General Counsel explicitly requested that the Administrative Law Judge (“ALJ”) issue an order requiring offers of conditional reinstatement. In his decision, the ALJ stated that, among other things, valid offers of reinstatement had not been made to the employees and that *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)(“*Hoffman*”) did not impact the

conditional reinstatement order provided in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417 (1995), *enfd.* 134 F. 3d 50, 56 (2d Cir. 1997) (“*A.P.R.A.*”). However, although the ALJ ordered backpay for the Employees, he failed to order conditional reinstatement. The Employer thereafter filed exceptions that included objections to the ALJ’s discussion of conditional reinstatement. Employers’ Exceptions to the Board ¶15. Given the favorable phrasing of the original order, the actual litigation of the reinstatement issue, and the ALJ’s rejection of the Employer’s *Hoffman*-based defense, neither the General Counsel nor the LatinoJustice PRLDEF (formerly the Puerto Rican Legal Defense and Education Fund) (“Charging Party”) filed exceptions to the ALJ’s failure to order conditional reinstatement.<sup>1</sup>

In a Supplemental Decision and Order dated August 9, 2011<sup>2</sup>, the Board made no mention as to whether the Employer should offer conditional reinstatement to the employees.

On September 6, 2011, the Charging Party filed a motion for reconsideration which motion made no reference regarding the issue of reinstatement. The motion was thereafter denied by the Board on November 3, 2011.

Subsequently, on March 27, 2012, employees Christian Palma, Anotnio Gonzalez, Francisco Javier Joya, Jose Antonio Quintuna and Jose Armando Sax-Gutierrez (“Petitioners”) filed a Petition for Review with the United States Court of Appeals for the Second Circuit. On July 10, 2013, while the Second Circuit denied the

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<sup>1</sup> *Cf. NLRB v. Local 345, Bhd. of Util. Workers of New England, Inc.*, 612 F.2d 598, 604 (1st Cir. 1980) (noting that “respondents could not be expected to except to that which favored them” [an ALJ’s recommended order] even though the remedy portion of the ALJD imposed additional liability that the Board later incorporated into its final order).

<sup>2</sup> *Mezonos Maven Bakery, Inc., supra.*

Petition with respect to backpay, it remanded the issue of conditional reinstatement to the Board. Specifically, the Second Circuit remand states:

In sum, given (a) that the ALJ Order did not recommend conditional reinstatement despite the findings in the ALJ Decision that reinstatement offers would be appropriate and that Mezonos had not met its obligation to make such offers, and despite an explicit request by the General Counsel for an order requiring offers of conditional reinstatement, (b) that petitioners did not file any exceptions with the Board despite the failure of the ALJ Order to recommend conditional reinstatement, and (c) that the Board did not consider whether an order requiring offers of conditional reinstatement would be appropriate despite Mezonos's explicit argument that the decision in *Hoffman Plastic* foreclosed any orders for conditional reinstatement, we conclude that this matter should be remanded to the Board for consideration, in the first instance, of issues relating to that form of relief—including issues of waiver, estoppel, and appropriateness.

*Palma* at 187.

The Board accepted the remand from the Court of Appeals and invited the parties to “file statements of position with respect to the issues raised by the remand.”

Letter from Farah Z. Qureshi, Associate Executive Secretary, NLRB, to Parties (Mar. 26, 2014), available at <http://www.nlr.gov/case/29-CA-025476>.

### **WAIVER AND ESTOPPEL**

The appropriateness of an order for conditional reinstatement is an issue properly before the Board and not barred by any rule or doctrine of waiver or estoppel.

#### **1. The Parties Are Not Prejudiced**

Given that the conditional reinstatement issue was litigated during the compliance proceeding, and that the Board is now providing the parties with a further opportunity to brief the issue on remand, no party is prejudiced by the Board taking up the merits of the conditional reinstatement issue. See *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1404 at fn.26 (D.C. Cir. 1984) (holding that “the Board was not precluded from ordering reimbursement by either the ALJ's decision not to

recommend that remedy, or the absence of an exception on that point by the General Counsel—or by those two factors taken together. . . . [This] conclusion . . . is particularly strong because the reimbursement remedy *was before the ALJ and was briefed* at that stage of this case: the petitioners cannot claim unfair surprise at this later stage.” (italics in original)); *Kallaher & Mee, Inc.*, 87 NLRB 410, 414 at fn. 2 (1949) (finding violation of the National Labor Relations Act (“NLRA”) that trial examiner had rejected, even though no exceptions were filed, because “the matter was thoroughly litigated” and the Board was relying on the examiner’s findings).

