UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEZONOS MAVEN BAKERY, INC.

and Case No. 29-CA-25476

LatinoJustice PRLDEF[1]

BRIEF IN SUPPORT OF CHARGING PARTY'S MOTION FOR RECONSIDERATION

Charging Party LatinoJustice PRLDEF files this brief in support of its motion for reconsideration of the Board's Supplemental Decision and Order in this case. As explained in detail below, the Board decided this case on a ground that was not raised by any party, *i.e.*, that the discriminatees in this case are not entitled to backpay as a matter of law because they were party to an unlawful employment relationship. This holding directly conflicts with the Board's own precedent, which holds that, notwithstanding the unlawful nature of the employment relationship, where an employer hires a worker *knowing* that the worker is not legally eligible for a position, the worker is not ineligible for backpay relief. The Board should grant this motion for reconsideration and decide this case in accord with the Board's own precedent, awarding backpay to the discriminatees in this case.

[1] On October 6, 2008, Charging Party Puerto Rican Legal Defense and Education Fund changed its name to LatinoJustice PRLDEF.

1. Respondent Mezonos violated the Act by "discharg[ing] the discriminatees after they concertedly complained about the treatment they were receiving from a supervisor." *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47, p. 1 (Aug. 9, 2011). As a result, the Board ordered Mezonos to make the discriminatees whole for lost wages and benefits. *Ibid.* In compliance, Mezonos argued as an affirmative defense to the Board-ordered remedy that it was not required to pay lost wages and benefits pursuant to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), because the discriminatees were allegedly undocumented immigrants not legally authorized to work in the United States. *Mezonos*, 357 NLRB No. 47, p. 1. The General Counsel and the Charging Party disagreed, arguing that because Mezonos hired the discriminatees without verifying their employment eligibility and employed them assuming they were undocumented, *Hoffman Plastic* did not apply. *Id.* at p. 3.

The Board agreed with Mezonos that the company was not required to pay backpay, but based its decision on a finding that the discriminatees were party to "an unlawful employment relationship." *Id.* at p. 2. The Board explained that the fact that the workers in this case did not engage in any illegal act in obtaining employment was, in its view, immaterial because "[t]he unlawful character of th[e] relationship does not depend on whether it is the employee or the employer who has violated IRCA." *Id.* at p. 3. Rather, "what matters," the Board said, "is

that IRCA has been violated, not which party to the employment relationship committed the violation." *Id.* at p. 4.

2. The Administrative Law Judge found that Mezonos "fail[ed] to verify its employees' documentation and continu[ed] to employ the seven discriminatees with knowledge of their undocumented status," thus "knowingly and intentionally violating IRCA and the Act." *Mezonos*, 357 NLRB No. 47, pp. 16-17. This finding calls into play the Board's long-established caselaw holding that where an employer knows that a worker is not legally eligible for a position but employs that worker anyway, the worker is entitled to be made whole for any subsequent violations of the Act.

The Board has awarded backpay, for example, in several cases in which a discriminatee was legally ineligible to work but the employer was aware of this ineligibility and employed the worker anyway. In *New Foodland Inc.*, 205 NLRB 418 (1973), the employer knowingly employed a worker who was too young to sell alcohol under local law. After the worker was fired for joining a union, the Board concluded that she was entitled to backpay, explaining that "Respondent knew that [the discriminatee] was under age when she was hired" and "did not consider her age an impediment to her employment prior to the time that she joined the Union." *Id.* at 420. In *The Embers of Jacksonville, Inc.*, 157 NLRB 627, 631 (1966), the Board, confronted with a similar scenario, held that underage busboys fired in violation of the Act were entitled to backpay because "Respondent had frequently hired busboys under 18 years of age [in violation of

state law], and then attempted to rely on having no knowledge of such situations until it was specifically called to their attention." *See also Douglas Aircraft Co.*, 10 NLRB 242, 282, 285 (1938) (discriminatee entitled to backpay even though as a non-citizen he was legally ineligible to work on federal contracts, "[s]ince [his] ineligibility for [such] work was not a factor in the refusal of his reinstatement after the strike").

