

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEZONOS MAVEN BAKERY, INC.

and

Case No. 29-CA-025476

LATINOJUSTICE PRLDEF

**STATEMENT OF POSITION ON REMAND BY  
DISCRIMINATEES CHRISTIAN PALMA, ANTONIO GONZALEZ,  
FRANCISCO JAVIER JOYA, JOSE ANTONIO QUINTUNA, AND  
JOSE ARMANDO SAX-GUTIERREZ**

Discriminatees Christian Palma, Antonio Gonzalez, Francisco Javier Joya, Jose Antonio Quintuna, and Jose Armando Sax-Gutierrez (collectively, “the discriminatees”) file this brief in response to the court of appeals’ remand in *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013), and the National Labor Relations Board’s March 26, 2014 letter inviting the parties to file statements of position with respect to the issues raised by the remand.

As we explain below, the discriminatees agree with the General Counsel that the Board should order Mezonos Maven Bakery to offer reinstatement to the discriminatees provided that they complete, within a reasonable time, I-9 forms so as to allow Mezonos to meet its obligations under the Immigration Reform and Control Act of 1986 (IRCA).

## STATEMENT

The following are the facts relevant to the conditional reinstatement remedy at issue on remand.

Respondent Mezonos discharged the employees in this case “after they concertedlly complained about the treatment they were receiving from a supervisor.” *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47, slip op. 1 (Aug. 9, 2011). In addition, the Board found – based on the General Counsel’s “agree[ment] to proceed on the assumption that the discriminatees are undocumented” – that Mezonos “violated IRCA by hiring [the discriminatees] knowing they were undocumented.” *Id.*, slip op. 1-2.

Rather than contest the charge, Mezonos entered into a formal settlement stipulation. *Palma*, 723 F.3d at 177. Pursuant to that stipulation, the Board issued an unpublished Decision and Order, which was enforced by the U.S. Court of Appeals for the Second Circuit. *Id.* at 177-78. The court of appeals’ judgment stated that Mezonos was to offer the employees

“unconditional reinstatement . . . except that [Mezonos] may avail itself of a compliance proceeding and therein attempt to establish that one or more of the alleged discriminatees is not entitled to an unconditional offer of reinstatement.” *Id.* at 178 (internal quotation marks omitted).

During compliance proceedings, Mezonos challenged the General Counsel's Compliance Specification on the ground that the discriminatees were allegedly undocumented workers not entitled to reinstatement pursuant to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). *Ibid.* In response, and "for the purpose[] of expediting this matter," the General Counsel agreed that "for the purposes of this proceedings, and only this proceeding, the General Counsel will proceed on the assumption that the discriminatees are undocumented." *Ibid.* (quoting ALJ Order Granting Motion to Amend Compliance Specification). The General Counsel also modified its requested remedy in order to seek conditional, rather than unconditional, reinstatement. *Ibid.*

As the court of appeals observed, "despite an explicit request by the General Counsel for an order requiring offers of conditional reinstatement," and "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," "the ALJ Order did not recommend conditional reinstatement." *Id.* at 187. On the other hand, "Mezonos – which should have been pleased about the absence of any order [in the ALJ's decision] recommending reinstatement – filed exceptions that repeatedly

challenged the ALJ’s views on reinstatement.”<sup>1</sup> *Id.* at 186. The NLRB’s brief to the court of appeals explained that, before the Board, both the General Counsel’s and Charging Party’s “answering briefs responded to Mezonos’s arguments and . . . discuss[ed] conditional reinstatement.” NLRB Brief in Opposition to Petition for Review, at 24. Despite this briefing on the reinstatement issue, “the Board did not consider whether an order requiring offers of conditional reinstatement would be appropriate.” *Palma*, 723 F.3d at 187. Because the Board did not consider this issue, the court “remanded [this case] to the Board for consideration, in the first instance, of issues relating to that form of relief – including issues of waiver, estoppel, and appropriateness.” *Ibid.*

## **ARGUMENT**

1. As an initial matter, the General Counsel did not waive its request for conditional reinstatement, nor is the General Counsel estopped from pursuing that remedy at this stage of the litigation.

