

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

<b>PERSONNEL STAFFING GROUP, LLC d/b/a</b>	)	
<b>MOST VALUABLE PERSONNEL</b>	)	
	)	<b>Case No.: 13-CA-155513</b>
<b>And</b>	)	
	)	
<b>ROSA CEJA, an Individual</b>	)	

**RESPONDENT’S REPLY TO GENERAL COUNSEL’S OPPOSITION TO  
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent, PERSONNEL STAFFING GROUP, LLC d/b/a MOST VALUABLE PERSONNEL (“MVP” or “Respondent”), by and through its attorneys, KOREY RICHARDSON LLC, and respectfully requests that the Board grant Respondent’s Motion for Summary Judgment. In support of this motion, Respondent states as follows:

**INTRODUCTION**

No genuine issue of material exists in this case, as the Charging Party, Rosa Ceja (“Ceja”) was not an employee while employed with MVP or during the time she engaged in allegedly protected concerted activity. Indeed, during its response, the General Counsel does not raise any supported facts which would contradict the proof offered by MVP in its Motion for Summary Judgment. As a result, the unconverted facts show that during her time with MVP, Ceja was a supervisor as defined in Section 2(11) of the NLRA as she performed her supervisory duties with independent judgment. Further, Ceja is not protected by the NLRA because she quit or abandoned her job prior to the time when she engaged in the alleged protected concerted activity, and moreover did not quit or abandon in the context of a labor dispute as required. Therefore, since there is no material fact that Ceja is not afforded protection under the NLRA, MVP’s Motion for Summary Judgment must be granted.

## ARGUMENT

There are three issues raised by the General Counsel's Opposition to Respondent's Motion for Summary Judgment ("GC Opposition"). Specifically, the General Counsel argues that: (1) MVP has not met its burden to establish that no material facts are in dispute; (2) Ceja did not exercise independent judgment as is required to be a supervisor under NLRA Section 2(11); and (3) even if Ceja quit her position with MVP, the NLRA still protects her. These arguments are without merit, as MVP has unequivocally demonstrated that there is no genuine issue of material fact in this case. First, Ceja exercised her supervisory duties with independent judgment, and any purported testimony indicating otherwise will be in direct contradiction with the hard documentary evidence supplied in MVP's Memorandum in Support of Its Motion for Summary Judgment ("SJ Memorandum"). Furthermore, Ceja is not afforded protection under the NLRA because the Act does not protect those employees who quit or abandon their job not in the context of a labor dispute. For these reasons, the General Counsel's arguments are unpersuasive, as MVP has demonstrated that there is no genuine issue of material fact, and thus the Board should grant MVP's Motion for Summary Judgment.

### **I. MVP Has Met Its Burden And Summary Judgment Should Be Granted In Its Favor**

The Board must grant a motion for summary judgment when 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. and United Mine Workers of America, District 17*, 362 NLRB No. 110, \*1 (NLRB 2015); *see also* 29 C.F.R. 102.24(b). As demonstrated through MVP's Motion for Summary Judgment, SJ Memorandum, the exhibits contained in the SJ Memorandum ("SJ Exhibits"), and the instant motion, it is clear that there is no genuine issue of material fact and MVP is entitled to judgment as a matter of law. Through these filings and the hard evidence

contained therein, MVP has fully demonstrated that there is no genuine issue of material fact because: (1) Ceja was clearly a supervisor under Section 2(11), as shown by the many e-mails, affidavits, and other documents provided in the SJ Memorandum, each of which unequivocally demonstrates Ceja's supervisory authority and independent exercise of that authority; and (2) Ceja quit or abandoned her job, *prior* to her engagement in alleged concerted protected activity, not in the context of a labor dispute, and therefore is not afforded any protection under the NLRA.

