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Mezonos Maven Bakery, Inc. and LatinoJustice PRLDEF.¹ Case 29-CA-025476

March 27, 2015

**SECOND SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA**

This case is on remand from the United States Court of Appeals for the Second Circuit. The sole question is whether the Board should order the conditional reinstatement of employees who, at the time they were unlawfully discharged by the Respondent, lacked proper documentation to work in the United States.

On August 9, 2011, the National Labor Relations Board issued a Supplemental Decision and Order in this case. 357 NLRB No. 47.² The Board held that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), precluded the Board from awarding backpay to the discriminatees because they were undocumented workers, even though it was the Respondent and not the employees who had violated the Immigration Reform and Control Act (IRCA).³ The Board, however, did not address the question whether it could order reinstatement subject to the employees presenting to the Respondent, within a reasonable time, documentation that they are now authorized to work in the United States. Thereafter, the United States Court of Appeals for the Second Circuit affirmed the Board's finding that backpay was not appropriate, but remanded the case to the Board for "consideration of issues relating

¹ The original charge was filed by Puerto Rican Legal Defense and Education Fund, which later changed its name to LatinoJustice PRLDEF.

² On November 3, 2011, the Board denied the Charging Party's motion for reconsideration.

³ IRCA makes it unlawful for an employer to hire or continue to employ an "unauthorized alien," knowing that he or she is unauthorized, § 1324a(a)(1)(A), (2), or to hire any person without verifying his or her authorization to work in the United States, *id.* § 1324a(a)(1)(B)(i), and for an individual knowingly to present fraudulent documents to an employer to obtain or continue employment, *id.* § 1324c(a)(2). As recognized by the Board in its supplemental decision and by the Second Circuit in its decision, the record reveals that the Respondent "violated IRCA by hiring and continuing to employ petitioners without obtaining the required documentation, and that petitioners had not violated IRCA because they had not obtained their jobs by presenting fraudulent documents." *Palma v. NLRB*, 723 F.3d 176, 180 (2d Cir. 2013). Member Miscimarra does not here reach or pass on questions regarding conditional reinstatement where discriminatees presented fraudulent documents in violation of IRCA.

to petitioners' request for conditional reinstatement." *Palma v. NLRB*, 723 F.3d 176, 187 (2d Cir. 2013).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the remanded issue in light of the parties' statements of position.⁴ For the following reasons, the Board has decided that a conditional reinstatement order is appropriate in this case.

Procedural Background

The discriminatees are former employees of the Respondent who engaged in protected concerted activity and were unlawfully discharged for that activity in 2003. On February 2, 2005, pursuant to a formal settlement stipulation, the Board issued an unpublished Decision and Order, ordering the Respondent to "make [the discriminatees] whole" with respect to "the amount of backpay due, if any," and to "offer [the discriminatees] unconditional reinstatement . . . except that [the Respondent] 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." On March 15, 2005, the Second Circuit enforced the Board's consent Order.

The General Counsel subsequently issued a compliance specification seeking backpay and unconditional offers of reinstatement. In the compliance proceedings, the Respondent contended that the Supreme Court's decision in *Hoffman*, supra, 535 U.S. 137, precluded backpay and reinstatement because the discriminatees were not legally authorized to work in, or to be present in, the United States. At the evidentiary hearing before the judge, the Respondent sought to examine the discriminatees as to their immigration status, but counsel for the discriminatees objected. The first witness refused to answer any questions relating to his immigration status, invoking his Fifth Amendment privilege against self-incrimination. The judge ruled the questioning appropriate, and he adjourned the hearing in order to request that the Board order the discriminatees to answer the questions. Before the Board ruled on that request, however, the General Counsel agreed to proceed on the assumption that the discriminatees were undocumented.⁵ When the judge asked whether that assumption altered the General Counsel's "request for a remedy," counsel for the General Counsel answered affirmatively and modified the

⁴ Only the General Counsel and the discriminatees filed statements of position.

⁵ The General Counsel stated, "[F]or the purposes of this proceeding, and only this proceeding, the General Counsel will proceed on the assumption that the discriminatees are undocumented. We have decided not to contest the issue of [the discriminatees' immigration] status in this proceeding for the purposes of expediting this matter."

request to seek conditional, rather than unconditional, reinstatement.

