

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

AMERICAN FEDERATION FOR CHILDREN, INC.

and

**Cases 28-CA-246878
28-CA-262471**

SARAH RAYBON, an individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (the Board), Counsel for the Acting General Counsel (CGC) files this opposition to Respondent's Motion for Summary Judgment or Dismissal (Respondent's Motion), filed on February 1, 2020. Respondent asserts that there are no genuine issues of material fact in dispute because the acts and conduct alleged in this matter do not violate Board law. To the contrary, the conduct alleged clearly violates Sections 8(a)(1) and 8(a)(4) of the National Labor Relations Act (the Act), and the pleadings present issues of material fact that require a hearing before an Administrative Law Judge of the Board. As discussed below, Respondent's Motion highlights the disputed facts to be fleshed out at hearing and is little more than a statement of Respondent's anticipated defenses and legal theories. For the reasons discussed below, Respondent's Motion should be denied in its entirety.

I. BACKGROUND

On September 1, 2020, a Complaint and Notice of Hearing (Complaint) issued in this matter, alleging that Respondent violated Sections 8(a)(1) and (4) of the Act by promulgating and maintaining unlawful overly broad rules, maintaining a prohibition on employees communicating with its national team, including by telephone or email, promulgating and

maintaining an unlawful requirement that employees “be careful” about raising concerted complaints, promulgating unlawful overly broad and discriminatory interpretations of employee handbook rules, creating the impression among its employees that their protected concerted activities were under surveillance by Respondent, threatening employees with unspecified reprisals for engaging in protected concerted activities, interrogating employees about the protected concerted activities of other employees, discharging its employee Sarah Raybon (Raybon or Charging Party) in retaliation for engaging in protected concerted activities; attempting to interfere with its employee Raybon’s relationship with Arizona’s Association of School Tuition Organizations in retaliation for Raybon’s protected concerted activities and Board activities; excluding Raybon from professional meetings and deliberations in retaliation for Raybon’s protected concerted activities and Board activities and in order to diminish Raybon’s professional standing in the school choice coalition; refusing to work with Raybon in her professional capacity in retaliation for Raybon’s protected concerted activities and Board Activities and in order to interfere with Raybon’s relationship with AASTO and to diminish Raybon’s standing in the school choice coalition; and unlawfully enforcing overly broad and discriminatory rules prohibiting employees from engaging in certain types of protected concerted activity.

In its Answer to the Complaint (Answer), filed on September 15, 2020, Respondent admits *only* that it maintained the handbook rules pled in the Complaint, and that it disciplined Raybon, distributed Raybon’s social media posts to leaders at Arizona’s Association of School Tuition Organizations, and excluded Raybon from professional meetings. In its Answer, Respondent specifically denies that it discharged Raybon, and that it refused to work with Raybon in her professional capacity. Respondent also categorically denies that any of this

conduct, whether admitted or denied, amounts to a single unfair labor practice. A hearing before an Administrative Law Judge is scheduled to begin on March 2, 2020.

II. ARGUMENT

A. The Board's Standard for Summary Judgment

The power to grant summary judgment in Board proceedings is grounded in the Board's Rules and Regulations and not in the Federal Rules of Civil Procedure. *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 495 (1966) *enfd.* 379 F.2d 517 (7th Cir. 1967) *cert. denied* 389 U.S. 1041 (1968); *Clark's Dept. Store*, 175 NLRB 337, 340 (1969). Simply because the Federal Rules contain a summary judgment provision does not make those rules "applicable when a motion is made for summary judgment pursuant to the authority of the Board's Rules and decisions." *Id.* In fact, the Board has no provision comparable to Rule 56(e) under which a moving party can set forth its version the facts and the other party must either admit or controvert with specific facts. *KIRO, Inc.*, 311 NLRB 745, 746 (1993). Indeed, the Board has noted "that it would be impracticable for the Board to follow Rule 56(e) because unlike Federal courts, the Board has never allowed prehearing discovery." *Id.* at 746 n.4.

Because its rules do not provide for pre-trial discovery, the Board has held that summary judgment proceedings are governed by the Board's Rules and Regulations, and not by the Federal Rules of Civil Procedure. *Id.* Thus, it is well settled that the General Counsel is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *Id.* at 746; *United States Postal Service*, 311 NLRB 254, 254 n. 3 (1993). Instead, the General Counsel can simply rely upon the unfair labor practice allegations in the Complaint, Respondent's denial of these allegations in its Answer, and general averments that factual issues exist requiring a hearing. *KIRO, Inc.*, 311 at 745-746, 745 n.3;

United States Postal Service, 311 NLRB at 254 n.3. Accordingly, because Respondent has denied the substantive allegations in the Complaint regarding threats to employees, Raybon's discharge, and Respondent's subsequent refusals to work with Raybon and attempts to interfere with her professional standing and reputation, genuine issues of material fact exist and summary judgment is inappropriate.