## **II. Ceja Was A Supervisor Under Section 2(11) And Is Not Protected Under the NLRA**

Under Section 2(11) of the NLRA, and as noted in the GC Opposition, an employee has the authority to engage in *one* of the twelve functions listed in Section 2(11). *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (emphasis added). In exercising this authority, the employee must use independent judgment. 29 U.S.C. § 152(11).

### A. Ceja Exercised Independent Judgment When Performing The Supervisory Functions

In order to be deemed a supervisor under the NLRA, Ceja must have performed one of the 12 supervisory functions listed in Section 2(11) using her independent judgment. *NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 712-13 (2001).

The General Counsel points to a number of the SJ exhibits to support his contention that the e-mails do not demonstrate that Ceja exhibited independent judgment when assigning work, and hiring and terminating employees. (Opp'n at 4).<sup>1</sup> However, this argument falls flat. Indeed, the e-mails indisputably show Ceja exercised independent judgment while performing the 2(11) supervisory functions. First, Ceja directly communicated with other MVP employees about payroll, time adjustments, assignments, termination, grievances, and any other issues that arose at

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<sup>1</sup> Since the General Counsel's Opposition does not touch upon Ceja adjusting grievances as a supervisor, MVP will assert that it maintains its position with respect to this point, specifically that Ceja adjusted employee grievances using independent judgment and in the interest of MVP while she was an onsite supervisor.

the client company where she was an onsite supervisor. (*See e.g.*, SJ Memorandum at Ex. D; Ex. E; Ex. F; Ex. T). As the highest-ranking MVP employee at the client company, Ceja acted on behalf of MVP and exercised her independent judgment to direct, assign, hire, terminate, and adjust grievances for her team of employees there. (*See id.* at Ex. T) (requesting that a laborer remain as part of “my team”). It was Ceja alone who made the determinations, without consulting any other employee or supervisor, about whom to hire or terminate. (*See e.g. id.* at Ex. J; Group Ex. M; Ex. N; Ex. P) (stating Ceja had “control of [her] people” at the client company). Ceja was onsite everyday as the only MVP employee directly interacting with the laborers there and the client company representatives, and if a problem arose, she was the only MVP employee there to handle it. *See NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1312 (7th Cir. 1983). Ceja independently and exclusively worked with the client company representative to address these issues, without involving any other MVP employees. (*See id.* at Ex. H; Ex I). Even when Ceja was provided with the number of laborers needed for each day, she independently would decide which laborers were actually assigned or terminated. (*See id.* at Ex. J; Ex. K). For example, if there were two more laborers than positions, Ceja would autonomously decide who to send home and would then exercise her supervisory authority by sending those laborers home. (*See id.* at Ex. N). During her time as a supervisor at MVP’s client company, Ceja harnessed her independent judgment and unique knowledge and made the ultimate decision about which workers to assign and which to terminate. *See NLRB v. Winnebago Television Corp.*, 75 F. 3d 1208, 1217 (7th Cir. 1996) (finding that an employee exercised independent judgment when he “harnesse[d] his unique knowledge of the employees’ capabilities in assigning tasks and areas of responsibility.”).

Furthermore, Ceja had hiring authority and exercised it independently, as she was directly involved in finding job applicants, coordinating interviews, and making recommendations for hire.

(See SJ Memorandum at Ex. J., Ex. K, Ex. L). Ceja had direct participation and input into the hiring of employees, as evidenced through the e-mails she sent to client company representatives. (See *id.* at Ex. J, Ex. K, Ex. L); see also *ADF International, Inc.*, Case 19-UC-168515, \*35-36 (stating that the hire function is found through direct participation and input or effective recommendation of the same). Specifically she submitted resumes directly on behalf of job applications, coordinated interviews, and ensured that those she recommended were hired. (See SJ Memorandum at Ex. CC). Ceja performed this hire function while exercising independent judgment because she found the candidate, submitted the resume, and followed the interview process to its end. She was not instructed on which candidates to make recommendations for, but exercised her independent judgment to only recommend those she believed were capable and worthy of such a recommendation. Thus, Ceja's e-mails unequivocally demonstrate that she exercised independent judgment while performing the assign, hire, and terminate functions.