The court of appeals found the General Counsel made “an explicit request . . . for an order requiring offers of conditional reinstatement” to the ALJ and “the ALJ Decision contained extensive discussion of Mezonos’s contention that offers

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<sup>1</sup> In its brief to the court of appeals, the NLRB acknowledged this fact, stating “Mezonos excepted to the judge’s discussion ( . . . in the context of its offers of reinstatement) of conditional reinstatement and argued that it was not an appropriate remedy after *Hoffman*.” *Ibid.* (quoting NLRB Brief in Opposition to Petition for Review, at 24) (emphasis omitted).

of reinstatement had been made to the discriminatees.” *Palma*, 723 F.3d at 186-87. Ultimately, “the ALJ found that Mezonos had an obligation to make valid reinstatement offers,” although the ALJ did not include such a requirement in his order. *Id.* at 186.

Before the Board, “Mezonos . . . filed exceptions that repeatedly challenged the ALJ’s views on reinstatement,” *ibid.*, and the General Counsel’s and Charging Party’s “answering briefs responded to Mezonos’s arguments and . . . discuss[ed] conditional reinstatement,” NLRB Brief in Opposition to Petition for Review, at 24. As the court of appeals explained with regard to this unusual role reversal, “[i]t may be that the parties simply assumed from the findings made in the ALJ Decision that the ALJ had in fact granted petitioners’ request for conditional reinstatement.” *Palma*, 723 F.3d at 186. The issue of conditional reinstatement was, in any event, squarely before the Board and fully briefed by all parties.

Even if Mezonos had not filed exceptions challenging the appropriateness of a conditional reinstatement remedy in this case, “it is the responsibility of the Board to fashion a specific remedy for unlawful conduct, even if the parties have not sought that remedy.” *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348, 1353 (2007). Thus, the D.C. Circuit has held that “the Board [i]s not precluded from ordering [a particular remedy] 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.” *Local 1814, Int’l Longshoremen’s Ass’n v. NLRB*, 735 F.2d 1384, 1404 n. 26 (D.C. Cir. 1984).

Moreover, as the General Counsel correctly explains in its brief, “no party is prejudiced by the Board taking up the merits of the conditional reinstatement issue” because “the conditional reinstatement issue was litigated during the compliance proceeding,” conditional reinstatement was litigated before the Board, and, further, “the Board is now providing the parties with a further opportunity to brief the issue on remand.” GC Brief to the Board Upon Remand, at 3. The Board should therefore reach the merits of the appropriateness of a conditional reinstatement remedy.

2. On the merits, conditional reinstatement is an appropriate remedy in cases in which an employer knowingly employs employees who lack work authorization and then fires them in violation of the NLRA.

Where an unfair labor practice has occurred, the Act requires that the Board “shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). The Board has long held that, where an unlawfully discharged employee lacks some prerequisite to reinstatement to his or her former position, the issuance of a reinstatement order conditioned upon the employee meeting that

prerequisite best “effectuates the policies of [the Act.]” *Ibid.* See, e.g., *Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1066-67 (2007), *enfd.*, 577 F.3d 467 (2d Cir. 2009) (conditioning reinstatement of bus driver on passing required driving test); *Epic Sec. Corp.*, 325 NLRB 772, 774 (1998) (conditioning reinstatement of armed guard on obtaining required gun license); *Future Ambulette, Inc.*, 307 NLRB 769, 771-72 (1992), *enfd.* 990 F.2d 622 (2d Cir. 1993) (conditioning reinstatement of ambulance driver on obtaining valid driver’s license); *De Jana Indus.*, 305 NLRB 845, 845 (1991) (conditioning reinstatement of garbage truck driver on obtaining valid driver’s license); *Douglas Aircraft Co.*, 10 NLRB 242, 282 (1938) (conditioning reinstatement to position building military aircraft – a position limited to U.S. citizens – on admission to citizenship).

