

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**PERSONNEL STAFFING GROUP, LLC D/B/A
MOST VALUABLE PERSONNEL**

and

Case 13-CA-155513

ROSA CEJA, an Individual

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY JUDGEMENT**

Pursuant to Rule 102.24 of the Board's Rules and Regulations, Counsel for the General Counsel submits this brief in opposition to Respondent Personnel Staffing Group, LLC d/b/a Most Valuable Personnel's Motion for Summary Judgment. Respondent's motion asks the Board to grant Respondent judgment as a matter of law, ostensibly because there are no material facts in dispute.

Respondent's motion suffers from three fatal flaws. First, Respondent's assertion that there are no material facts in dispute is inaccurate, and as a result, Respondent has failed to meet the threshold requirement for granting a motion for summary judgment. Second, Respondent's contention that Rosa Ceja, the charging party, is a Section 2(11) supervisor is not supported by the facts which will be shown at trial. Finally, Respondent's claim that Ceja quit is irrelevant as she is still protected as an employee under the NLRA. Thus, the Board should deny Respondent's motion for summary judgment and allow the parties to present their evidence to the administrative law judge to determine the facts and resolve this case expeditiously.

I. PROCEDURAL BACKGROUND

The original charge in this proceeding was filed by the charging party on June 7, 2015. Following an investigation, the Acting Regional Director for Region 13 issued a Complaint and Notice of Hearing on March 24, 2016. The Complaint alleges that Respondent violated Section 8(a)(1) by: (1) filing and maintaining a state court lawsuit against the charging party on January 15, 2014 in order to retaliate against the charging party for engaging in activity protected by Section 7 of the Act; (2) issuing interrogatories and requests for documents that impinged on the charging party's Section 7 rights. The hearing was originally set for July 18, 2016.

Respondent filed its Answer and Affirmative Defenses to the Complaint on April 7, 2016 and filed its Motion for Summary Judgment on June 20, 2016. On June 27, 2016, due to related charges being filed against Respondent in cases 13-CA-149591; 13-CA-149592; 13-CA-149593; 13-CA-149594; 13-CA-149596; 13-CA-162002; and 13-CA-162270, the Regional Director of Region 13 issued his Order Postponing Hearing Indefinitely. The parties were informed by the Region that these cases would be consolidated with a new date for trial.

II. ARGUMENT

In its Motion, Respondent claims it is entitled to summary judgment because there are no genuine issues of material fact at issue. In support of its claim, Respondent submitted numerous documents including affidavits, personnel forms and e-mails which it claims proves that the charging party was a 2(11) supervisor and not entitled to the protections of the Act.

A. Charging Party is not a 2(11) Supervisor

Section 102.24 of the Board's Rules provides for the potential entry of summary judgment in favor of a party without a hearing. However, Section 102.24(b) specifically states

that “[t]he Board in its discretion may deny the motion 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.” Thus, the Board will grant motions for summary judgment if there is “no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” *L’Hoist North America of Tennessee, Inc.*, 362 NLRB No. 110 (2015).

Section 2(11) defines “supervisor” as any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and (3) their authority is held “in the interest of the employer.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The burden to prove supervisory authority is on the party asserting it. *Id.*, at 694.

Simply put, the charging party’s supervisory status is in dispute. Contrary to Respondent’s claims to the contrary, the charging party was a supervisor in name only and the affidavits and documentary evidence submitted with Respondent’s motion fail to establish the absence of a genuine issue as to this material fact. For example, it is well-established that job

descriptions, job titles, and similar “paper authority,” without more, do not demonstrate supervisory authority. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006), therefore Respondent’s attempts to rely on the charging party’s job title and position description are unavailing. Similarly, the affidavits and documents fail to clearly prove Ceja exercised independent judgment or sufficient degree of discretion that was free from significant employer constraint to find her a 2(11) supervisor . The mere fact, for example, that she relayed to others at Respondent that workers had not been paid properly is insufficient to demonstrate that she possessed sufficient authority under the Act to be deemed a supervisor. Resp. Ex. D-H.

Similarly, Respondent’s claim that Ceja assigned work and terminated employees is misleading. Respondent’s brief in support claims that Ceja had control of the laborers, including recruiting, hiring, assigning, training, and directing work and points to numerous e-mails as exhibits. Resp. Ex. J, K, L, M, N, O, P, Q and R. However, none of these e-mails show that Ceja had independent judgment, the context of Ceja’s communications and her duties, or that she was performing anything other than routine tasks. As Respondent’s exhibit M shows, Ceja she was responsible for filling the “order” for temps on a certain day or shift, but she did not decide who, or how many workers were needed. Those decisions were made by the third-party client. Respondent’s evidence does not prove that Ceja exhibited independent judgment, only that she is informing Respondent of what the “order” requires.