B. Ceja's Job Title And Description Are Secondary Indicia of Her Supervisory Status

In the GC Opposition, the General Counsel argues that MVP cannot rely on Ceja's job title or description to support a finding of supervisory status. (Opp'n at 4). However, the General Counsel misreads MVP's argument on this point, as MVP relied on Ceja's job title and description as proof of secondary indicia, in addition to the direct evidence that demonstrates her exercise of the supervisory functions, tending to further demonstrate Ceja's supervisory status. See *E & L Transport CO. v. NLRB*, 85 F. 3d 1258, 1270 (7th Cir. 1996) (finding that if the employee is shown to have one of the supervisory functions listed in Section 2(11), then a showing of secondary indicia further supports a supervisory status finding). Ceja's title as an "onsite supervisor," and job description requiring her to perform the supervisory functions outlined in Section 2(11), are directly relevant and can be used to support a finding that she was in fact a supervisor while

employed with MVP. *See Southern Indiana Gas and Elec. Co v. NLRB*, 657 F. 2d 878, 886 (7th Cir. 1981) (“The Company’s designation of the position as supervisory, while not itself determinative, is certainly a *significant factor* in ascertaining employee status.” (emphasis added)).

C. The Proposed Testimony Is Insufficient To Support A Genuine Issue Of Material Fact

Finally, the GC Opposition sets forth a number of bases to show there is a genuine dispute of material fact, but presents no affidavits or other documentary evidence. Rather, the General Counsel supports its contention that Ceja did not exercise independent judgment, and thus there is a genuine issue of material fact, because Ceja will purportedly provide testimony indicating this. (*See* Opp’n at 5-6). Despite the “credible testimony” Ceja would present at any hearing, this testimony would not be able to override the indisputable facts that Ceja exercised supervisory functions, as Ceja’s performance and exercise of these functions are well-documented in the SJ Exhibits. (*See, e.g.*, SJ Memorandum at Ex. D; Ex. E; Ex. F; Grp. Ex. G; Ex. P; Ex. N). Furthermore, the General Counsel completely glosses over Ceja’s prior statements in which she told the Niles Police that “she manage[d] all the temporary workers.” (*See* SJ Memorandum at Ex. X). Even when Ceja had her attorney corrected the errors in the Police Report, Ceja’s statement that she managed employees was not amended. (*See id.* at Ex. Y). Additionally, Ceja’s article in The Chicago Reporter described her as “working for a temp agency [MVP] in spring 2014, *supervising* workers at a big brick packaging plant.” (*Id.* at 12 n.3). Both of these statements demonstrate Ceja’s own belief that she was a supervisor while employed at MVP. Furthermore, if Ceja testifies to the facts as outlined in the GC Opposition (which may or may not actually be given at the hearing), namely that she was not a supervisor and did not believe that she was a supervisor while employed with MVP, she would be in direct contradiction with the e-mails to the contrary, as well as her prior statements to the Niles Police and The Chicago Reporter. (*See* SJ

Memorandum at Ex. P; Ex. T; Ex. X; Ex. Y, 12 n.3). Regardless, the General Counsel cannot rely on unsupported allegations in an effort to raise an issue of material fact for purposes of surviving a summary judgment motion. *L'Hoist*, 362 NLRB at \*1 (Miscimarra, concurring) (stating that while the opposition is not required to be supported by documentary evidence, the General Counsel should "state with reasonable specificity" the grounds for claiming any genuine issue of material fact).

For all of these reasons, there is no genuine issue of material fact that Ceja exercised her independent judgment in performing the Section 2(11) supervisory functions. Ceja's authority of such supervisory duties is further supported by her job title and description. Additionally, the General Counsel has failed to provide any supported evidence contradicting Respondent's evidence; as a result, the General Counsel has not met its burden in showing that there is an issue of material fact with respect to Complainant's supervisory status. For these reasons, Respondent's Motion for Summary Judgment must be granted.