In his decision, the judge recommended backpay for seven discriminatees, finding the case distinguishable from *Hoffman*. In *Hoffman*, the judge reasoned, the discriminatee had violated IRCA by presenting the employer with fraudulent documents, and the employer was unaware of the fraud, whereas here, the Respondent was the IRCA violator because it knowingly employed undocumented workers. 357 NLRB No. 47, slip op. at 16-17. The judge ultimately determined that *Hoffman* was not inconsistent with conditional reinstatement of the sort the Board ordered in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417 (1995), enfd. 134 F.3d 50, 56 (2d Cir. 1997), and therefore that such an order was appropriate here.⁶ Despite this finding, the judge failed to include a conditional reinstatement provision in his recommended Order. Neither the General Counsel nor the Charging Party filed exceptions to his failure to do so. The Respondent, however, filed exceptions to the judge's discussion of conditional reinstatement, as well as to the recommended backpay order.

In its Supplemental Decision and Order, the Board reversed the judge's grant of backpay, finding it precluded by *Hoffman*. 357 NLRB No. 47, slip op. at 4. The Board did not address whether the Respondent should be required to offer conditional reinstatement.⁷

Five of the discriminatees jointly filed a petition for review with the Court of Appeals for the Second Circuit, arguing, as relevant here, that the Board erred in rejecting, without explanation, the "ALJ's reinstatement order" recommending that the Respondent be required to offer the discriminatees conditional reinstatement. On July 10, 2013, the Second Circuit remanded the issue of conditional reinstatement to the Board. *Palma*, supra, 723 F.3d at 187.

In ordering the remand, the court stated that it did not "understand the Board to have ruled that petitioners were not entitled to offers of reinstatement conditioned upon their presentation to Mezonos of IRCA-compliant documentation to show that they are lawfully present in, and authorized to work in, the United States. The Board's

⁶ 357 NLRB No. 47, slip op. at 13-14. In *A.P.R.A.*, the Board ordered the employer to offer the discriminatees immediate and full reinstatement, 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. 320 NLRB at 417.

⁷ On September 6, 2011, the Charging Party filed a motion for reconsideration concerning the denial of backpay, but that motion made no reference to conditional reinstatement. The Board denied the motion on November 3, 2011.

decision simply did not address that question . . ." Id. at 185. The court stated further that it was "skeptical" of the Respondent's contention that conditional reinstatement is not an appropriate remedy after *Hoffman*. Id. at 186. The court observed that although *Hoffman* "did not directly deal with an issue of reinstatement, its 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." Id. at 187. Concerning the petitioners' failure to except to the omission of a conditional reinstatement order, the court surmised that the parties might have "simply assumed from the findings made in the ALJ Decision that the ALJ had in fact granted petitioners' request for conditional reinstatement." Id. at 186. Indeed, the court noted that the Respondent's exceptions "repeatedly challenged the ALJ's views on reinstatement." Id. The court summarized its findings as follows:

In sum, given (a) that the ALJ Order did not recommend conditional reinstatement 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, and despite an explicit request by the General Counsel for an order requiring offers of conditional reinstatement, (b) that petitioners did not file any exceptions with the Board despite the failure of the ALJ Order to recommend conditional reinstatement, and (c) that the Board did not consider whether an order requiring offers of conditional reinstatement would be appropriate despite Mezonos's explicit argument that the decision in *Hoffman Plastic* foreclosed any orders for conditional reinstatement, we conclude that this matter should be remanded to the Board for consideration, in the first instance, of issues relating to that form of relief—including issues of waiver, estoppel, and appropriateness.

Id. at 187.

On March 26, 2014, the Board invited the parties to "file statements of position with respect to the issues raised by the remand." The General Counsel and the five discriminatees filed statements of position. The Respondent and LatinoJustice PRLDEF did not.