## 2. The Board May Act *Sua Sponte*

The Board may act *sua sponte* with respect to the conditional reinstatement issue, even if the parties should have filed exceptions to the ALJD. In *Dish Network Corp.*, 359 NLRB No. 32 (Dec. 13, 2012), the Board explained that Sec. 102.46(b)(2) and (g) of the Board’s rules<sup>3</sup>, which provide that failure to take exception to an ALJ’s ruling constitutes a waiver of the right to challenge that ruling before the Board, “operates against the parties, not the Board” (*Id.*, slip op. at 4) and “does not prohibit the Board from considering a matter *sua sponte*, where due process permits.” *Id.*, slip op. 6 at fn. 9. The Board noted that the Court in *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959), which rejected the argument that the Board is barred by Section 102.46 from considering an issue not raised by a party in exceptions, “held that ‘[e]ven absent an

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<sup>3</sup> Section 102.46(b)(2) of the Board Rules provides:

“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.”

Section 102.46(g) of the Board Rules provides:

“No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.”

exception, the Board is not compelled to act as a mere rubber stamp for its Examiner (now administrative law judge), but rather is ‘free to use its own reasoning’”. See also *NLRB v. Oregon Worsted Co.*, 94 F.2d 671, 672 (9th Cir. 1938) (“The Board may accept or reject any and add to the accepted recommendations such other orders as seem warranted by the evidence and its findings.”); *Shalom Nursing Home*, 241 NLRB 62, 63 at fn.9 (1979) (“The Board’s authority to act in the absence of an exception is well established and has been repeatedly exercised in the past”).

### **CONDITIONAL REINSTATEMENT IS THE APPROPRIATE REMEDY**

#### 1. The Reinstatement Order In *A.P.R.A.* Is Controlling

*A.P.R.A.* required, in relevant part, that the employer:

Offer [the discriminatees] immediate and full reinstatement to their former positions of employment or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, INS [now, USCIS] Form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986[.]

*Id.* at 417.

#### 2. Conditional Reinstatement Is In Harmony With IRCA

Reinstatement is the standard remedy for employee discharges that violated the Act. In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (“*Sure Tan*”), the Supreme Court held that a reinstatement order was both appropriate and necessary to remedy the unlawful discharge of undocumented workers, and that making that order conditional on compliance with federal immigration laws eliminated any potential inconsistency with

those laws.<sup>4</sup> A conditional reinstatement remedy is also fully in harmony with IRCA's policies. See *A.P.R.A.*, *supra.*, and the Second Circuit's decision affirming it, 134 F.3d 50, 56 (2d Cir. 1997) (concurring with the Board's assessment of IRCA's policies and "hold[ing] without hesitation that IRCA did not diminish the Board's power to craft remedies for violations of the NLRA, provided that the Board's remedies do not conflict with the requirements of IRCA."). A conditional reinstatement order "provides a measure of compensatory relief that is properly gauged to [the discriminatees'] right (or lack thereof) to work in the United States . . . and felicitously keeps the Board out of the process of determining an employee's immigration status, leaving compliance with IRCA to the private parties to whom the law applies." 134 F.3d at 57.

### 3. Prior Board And Court Orders Have Provided Conditional Reinstatement Remedies In Similar Circumstances

The Board and courts have long held that orders for conditional reinstatement are appropriate in similar circumstances. See *A.P.R.A.*, 320 NLRB at 415 ("[C]onditional remedies have been used in other cases when reinstatement would require removal of a legal disability."). See, e.g., *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) (modifying Board remedy to condition reinstatement of a driver whose license had been suspended on his presentation of a valid driver's license within a reasonable period of time); *De Jana Industries*, 305 NLRB 845 (1991) (ordering employer to offer employee reinstatement to a driver position once employee established that he had a valid driver's license); *Douglas Aircraft Co.*, 10 NLRB 242, 282, 285 (1938) (discriminatee entitled to reinstatement to his former position, conditioned on admission