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court approved of the use of conditional reinstatement orders in cases involving unlawfully discharged undocumented workers. *Sure-Tan* involved an employer who, after its employees voted to form a union, sent a letter to the Immigration and Naturalization Service (INS) reporting that the employees were unlawfully present in the United States, which led to the workers’ arrest and deportation. *Id.* at 887. The Board found that the employer, by calling the INS, constructively discharged the employees in violation of the Act and ordered the conventional remedy of backpay and reinstatement. *Id.* at 889. On the employer’s petition for review,

however, the Supreme Court held that “the implementation of the Board’s traditional remedies . . . must be conditioned upon the employees’ legal readmittance to the United States.” *Id.* at 902-03. Remanding the case to the Board, the Court explained that “[b]y conditioning the offers of reinstatement on the employees’ legal reentry, a potential conflict with the [Immigration and Nationality Act] is thus avoided.” *Id.* at 903. On remand, the Board issued a modified reinstatement order stating that the employer “must advise the discriminatees that the Respondent has no obligation to reinstate them unless they are legally present in the United States and legally free to be employed when they offer themselves for reinstatement.” *Sure-Tan, Inc.*, 277 NLRB 302, 303 (1985).

Although *Sure-Tan* was decided before Congress enacted IRCA, which for the first time levied sanctions on employers who knowingly employ workers without work authorization, the Board has since reaffirmed the appropriateness of conditional reinstatement orders in cases involving undocumented employees. The lead case, *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 408 (1995), *enfd.* 134 F.3d 50, 57 (2d Cir. 1997), concerned an employer that hired two undocumented employees “with full knowledge that they lack[ed] proper work authorization” and then unlawfully discharged those employees for their support of a union organizing effort. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d at 52 (capitalization and italics omitted). The Board ordered the employees

reinstated, “condition[ing] the Respondent’s obligation to reinstate these individuals on the individuals’ production, within a reasonable time, of documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States.” *A.P.R.A. Fuel Oil*, 320 NLRB at 408. The court of appeals enforced, commenting approvingly that “the Board’s order quite clearly tailors the remedy for the violation of the NLRA to the restrictions of [IRCA][,]” 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.” *A.P.R.A. Fuel Oil*, 134 F.3d at 57.

Subsequently, the Supreme Court decided *Hoffman Plastic*, which held that, “allowing the Board to award *backpay* to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.” 535 U.S. at 151 (emphasis added). Notably, however, the *Hoffman Plastic* Court was not faced with the issue of conditional reinstatement because the Board did not seek a reinstatement remedy in that case. *See Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060, 1062 (1998). As a result, the *Hoffman Plastic* Court’s “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 187.

Following *Hoffman Plastic*, the Board has continued to find conditional reinstatement orders appropriate in cases involving undocumented workers. *See, e.g., Rogan Bros. Sanitation*, 357 NLRB No. 137, slip op. 4 n.4 (Dec. 9, 2011); *Tuv Taam Corp.*, 340 NLRB 756, 759 n. 5 (2003). *See also* General Counsel Memorandum 02-06, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.* (July 19, 2002) (“[T]he *Hoffman* decision does not preclude the Board from imposing a conditional reinstatement order against employers who flout both the Act and IRCA by hiring and firing known undocumented workers.”).

In this case, the ALJ correctly concluded that:

“*Hoffman* did not disturb the conditional reinstatement part of the order in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417 (1995), *enfd.* 134 F.3d 50, 56 (2d Cir. 1997), in which the employer that hired employees knowing that they were undocumented was required to offer immediate and full reinstatement to the workers ‘provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA.’” *Mezonos*, 357 NLRB No. 47, slip op. 13-14.

Applying this correct legal standard to the facts presented at the hearing, the ALJ stated, “I . . . find and conclude that valid offers of reinstatement have not yet

been made to the . . . employees,” but the ALJ nevertheless did not include conditional reinstatement in his order. *Id.* at 14. All that remains for the Board to do, therefore, is to amend the ALJ’s order to require Mezonos to offer conditional reinstatement to the discriminatees in this case.

3. As is the NLRB’s established practice, the Board’s conditional reinstatement order should explicitly require Mezonos to provide the discriminatees a reasonable period of time to meet the condition for reinstatement. *See, e.g., Consol. Bus Transit, Inc.*, 350 NLRB at 1068 (“reestablish[] his [driving] certification within a reasonable time”); *A.P.R.A. Fuel Oil*, 320 NLRB at 417 (“complete, within a reasonable time, INS Form I-9”).