B. Respondent's Motion for Summary Judgment is Procedurally Faulty

CGC notes that Respondent has correctly filed its motion for summary judgment pursuant to Section 102.24 of the Board's Rules and Regulations, rather than pursuant to Rule 56 of the Federal Rules of Civil Procedure. However, Respondent has failed to adhere to the requirements of Section 102.24, by filing this motion with the Division of Judges rather than with the Board itself. Under Section 102.24, motions for summary judgment must be filed with the Board at least 28 days in advance of the scheduled hearing date, at which time the Board may grant the motion or issue a notice to show cause why the motion should not be granted. It is presently a mere 21 days prior to the scheduled hearing date, and this motion has not been filed with the Board. Consequently, even if Respondent were to file its motion with the Board today, its Motion for Summary Judgment is procedurally faulty and should be denied on that basis.

C. Respondent's Motion for Summary Judgment Relies on Inadmissible Evidence.

In a Motion for Summary Judgment, the moving party has the burden of supporting its motion with admissible evidence. *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 n.4 (1979). The adverse party has no obligation to respond until the moving party has met this burden. *Id.* at n.3. In support of its Motion, Respondent has not produced any admissible evidence to sustain its assertions that President John Schilling (Schilling) and Arizona State Director Steve Smith (Smith) of Respondent were unaware of Raybon's protected activities, or that Raybon's protected activities were not motivating factors in Respondent's decision to

discharge Raybon. Respondent also asks the Board to overlook the fact that it cannot even agree with itself about whether Raybon was discharged at all from day to day. Accordingly, the Acting General Counsel has no obligation to respond and, on its face, Respondent's Motion is deficient and must be denied.

In support of its Motion, Respondent only offers the Affidavits of certain management personnel, namely Schilling, Smith, National Director of State Teams and Political Strategy Darrell Allison, and Arizona Communications Director/National Correspondence Kim Martinez, and five unauthenticated exhibits. Rule 801(c) of the Federal Rules of Evidence states that "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A document submitted to assert the truth of its written content is hearsay and inadmissible. Fed. R. Evid. 801(c). Respondent's attached affidavits are submitted for the truth of the matters therein, namely that Schilling and Smith had no knowledge of Raybon's protected concerted activities and that other employees did not like Raybon and complained that she was harassing non-white coworkers. Therefore, the affidavits are inadmissible hearsay.

As for the exhibits, most are clearly missing significant sections, which have been photoshopped out of the documents, and none have been authenticated by witnesses who can attest to the unaltered nature of the documents. Rule 901(a) of the Federal Rules of Evidence requires that the proponent of a specific piece of evidence must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Respondent has presented no such evidence. While some of these documents are referenced in the affidavits which Respondent filed with its Motion, those affidavits are inadmissible hearsay and therefore cannot be used to authenticate the documents. Furthermore, in light of the visible alterations to the

documents, there is in fact more evidence on the face of these exhibits to suggest that they are not authentic than there is to suggest that they should be relied upon. Should Respondent wish to present these documents as evidence, it would be most appropriate to do so at a hearing, with witnesses who are subject to cross examination and voir dire examination.

D. The Pleadings Establish That There Are Genuine Issues of Material Fact

The Board has held that summary judgment proceedings are governed by the Board's Rules and Regulations. *KIRO, Inc.*, 311 NLRB 745, 746 (1993). Section 102.24(b) of the Board's Rules and Regulations provides, in relevant part, 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."

It is well settled that CGC is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *Id.* at 746; *United States Postal Service*, 311 NLRB 254, 254 n. 3 (1993). Instead, CGC can simply rely upon the unfair labor practice allegations in the Complaint. In this matter, Respondent's denial of these allegations in its Answer, and general averments that factual issues exist require a hearing be held. *KIRO, Inc.*, 311 at 745-746, 745 n.3; *United States Postal Service*, 311 NLRB at 254 n.3. "[A] simple denial of unlawful conduct is sufficient to raise a material question, without requiring [General Counsel] to come forward with affidavits or other evidence." *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 n.3 (1979).

Accordingly, because Respondent has denied the substantive allegations presented in paragraphs 4 (a), (c), (d), (h), (j) and (m) of the Complaint in both its Answer and Motion,¹ there are genuine issues of fact, and Respondent's Motion should be denied in its entirety.

III. CONCLUSION

Respondent's Motion appears to be nothing more than a summary of its legal arguments in support of its defenses to the Complaint allegations – defenses which necessitate factual determinations made by an Administrative Law Judge based on the record developed at an unfair labor practice hearing. As discussed above, Respondent, by its answer, denies the commission of any unfair labor practices – a position that Respondent reiterated in its Motion. These simple denials alone would be enough to establish factual disputes sufficient to justify denying summary judgment in this case. In addition to these denials, however, Respondent's Motion and the accompanying inadmissible affidavits and exhibits makes factual assertions that raise new factual disputes which must be resolved by an Administrative Law Judge. Accordingly, CGC requests that the Board deny Respondent's Motion in its entirety.

Dated at Albuquerque, New Mexico, this 9th day of February, 2021.

Respectfully submitted,

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¹ In addition to continuing to assert the same denials previously made in its Answer in the Motion, Respondent has raised additional factual disputes in the Motion and its attachments. Indeed, the affidavits submitted by Respondent in support of their Motion for Summary Judgment, while inadmissible hearsay, do raise additional questions of fact which are best resolved by an Administrative Law Judge at a hearing.