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<sup>4</sup> The order in *Sure Tan* conditioned reinstatement on the employee's legal reentry to the country, rather than the completion of a Form I-9 with appropriate documentation, because the INA did not prohibit the employment of undocumented aliens but rather only prohibited their illegal entry into the country.

to U.S. citizenship); *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1067 (2007); *enfd.* 577 F.3d 467 (2d Cir. 2009) (ordering employer to offer reinstatement contingent upon employee's demonstrating that he reestablished his state certification to drive school bus within a reasonable time of the offer); *Epic Security Corp.*, 325 NLRB 772, 774 (1998) (reinstatement of employee to position as armed guard conditioned upon his regaining gun license).

4. Conditional Reinstatement is Particularly Important in this Context to Provide Some Meaningful Remedy for the Employer's Unfair Labor Practices

Given *Hoffman's* limitation on the Board's authority to order backpay, it is crucial that the Board do everything within its power to make employees whole, to deter employers from violating the Act with impunity, and to insure that all employees understand that they can exercise their statutory rights without fear of reprisal. Absent a meaningful remedy, the Employer's conduct in this case – discharging employees who concertedly complained about treatment they had received from a supervisor – clearly will chill the future exercise of statutory rights by both the Employees and their co-workers. Requiring the Employer to offer conditional reinstatement to Employees who were unlawfully discharged will significantly enhance the remedial effect of a cease and desist order and notice-posting, whether or not the offers are ultimately accepted.

5. *Hoffman* Does Not Preclude A Conditional Reinstatement Remedy

In remanding this issue to the Board, the Second Circuit wrote that it was "skeptical" of Mezonos's argument that *Hoffman* foreclosed conditional reinstatement orders, explaining that "although the *Hoffman Plastic* Court did not directly deal with an issue of reinstatement, its discussion plainly did not foreclose relief in the nature of an

order for reinstatement conditioned upon an employee's submission of documentation as required by IRCA." *Palma*, 723 F.3d at 186,187.

(a) The appropriateness of orders for conditional reinstatement was not before the Court in *Hoffman*. The issue in *Hoffman* was whether federal immigration policy foreclosed the Board from awarding backpay to an undocumented alien who had never been legally authorized to work in the U.S. The Court's decision only dealt with the backpay remedy and did nothing to abrogate that portion of *A.P.R.A.*, *supra.*, that approved of orders for conditional reinstatement.

(b) Unlike in *Hoffman*, there is no "after-acquired knowledge" defense that might preclude a conditional reinstatement remedy. Thus, in *Hoffman*, the employer (1) had attempted to comply with IRCA and did not knowingly hire any employee in violation thereof, and (2) would not have hired the discriminatee had it known of his unauthorized immigration status. 326 NLRB 1060, 1062 (1998). The Board, therefore, denied any sort of reinstatement remedy under the after-acquired knowledge doctrine (distinguishing *A.P.R.A.*, where "the employer was on notice from the outset of the employees' ineligibility for employment and was therefore precluded from raising an after-acquired knowledge defense"). *Id.* at 1062. Here, as in *A.P.R.A.*, the Employer knowingly violated IRCA, and thus it cannot argue that, had it known of the Employees' undocumented status, it would never have hired them in the first instance.

(c) *Hoffman* did not upset the Supreme Court's clear approval of orders for conditional reinstatement in *Sure-Tan*. In *Hoffman*, the Court, citing *Sure-Tan*, stated that the Board's remedial "authority [is] limited by federal immigration policy," and that "to avoid 'a potential conflict with the INA,' the Board's reinstatement order [in *Sure-Tan*]

had to be conditioned upon proof of ‘the employees’ legal reentry.’” 535 U.S. at 145. Although the Court in *Hoffman* recognized that IRCA “significantly changed” the legal landscape since *Sure-Tan*, by mandating that employers verify the identity and eligibility of new hires by means of certain documentation requirements [535 U.S. at 147–48], that change in immigration policy is fully reflected in the order for conditional reinstatement proposed here, which requires the Employees to complete federal Form I-9 and present appropriate documentation.