### **III. If Ceja Quit or Abandoned Her Job, She Is Not Protected Under the NLRA**

Ceja was not an "employee" as defined by the NLRA Section 2(3) when she engaged in the alleged protected concerted activity, and therefore is not afforded protection under the Act. The General Counsel posits to define "employee" in overbroad terms. Specifically, the General Counsel's proposition as to who qualifies as an employee and is therefore protected by the Act, goes well beyond the reach or intent of the NLRA, and any subsequent interpretation of such by the Board and the courts. Specifically, the General Counsel argues that all former employees, regardless of whether the employee quit, resigned, abandoned, or was fired, are protected by the NLRA. (Opp'n at 6). For example, under the General Counsel's proposed definition of "employee," an employee would be protected if she quit her employment (not in the context of a

labor dispute or because of any unfair labor practice), and years later made remarks on social media regarding her former employer and working conditions. In this scenario, the General Counsel would have this Board deem the former employee's social media post as "protected concerted activity" despite having quit years earlier for reasons unrelated to her working conditions. This would extend the NLRA's protection far beyond the intention of Congress when it enacted the statute as a former employee would have unlimited protection for any subsequent statements made regarding her former employer despite why the employment ended, the time elapsed since the employment ended, and the types of statements made.

To support the broad scope of defining "employee," the General Counsel cites to *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (2015). However, *Leslie's Poolmart, Inc.* involved a former employee who filed a ULP charge against the former employer regarding an arbitration agreement signed as a condition of employment, which arguably prohibited the Charging Party from filing a class action. *Id.* at \* 4. The ALJ found that the former employer violated Section 8(a)(1) because the arbitration agreement was signed while the former employee was employed, covered actions taken after his employment ended, was an agreement which the former employer continued to maintain even after the employment ended, and was an agreement which the former employer required all of its new hires to execute. *See id.* This case is distinguishable from the facts at hand, as the ALJ expanded the definition of "employee" to encompass former employees who were still covered by the agreement as it restricted their post-employment conduct. In Ceja's situation, there was no agreement or policy in place concerning or restricting the alleged protected concerted activity. Moreover, one of the major issues is that Ceja quit or abandoned her job and is not afforded protection under the NLRA. *Leslie's Poolmart, Inc.* does not even address this, let alone

the reason for why the employee was no longer employed. *See id.* Thus, reliance on this case carries no weight.

Next, the analysis concerning Ceja's situation must address the fact that Ceja did not quit or abandon her job in the context of a labor dispute or unfair labor practice—a point which the General Counsel does not even address. The GC Opposition does not delve into this because it is clear, as was demonstrated through the SJ Memorandum and supporting documents, that Ceja quit or abandoned her job with MVP long before she engaged in any alleged protected concerted activity. (*See generally* SJ Memorandum, Part II). Without such circumstances, Ceja is certainly not afforded the protections of the NLRA. *See Halstead Metal Prods., a Div. of Halstead Industries, Inc. v. NLRB*, 940 F.2d 66, 71 (4th Cir. 1991). The Courts have specifically addressed the exact scenario at play here—whether a former employee is protected by the NLRA—and have consistently declared that a former employee is afforded no NLRA protection when the employee “leaves work for reason[s] other than a labor dispute or unfair labor practice.” *See Merk v. Jewel Companies, Inc.*, 848 F.2d 761, 765 (7th Cir. 1988); *Choc-Ola Bottlers, Inc. v. NLRB*, 478 F.2d 461, 464-65 (7th Cir. 1973) (finding an employee discharged for cause was not an employee under the NLRA). Both the Board and the Seventh Circuit have held that by quitting or abandoning the job, the employee loses NLRA protection “because they no longer have the requisite expectation of future employment.” *Montgomery Ward & CO., Inc. v. NLRB*, 668 F.2d 291, 299-200 (7th Cir. 1981) (citations omitted).

