Nos. 12-5068 & 12-5138

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al* .,

Appellants/Cross-Appellees

v.

NATIONAL LABOR RELATIONS BOARD, *et al*.,

Appellees/Cross-Appellants

ON CROSS-APPEALS FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
C.A. No. 11-cv-01629-ABJ

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[1] The provisions contained in 29 C.F.R. Part 104 are enjoined pending appeal pursuant to this Court's order in this case on April 17, 2012.

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GLOSSARY

ADA – Americans with Disabilities Act

FLSA-Fair Labor Standards Act

FMLA-Family Medical Leave Act

D.A. – Deferred Appendix

Mem. Op. – March 2, 2012 Decision by district court below, granting in part and denying in part Plaintiff Employers' and the Board's motions for summary judgment

NLRB - National Labor Relations Board or "the Board"

GLOSSARY (cont'd)

NLRB Principal Br. - NLRB Principal & Response Brief

NLRA - National Labor Relations Act or "the Act"

Plaintiff Employers' Response Br.- Plaintiff Employers' Response and Reply Brief

Title VII – Title VII of the Civil Rights Act of 1964

SUMMARY OF ARGUMENT

The district court erred in striking down Sections 104.210 and 104.214(a) of the Board's Rule. The Rule is consistent with Section 8(a)(1) and Section 10(b) of the NLRA. 29 U.S.C. §§ 158(a)(1), 160(b).

I. The district court erred in striking down Section 104.210 of the Rule.

The Board correctly found that an employer violates Section 8(a)(1) when it fails to post the notice.

A. The duties in Section 8(a)(1) are not limited to the duties "expressly" addressed in other Sections of 8(a).

Plaintiff Employers argue that Section 8(a)(1) is limited to obligations "expressly" addressed by other unfair labor practices. Plaintiff Employers' Response and Reply Brief 7 n.4; 23-24 ("Plaintiff Employers' Response Br."). This argument finds no support in the broad and general text of Section 8(a)(1). And, in fact, Congress said the opposite: the other provisions are "not intended to limit in any way the interpretation of the general provisions of subsection [8(a)](1)." H.R. Rep. No. 74-1147, at 17 (1935), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3066 (1959) ("Leg. Hist.").[1]

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[1] *See* NLRB Principal & Response Brief 43-46 ("NLRB Principal Br.") (discussing legislative history and cases); *see also Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991) ("Section 8(a)(1) is the blanket 8(a) provision that shields employees from unfair practices."); *NLRB v. S. Cent. Bell Tel. Co.*, 688 F.2d 345, 354 (5th Cir. 1982) (finding that Sections 8(a)(2)-(5) were intended by Congress "to be a *nonexhaustive* list of four specific types of employer behavior barred by section 8(a)(1)") (citing H.R. Rep. No. 74-969, at 15 (1935)).

Congress framed the "general guarantees" of Section 8(a)(1) broadly, because it knew that it could only "spell out with particularity [in the statute] *some* of the practices that have been most prevalent and most troublesome." S. Rep. No. 74-573, at 9, *reprinted in* 2 Leg. Hist. 2309 (emphasis added); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) ("The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice."). Thus, there are many Section 8(a)(1) violations entirely independent of the other provisions. *See, e.g.*, *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-24 (1964) (violation of Section 8(a)(1) independent of Section 8(a)(3)). Plaintiff Employers simply ignore this point (Plaintiff Employers' Response Br. 24 n.13): Congress *wanted the Board to apply Section 8(a)(1) to employer duties that Congress did not foresee*, because it knew that the effective protection of Section 7 rights required adjusting to the constantly "changing patterns of industrial life." *NLRB v. J. Weingarten Corp.*, 420 U.S. 251, 266 (1975). Thus, the text and purpose of Section 8(a)(1) support the duty to post this notice, and the Board reasonably so found. 76 Fed. Reg. 54,006, 54,032. (Aug. 30, 2011); Deferred Appendix 040 ("D.A.").