Discussion

Waiver and Estoppel

As a threshold issue, we must decide whether the appropriateness of a conditional reinstatement order is properly before us. That is, in accordance with the court's instruction to consider "issues of waiver [and] estoppel," we must resolve whether the General Counsel and the discriminatees waived this argument by failing to file exceptions to the judge's omission of a conditional

reinstatement order or are otherwise estopped from seeking that remedy at this stage of the proceeding.

We find that the General Counsel and the discriminatees are not estopped from seeking a conditional reinstatement order in this case. The General Counsel explicitly requested conditional reinstatement at the hearing. The judge made a specific finding that *Hoffman* "did not disturb" the conditional reinstatement part of the order in *A.P.R.A.*, and he found that the Respondent had an obligation to make valid reinstatement offers. The Respondent excepted to the judge's discussion of the appropriateness of a conditional reinstatement remedy. Although neither the General Counsel nor the discriminatees excepted to the judge's failure to include a conditional reinstatement remedy in his recommended Order, and the Board's decision focused only on the backpay issue, the issue of conditional reinstatement was sufficiently raised and litigated before the Board.

We further find that neither the General Counsel nor the discriminatees waived their right to seek conditional reinstatement. It is well settled that the Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will effectuate the policies of the Act. See *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996). Remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions. *Id.* The Board is "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." *Longshoremen ILA Local 1814 v. NLRB*, 735 F.2d 1384, 1404 fn. 26 (D.C. Cir. 1984), cert. denied 469 U.S. 1072 (1984). See also *Schnadig Corp.*, 265 NLRB 147, 147 (1982); *R. J. E. Leasing Corp.*, 262 NLRB 373, 373 fn. 1 (1982) (order granting motion and modifying decision and order). Thus, the failure of the General Counsel or the discriminatees to except to the judge's omission of a conditional reinstatement order does not constitute a waiver of that issue.

We find that no party will be prejudiced by our consideration of conditional reinstatement. The parties were given an opportunity to file position statements on remand, and the Respondent has not argued that the Board is precluded from granting conditional reinstatement or that it would be prejudiced by our doing so. Accordingly, we find no procedural impediment to our consideration of the appropriateness of the remedy.

Appropriateness of a Conditional Reinstatement Order

We find that conditional reinstatement is an appropriate remedy where, as here, an employer knowingly em-

ployes individuals who lack authorization to work in the United States and then discharges them in violation of the NLRA. Such a remedy is consistent with the policies of both the Act and IRCA.

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court approved of the use of a conditional reinstatement remedy in cases involving unlawfully discharged undocumented workers. The Court reasoned that making a reinstatement order conditional on compliance with Federal immigration laws eliminated any potential inconsistency with those laws. 467 U.S. at 902-903. Although *Sure-Tan* was decided under the Immigration and Nationality Act (INA), later superseded by IRCA, the Board in *A.P.R.A.*, supra, 320 NLRB at 415, 417, subsequently reaffirmed the appropriateness of conditional reinstatement orders in cases involving undocumented employees under IRCA.⁸ *A.P.R.A.*'s conditional reinstatement remedy was enforced by the Second Circuit, which held that "IRCA did not diminish the Board's power to craft remedies for violations of the NLRA, provided that the Board's remedies do not conflict with the requirements of IRCA." 134 F.3d at 56. The court further stated that a conditional reinstatement order "provides a measure of compensatory relief that is properly gauged to [the discriminatees'] right (or lack thereof) to work in the United States" and "feliculously 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." 134 F.3d at 57. The court concluded that a conditional reinstatement order requiring discriminatees to complete Federal Form I-9 and present appropriate documentation "promotes the shared policy goals of IRCA and the NLRA, and avoids any conflict with the specific provisions of IRCA." *Id.*

We agree with the administrative law judge and the Second Circuit that *Hoffman*, supra, 535 U.S. 137, did not cast doubt on the use of conditional reinstatement orders in cases involving undocumented discriminatees. In *Hoffman*, the Court 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). The Court did not, however, address the appropriateness of conditional reinstatement remedies because it was not faced with such a remedy in that case. Therefore, as observed by the Second Circuit in remanding this case, the *Hoffman* Court's "discussion plainly did not foreclose relief in the nature of an order for reinstatement conditioned upon an employee's sub-

⁸ See also *Regal Recycling, Inc.*, 329 NLRB 355, 357 (1999) (ordering conditional reinstatement, relying on *A.P.R.A.*)

mission of documentation as required by IRCA.” 723 F.3d at 187.