(d) The policy considerations underlying *Hoffman* do not conflict with, and in fact support, an order for conditional reinstatement here.

(i) The proposed order does not give rise to any conflict between the NLRA and IRCA and supports the effectuation of both. In *Hoffman*, the Court held that awarding backpay to undocumented aliens undermined IRCA’s policies by “encourag[ing] the successful evasion of apprehension by immigration authorities, condon[ing] prior violations of the immigration laws, and encourag[ing] future violations.” 535 U.S. at 151. By contrast, in this case, an order for conditional reinstatement would encourage compliance with IRCA since such compliance would provide the only avenue by which the Employees could regain their jobs.

(ii) *Hoffman* abrogated the Board and Second Circuit’s reasoning as applied to backpay orders, since such a remedy entails rewarding “an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.” 535 U.S. at 149. That policy rationale is clearly inapplicable to conditional reinstatement orders, which are contingent upon compliance with IRCA and thus do not reward or encourage violations of

immigration law. To the contrary, it provides an incentive for individuals who have been discriminated against in violation of the NLRA to obtain compliance with IRCA.

(iii) Indeed, failure to issue a conditional reinstatement order would arguably run afoul of IRCA. The immigration laws specifically endorse the employment of individuals who receive an adjustment of status, and the Employees in the present case may now be eligible to legally work in the U.S. The failure of a Board remedy to take full account of that and to accommodate an Employee's adjustment of status would therefore run the risk of "trench[ing] upon a federal statute or policy outside the Board's competence to administer". *Hoffman*, 535 U.S. at 147.<sup>5</sup>

#### 6. A Conditional Reinstatement Order Is Particularly Appropriate in this Case

(a) The Employees here were unlawfully discharged in February 2003. *Mezonos*, 357 NLRB No. 47, slip op. at 1. In May 2006, the General Counsel agreed to proceed, for purposes of the compliance proceeding only, on the assumption that the Employees were undocumented. Administrative Law Judge's Order Granting Motion to Amend Compliance Specification and Withdrawal of the Section 102.31(c) Request, Case No. 29-CA-25476 (June 2, 2006). The Employees might have been able to demonstrate proper documentation had they been offered conditional reinstatement at the conclusion of the Board's proceedings. Moreover, a significant amount of time has now elapsed since these events, and Employees who were not in fact documented before may well have obtained adjustments of status during this time. See *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012) (mentioning general rule that "aliens who

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<sup>5</sup> We further note that the statutory prohibition of certain immigration-related unfair employment practices evidences a federal policy supporting the employment of certain classes of individuals regardless of citizenship status. See 8 U.S.C. § 1324b(a) (prohibiting, *inter alia*, discrimination against certain "protected individual[s]").

accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident” but noting that there are “certain exceptions”); 2 Immigr. Law & Business § 12:37 (2d ed.) (available on Westlaw). For example, “immediate relatives” of U.S. citizens<sup>6</sup> and certain “special immigrants” who have engaged in unlawful employment or had been or are currently out of status may apply for adjustment of status. 8 U.S.C. §1255; 8 C.F.R. § 245.1(b)(10). Employment-based immigrants may also apply for adjustment of status, provided they have engaged in no more than 180 days of unauthorized employment. 8 U.S.C. §1255(k).

(b) The fact that there may be some uncertainty as to whether any of the Employees will be able to comply with I-9 requirements and thereby obtain reinstatement under the order is irrelevant, since uncertainty is inherent in conditional orders of this type. See *Sure-Tan*, 467 U.S. at 904 (recognizing “probable unavailability of the Act’s more effective remedies [including conditional reinstatement] in light of the practical workings of the immigration laws”).

### **CONCLUSION**

General Counsel respectfully requests that because conditional reinstatement is the appropriate remedy in the instant case and not barred by any waiver or estoppel

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<sup>6</sup> “[T]he term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.” 8 U.S.C. § 1151(b)(2)(A)(i). It is possible, for example, that an Employee may have become a spouse of a U.S. citizen and thereby had his or her status adjusted during the course of the NLRB proceeding.

rule, the Board should require the Employer to offer conditional reinstatement to the Employees.

Dated: Brooklyn, New York  
May 1, 2014

  
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