Finally the General Counsel argues that MVP does not cite cases that support its position. *See Merk*, 848 F.2d at 761; *Southern Florida Hotel & Motel Association*, 245 NLRB 561 (1979). In *Merk*, while the Seventh Circuit stated that Section 2(3) of the NLRA “does not *in terms* exclude workers who have retired, quit, or been fired,” it goes on to states that the “former employees []

lost their status as NLRA ‘employees’ when they left work for reasons *other than a labor dispute or unfair labor practice.*” 848 F.2d at 765 (emphasis added). While this case pertains to unions, the analysis of who is an “employee” or when NLRA status is lost is equally applicable to the facts in the present matter. Ceja lost her status as an NLRA employee when she left her employment with MVP for reasons “other than a labor dispute or unfair labor practice.” *Id.* Next, the General Counsel contends that *Southern Florida Hotel & Motel Association* does not support MVP’s position because the issue was not whether an employee lost NLRA protection “for subsequent protected concerted activity.” (Opp’n at 7). However, this misreads MVP’s use of this case because this case was referenced to support the analysis the Board must use when determining whether Ceja quit her job. *See* 245 NLRB at 605 (“Th[e] question [of whether the employees quit their jobs] must be answered by ascertaining the intent of the employees as evidenced by their entire course of conduct.”) (citation omitted).

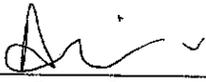
Accordingly, Ceja cannot be considered an “employee” under the NLRA because the Act does not grant her such protection since she quit or abandoned her job for reasons other than a labor dispute or unfair labor practice. Thus, the Board must grant MVP’s Motion for Summary Judgment as there is no genuine issue of material fact on these issues.

### **Conclusion**

The General Counsel has not demonstrated that there exists any genuine issue of material fact as to preclude the Board from granting summary judgment in favor of MVP because: (1) Ceja exercised independent judgment while performing the supervisory functions; and (2) Ceja did not quit or abandon her job in the context of a labor dispute or ULP. For these reasons, it is indisputable that Ceja is not protected by the NLRA and the Board should grant Respondent’s Motion for Summary Judgment.

Respectfully Submitted,

PERSONNEL STAFFING GROUP, LLC  
d/b/a/ MOST VALUABLE PERSONNEL,

By:   
\_\_\_\_\_  
One of Its Attorneys

Elliot Richardson  
Britney Zilz  
Alison M. Field  
KOREY RICHARDSON LLC  
20 S. Clark Street, Suite 500  
Chicago, IL 60603  
P: (312) 372-7075

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	)	
<b>ROSA CEJA, an Individual</b>	)	

**CERTIFICATE OF SERVICE**

I, ALISON M. FIELD, an attorney, certify that a Copy of **Respondent's Reply to General Counsel's Opposition to Respondent's Motion for Summary Judgment** was electronically filed and hand delivered with the National Labor Relations Board, Region 13 on August 5, 2016, and that a copy of the foregoing Reply to General Counsel's Opposition to Respondent's Motion for Summary Judgment was sent to the undersigned via UPS Overnight Mail on or before 5:00 pm on August 5, 2016:

Gary Shinnors, Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570-0001

Christopher J. Williams  
Neil Kelley  
Counsel for Rosa Ceja  
Workers' Law Office, P.C.  
53 W. Jackson Blvd., Suite 701  
Chicago, Illinois 60604  
(312) 795-9121

**VIA HAND-DELIVERY:**

Kevin McCormick  
Counsel for the General Counsel  
NATIONAL LABOR RELATIONS BOARD  
Region 13  
219 South Dearborn Street  
Room 808  
Chicago, Illinois 60604

I further certify that an electronic copy was served on counsel for the Charging Party via electronic mail on August 5, 2016.

Dated: August 5, 2016

/s/ Alison M. Field

Alison M. Field