Following *Hoffman*, the Board has found conditional reinstatement orders appropriate in cases involving undocumented workers. See, e.g., *Tuv Taam Corp.*, 340 NLRB 756, 759 fn. 5 (2003).⁹ The Supreme Court in *Sure-Tan* squarely held that conditional reinstatement orders are appropriate in the immigration context, this holding was undisturbed by the Supreme Court’s decision in *Hoffman*, and the Respondent has provided us with no reason to conclude otherwise.¹⁰

Conditional reinstatement accommodates the interests protected by the Federal immigration laws, as it allows reinstatement only if the employee provides the necessary documentation under IRCA. We agree with the General Counsel’s argument that conditional reinstatement is important in the immigration context in order to provide a meaningful remedy for the Respondent’s unfair labor practices. Because *Hoffman* limits the Board’s authority to order backpay, conditional reinstatement is the only means available to the Board to provide relief to the discriminatees and the principal means of deterring future unfair labor practices.

Finding conditional reinstatement orders appropriate in the immigration context is also consistent with the Board’s practice in other nonimmigration-related circumstances where reinstatement “would require the removal of a legal disability.” *A.P.R.A.*, supra, 320 NLRB at 415. In cases in which an unlawfully discharged employee lacks a prerequisite to reinstatement to his or her former position, the issuance of a reinstatement order conditioned upon the meeting of the prerequisite has been found to effectuate the policies of the Act. See, e.g., *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) (conditioning reinstatement of a driver whose license had been suspended on his presentation of a valid driver’s license within a reasonable period of time); *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1067 (2007) (ordering employer to offer reinstatement contingent upon demonstration that employee reestablished, within a reasonable time of the offer, state certification to drive school bus), enfd. 577 F.3d 467 (2d Cir. 2009); *Epic Security Corp.*, 325 NLRB 772, 774 (1998)

⁹ The General Counsel has taken the same position. See 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.”).

¹⁰ As noted previously, only the General Counsel and the discriminatees filed statements of position on remand, none was filed by the Respondent.

(reinstatement of employee to armed guard position conditioned upon his regaining gun license); *De Jana Industries*, 305 NLRB 845 (1991) (ordering employer to offer reinstatement to a driver position once employee established that he had a valid driver’s license).

We agree with the judge’s conclusion that *Hoffman* does not preclude us from ordering conditional reinstatement, and we find that it would effectuate the policies of the Act to do so in this case.¹¹ Consistent with *A.P.R.A.*, our conditional reinstatement order will require the Respondent to provide the discriminatees with a reasonable period of time to meet the condition for reinstatement.¹²

ORDER

The National Labor Relations Board orders that the Respondent, Mezonos Maven Bakery, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer the discriminatees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, USCIS Form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act (IRCA).

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and main-

¹¹ We also find it appropriate to require the Respondent to post notices to employees to inform its work force that conditional reinstatement has now been ordered for the discriminatees in this case.

¹² We will not, in this decision, decide what constitutes a reasonable period, as that determination “will depend essentially on the situation in which an employee finds himself.” *Esterline Electronics Corp.*, 290 NLRB 834, 834 (1988); see also *Sure-Tan*, 277 NLRB 302, 302-303 fn. 6 (1985) (34 days “did not give the discriminatees a reasonable time to consider the offer or make arrangements for legally entering the United States,” and 4 years was a reasonable period during which to hold open the job offers “given the lengthy time normally required for Mexican nationals to acquire immigrant visas.”) Any matters relating to “reasonable time” may be resolved in subsequent compliance proceedings, if necessary.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

tained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 27, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL, within 14 days of the date of the Board's Order, offer the discriminatees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, USCIS Form I-9, including the presentation of the appropriate documents, in order to allow us to meet our obligations under the Immigration Reform and Control Act.

MEZONOS MAVEN BAKERY, INC.

The Board's decision can be found at www.nlr.gov/case/29-CA-025476 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