Should the Board be called upon to evaluate whether Mezonos has in fact permitted a discriminatee sufficient time to meet a condition required for reinstatement, “[t]here is no *per se* rule as to the period of time that will constitute reasonable notice to the discriminatee[.]” *Nuclear Automation Div. of Esterline Electronics Corp.*, 290 NLRB 834, 834 (1988). Rather “what constitutes a ‘reasonable time’ will depend essentially on the situation in which an employee finds himself.” *Ibid.* *See also* Casehandling Manual 10534.4 (“A valid reinstatement offer must give the employee a reasonable period to accept and report to work. There are no hard-and-fast deadlines for accepting a reinstatement

offer and what constitutes a reasonable period depends on the circumstances of both employer and employee.”).

For example, in its decision on remand from the Supreme Court in *Sure-Tan*, the Board held that the employer’s “offers of reinstatement, which only remained open for some 34 days, did not give the discriminatees a reasonable time to consider the offer or to make arrangements for legally entering the United States.” 277 NLRB at 302-03 n. 6. Instead, the Board concluded that “4 years is a reasonable period during which to hold the job offers open given the lengthy time normally required for Mexican nationals to acquire immigrant visas.” *Id.* at 303. *Cf. Douglas Aircraft*, 10 NLRB at 267 & 282 (where discriminatee had applied to be admitted to U.S. citizenship, employer was required to reinstate him to his former position, which was open only to U.S. citizens, upon his admission).

In the context of post-IRCA immigration law, what constitutes a reasonable period for an unlawfully-discharged employee to fulfill a condition required for reinstatement will vary depending on the specific circumstances faced by the employee. For example, under the Immigration and Nationality Act (INA), an immigrant worker who is the victim of certain unfair labor practices that also constitute “qualifying crimes” – such as extortion, felonious assault, witness tampering, obstruction of justice, or perjury – may qualify to receive a “U Visa”

permitting the individual to live and work in the United States.<sup>2</sup> 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14(c)(2). According to USCIS, the current waiting time for a U visa is approximately 14 months.<sup>3</sup>

To take another example, employees who were lawfully employed in the United States on a temporary visa tied to their employer may lose employment authorization and be forced to leave the United States or otherwise risk falling out of lawful immigration status as a result of being illegally discharged in violation of the NLRA. *See* OM 1162, *Upgrading Procedures in Addressing Immigration Status Issues*, at 4 (discussing “cases involving lawful immigration status that is illegally stripped from an employee as a direct result of an unfair labor practice”). In such cases, the time required for the discriminatee to regain a visa and work authorization and, if necessary, to lawfully reenter the United States, may be similarly lengthy.

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<sup>2</sup> In appropriate cases, the NLRB’s General Counsel will certify a discriminatee’s application for a U visa; such a certification is a prerequisite for the discriminatee to apply for a visa and employment authorization from U.S. Citizenship and Immigration Services (USCIS), the agency within DHS that issues U visas. *See* OM 11-62, *Updating Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings*, at 5-6 (June 7, 2011) (describing U visa and NLRB process for certifying U visa applications in appropriate cases).

<sup>3</sup> *See* USCIS, *Processing Time Information*, available at <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last checked on May 14, 2014). Using the processing time tool available at this webpage, a search for “Vermont Service Center” (where U visa applications are processed) shows that “the filing date of the last case that the office completed before updating the chart” on March 31, 2014 for a “Petition for U Non-Immigrant Status” is Feb. 11, 2013, *i.e.*, a processing time of approximately 14 months for U visa applications.

In sum, although the NLRB need do no more in this case at this time than order Mezonos to offer conditional reinstatement to the discriminatees and provide them with a reasonable period to complete I-9 forms, the Board should reaffirm that, in general, “what constitutes a ‘reasonable time’ [to accept an offer of reinstatement] will depend essentially on the situation in which an employee finds himself,” *Nuclear Automation Div.*, 290 NLRB at 834, including any pending applications or requests that relate to a discriminatee’s immigration status and authorization to work in the United States.

### CONCLUSION

The NLRB should order Mezonos to offer reinstatement to the discriminatees provided that they complete, within a reasonable time, I-9 forms so as to allow Mezonos to meet its obligations under IRCA.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Matthew J. Ginsburg, hereby certify that, on May 14, 2014, I caused to be served a copy of the foregoing Statement of Position on Remand By Discriminatees Christian Palma, Antonio Gonzalez, Francisco Javier Joya, Jose Antonio Quintuna, and Jose Armando Sax-Gutierrez by electronic mail on the following:

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