



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570

October 29, 2019

[REDACTED]

Re: Harbor Tools USA, Inc.  
Case 28-CA-232596

Dear [REDACTED]

Your appeal from the Acting Regional Director's partial refusal to issue complaint has been carefully considered. The appeal is denied substantially for the reasons in the Acting Regional Director's letter of September 19, 2019.

The charge alleges, in part, that the Employer discharged and later refused to hire an employee who engaged in protected concerted activity, in violation of Section 8(a)(1) of the National Labor Relations Act. In that regard, the Act specifically excludes [REDACTED] from its definition of employees. Individuals are [REDACTED] within the meaning of the Act if (1) they possess the authority to engage in any 1 of the 12 [REDACTED] functions listed in Section 2(11) including the authority to, among other things, assign, reward, or discipline other employees, or the responsibility to direct them; (2) their exercise of authority requires independent judgment; and (3) that authority is held in the interest of the employer. *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 713 (2001); *see also Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006).

We determined that the evidence disclosed by the investigation disclosed that you were a supervisor and thus outside the protection of the Act. Notably, in your position as [REDACTED] [REDACTED] you had the authority to hire employees and exercised independent judgment in doing so, and during your tenure you used that authority to hire approximately fifty (50) employees.

Apart from the issue of your [REDACTED] the evidence was also insufficient to establish that the Employer discharged and refused to hire you because of any protected concerted activities. In that regard, to determine whether an employer's adverse action against an employee was discriminatorily motivated, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected activity was a motivating factor for the adverse decision; only after such showing is established, the inquiry turns into whether the employer would have taken the same action in the absence of the protected conduct. *See Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

We determined that the evidence did not indicate that your employment ended for protected concerted actions rather than for work-related reasons, specifically conflicts with the Employer's workplace conduct policies at your particular facility. The evidence was also insufficient to establish that the Employer later refused to hire you at other facilities for any unlawful reasons. The evidence indicates that some Employer representatives at other facilities offered you a position, which you were ultimately unable to accept for apparent personal reasons.

Accordingly, we deny the appeal. However, this determination does not impact other matters currently pending with the Regional Office.

Sincerely,

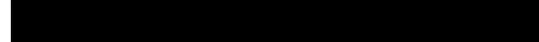
Peter Barr Robb  
General Counsel

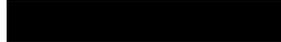


By: \_\_\_\_\_

Mark E. Arbesfeld, Director  
Office of Appeals

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