In other cases, the Board has awarded backpay where, although the discriminatee lacked a required occupational license, the employer was aware of this legal deficiency at the time it employed the worker. In *Future Ambulette, Inc.*, 307 NLRB 769 (1992), the employer sought to escape backpay liability on the basis that the discriminatee truck driver lacked a required license. The Board rejected this defense because "the Respondent employed other unlicensed drivers," *id.* at 771-72, explaining that "Respondent . . . is not to be relieved of its backpay liabilities because of [the discriminatee]'s license deficiencies so long as it countenances those of the drivers on its current staff." *Future Ambulette, Inc.*, 293 NLRB 884, 894 (1989). Likewise, in *Local 57, Int'l Union of Operating Engineers*, 108 NLRB 1225, 1228 (1954), the Respondent union sought relief from backpay liability because the discriminatee lacked a license to operate a crane. The Board dismissed this argument as well, explaining that "the record . . . conclusively proves . . . that the licensing law was not complied with by the employer on the project involved in this case." *Ibid. See also Robinson Freight*

Lines, 129 NLRB 1040, 1042, 1047 (1960) ("[Discriminatee's] lack of a license did not render him ineligible for backpay.").

The rule that emerges from the Board's caselaw is that backpay will be awarded where the "Respondent knew that [the discriminatee was not legally eligible for the position] when she was hired" and "did not consider her [legal ineligibility] an impediment to her employment prior to the time she joined the Union" or otherwise engaged in protected concerted activity. *New Foodland*, 205 NLRB at 420. In other words, contrary to the Board's holding in this case – that, in awarding backpay, it is "[t]he unlawful character of th[e] relationship" and "not . . . whether it is the employee or the employer who has violated [the law]" that matters, *Mezonos*, 357 NLRB No. 47, at 3 – numerous Board decisions clearly hold that whether an employer knowingly employs a worker who is legally ineligible for a position *does* matter when it comes to awarding backpay.

3. In its decision in *Hoffman Plastic*, the Supreme Court did not consider the Board's precedent concerning the availability of backpay for NLRA violations when an employer knowingly enters into an unlawful employment relationship because "the employee in [*Hoffman Plastic*] violated IRCA by proffering fraudulent work-authorization documents, whereas in this case the Respondent is the IRCA violator." *Mezonos*, 357 NLRB No. 47, at p. 3. That line of precedent was not at issue in and therefore could not have been overruled by *Hoffman Plastic*.

In the litigation below all of the parties focused on the availability of backpay in this case as a narrow immigration-related issue, rather than as one instance of the more general pattern of employers seeking to avoid liability for violations of the NLRA after knowingly entering into an unlawful employment relationship. In its exceptions, Mezonos focused specifically on whether "the instant . . . case is controlled by the Supreme Court's decision of *Hoffman Plastic*," Resp. Br. in Support of Exc. at 7, never acknowledging that its employment of the discriminatees constituted an unlawful employment relationship nor suggesting that this fact might constitute a basis for denying backpay. And, because Mezonos did not rely on the unlawful employment relationship theory in its exceptions, neither the General Counsel nor the Charging Party addressed this argument in its response. *See* NLRB Rules & Regulations, § 102.46(d) (stating that in opposing exceptions, a party is "limited to the questions raised in the exceptions and the brief in support thereof"). In particular, neither the General Counsel nor the Charging Party had the opportunity to explain why, under established Board law, where an employer hires a worker *knowing* that the worker is not legally eligible for a position, that worker *is* entitled to backpay for any subsequent violations of his or her rights under the NLRA.

The Board should, therefore, grant this petition for rehearing in order to address the decisions referenced above and evaluate the facts of this case in light of this controlling precedent regarding the availability of backpay for NLRA violations when an employer knowingly enters into an unlawful employment

relationship. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (where the Board reaches a decision on a ground "not raised during the proceedings before the Board," the proper course for a party that disagrees is to "object[] to the Board's decision in a petition for reconsideration or rehearing").

CONCLUSION

For the foregoing reasons, LatinoJustice PRLDEF respectfully requests that the Board grant its motion for reconsideration and affirm the Administrative Law Judge's decision awarding backpay to the discriminatees in this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew J. Ginsburg, hereby certify that, on September 6, 2011, I caused to be served a copy of the foregoing Brief in Support of Charging Party's Motion for Reconsideration by electronic mail on the following:

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