Respondent relies on its exhibit N for the claim that Ceja terminated temporary employees. Once again, this evidence does not show that Ceja made the actual decision to terminate those employees. All the document shows is that Ceja relayed information that was decided upon by the client company. Respondent seeks to have the Board assume facts that are

not in evidence about the context of the e-mail and who these decisions actually come from. Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Springfield Terrace LTD*, 355 NLRB 937, 941 (2010).)

Respondent also claims that Ceja had hiring authority and exercised it independently. Resp. Ex. J, K. and L. Once again, all the e-mails show is that Ceja was somehow involved in the coordination of information between Respondent and client companies and not that she made the decisions at issue herself. Acting as a conduit for information between Respondent and client companies on interviewing does not demonstrate the authority to actually hire applicants. Resp. Ex CC.

Moreover, the charging party's credible testimony will show that her duties were in fact merely routine or clerical in nature, and did not require independent judgment as required by *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). In her role as an on-site supervisor, she was generally the only full time employee of Respondent on the actual site of the third party clients. Instructions regarding job orders and work assignments, including the number of temp workers needed, any specific qualifications required, and the duration of the assignments came from the client company and were not determined by the charging party. The charging party's testimony on her actual day-to day-duties will show that despite the label the Respondent gave to her position, she acted merely as a conduit for payroll and timekeeping information between Respondent, its employees and the client. She did not have the independent authority to adjust grievances on her own. All genuine management authority and decisions rested with the Respondent and the third-party clients themselves. Respondent's self-serving and conclusory statements based on its exhibits leave out critical testimony from charging party herself. Thus,

as these genuine issues of material fact are clearly in dispute and require credibility determinations, the Respondent is not entitled to summary judgment as a matter of law and her supervisory status must be resolved by the administrative law judge.

B. Former Employees are Protected by the NLRA

Similarly, the Respondent's job abandonment argument also fails. Section 2(3) of the Act "includes any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise...." Even assuming that the charging party left her position, the Board defines the term employee under Section 2(3) broadly. The Board has "long held that that term [employees] means 'members of the working class generally,' including 'former employees of a particular employer.' *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015)(citing *Briggs Mfg. Co.*, 75 NLRB 569, 570, 571 (1947)).

In *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (2015), the Board found that a former employee engaged in protected concerted activity when he filed a class action law suit against his former employer in state court alleging that the employer incorrectly and unlawfully calculated and paid overtime to class members for overtime worked. When the Employer attempted to compel arbitration, the former employee filed an unfair labor practice alleging that the employers mandatory arbitration agreement violated Section 8(a)(1) of the Act. The Board rejected the employer's argument that the former employee did not have standing to assert his ULP. (citing *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, (2015). Thus, even if Respondent is correct and charging party did abandon her position, Section 7 of the Act still protects her from coercive lawsuits like the one Respondent filed against her in violation of Section 8(a)(1).

In addition, cases cited by Respondent do not support its position. In *Southern Florida Hotel & Motel Association*, 245 NLRB 561, 605 (1979), in the context of a strike, the issue concerned whether certain employees had quit their jobs or were unlawfully terminated. The issue was not whether someone who quits loses the protection of the Act for subsequent protected concerted activity. Another case cited by Respondent, *Merk v. Jewel Companies, Inc.* 848 F.2d. 761 (7th Cir. 1988), is even less relevant since it held that a union does not need to represent non-employees. The court even points out that Section 2(3) “does not in terms exclude workers who have retired, quit, or been fired...” *Id.* at 765.

CONCLUSION

Respondent is clearly not entitled to summary judgment as a matter of law. Substantial factual matters must be heard before an administrative law judge before conclusions of law can be made. Respondent’s evidence only provides a small part of the picture of its ongoing illegal lawsuit against the charging party. For these reasons, Counsel for the General Counsel requests Respondent’s motion for summary judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE
13-CA-155513

The undersigned hereby certifies that true and correct copies of General Counsel's Opposition to Respondent's Motion for Summary Judgment have been e-filed with the Executive Secretary and served this 15th day of July, 2016, in the manner indicated, upon the following parties of record.

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