B. The duty to post is analogous to the other duties recognized under Section 8(a)(1).

Plaintiff Employers acknowledge that Section 8(a)(1) "imposes . . . affirmative obligation[s] such as the duty to bargain," but seek to distinguish those

obligations from the obligation to post a notice of employee rights. Plaintiff Employers' Response Br. 23-24. Contrary to Plaintiff Employers' argument, the "failure to act" cases they concede are within the scope of Section 8(a)(1) involve unlawful interferences similar to the interference that the Board found results from an employer's failure to post a notice informing employees of their NLRA rights.

Plaintiff Employers agree that Section 8(a)(1) encompasses an employer's failure to respond to an employee representative's reasonable request for information needed for the effective exercise of employee rights. *See Tech. Serv. Solutions*, 324 NLRB 298, 301-02 (1997) (Section 8(a)(1) violated where the employer failed to give the union requested employee names and contact information); *Standard Oil Co. of Cal., W. Ops., Inc. v. NLRB*, 399 F.2d 639, 641-42 (9th Cir. 1968) (same); *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), (Section 8(a)(1) violated where the employer fails to provide requested information needed to enable effective bargaining on behalf of employees), *enforcement denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956). Similarly, as discussed in the NLRB's Principal Br. 47-48 n.19, and not disputed by Plaintiff Employers, an employer that has not itself engaged in any affirmative misconduct may violate Section 8(a)(1) by doing nothing to remove impediments to the free exercise of Section 7 rights that are created by others. *See St. Francis Med. Ctr.*, 347 NLRB 368, 369 (2006) (Section 8(a)(1) violated where the employer "took no

action" in response to anti-union interference by a co-worker); *Champagne Color, Inc.*, 234 NLRB 82, 82 (1978) (same).

What is common to these examples is that the employer's duty to act arises because, in the Board's judgment, employer inaction results in working conditions where the free exercise of employee rights is impeded. The same analysis applies to this Rule. The Board reasonably found that employees are generally unaware of their Section 7 rights, and that these conditions require employers to post a notice providing employees with information about their NLRA rights and how to enforce them within statutory timeframes. *See* 76 Fed. Reg. 54,014-18, 54,032 (D.A. 022-26, 040). Otherwise, as in cases where employers fail to provide information needed for meaningful representation by the employees' designated bargaining representative, Section 7 activity is blocked at the threshold. For these reasons, the Board justifiably concluded that an employer's failure to post an official notice informing employees of their Section 7 rights "reasonably tends to interfere with the exercise of such rights." 76 Fed. Reg. at 54,032 (D.A. 040).

Plaintiff Employers attempt to recast the Section 8(a)(1) information cases as involving an employer "action of refusing" to perform its duty. Plaintiff Employers' Response Br. 24. As the district court itself correctly noted, however, "refusal" is a "form of inaction." D.A. 120. Equally without merit is Plaintiff Employers' suggestion that the cited Section 8(a)(1) cases are all distinguishable

on the grounds that "there has been some *affirmative action* by a party, which has created the obligation" to act. Plaintiff Employers' Response Br. 24 (emphasis in original). The attempted distinction is untethered from Section 8(a)(1), which focuses solely upon *employer* interference, coercion, or restraint, and contains no requirement of affirmative action by a third person. For these reasons, the Board appropriately found that the failure to post a governmental notice which the Board has determined "is necessary to ensure effective exercise of Section 7 rights" violates Section 8(a)(1). 76 Fed. Reg. at 54,032 (D.A. 040).

C. *Teamsters Local 357 v. NLRB* is a poor analogy.

Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961), discussed at Plaintiff Employers' Response Br. 24-25, does not address a notice-posting issue like the one presented here and the Supreme Court's rationale for striking down the Board's union hiring hall notice requirement does not extend to this case. As Justice Douglas explained, Congress debated union hiring halls in great detail and *explicitly rejected* broader regulation of them beyond certain "specific discriminatory practices." 365 U.S. at 676. Thus, the specific scheme for regulating hiring halls was exclusive, and it would conflict with the specific terms of the statute to require broader hiring hall regulation. Here, by contrast, Congress did not consider the issue of general notice posting, and instead chose to give the Board broad discretion to spell out with particularity what employer duties are

encompassed by Section 8(a)(1). S. Rep. No. 74-573, at 9, *reprinted in* 2 Leg. Hist. 2309. For these reasons, *Local 357* does not apply here.

II. The district court erred in striking down Section 104.214(a) of the Rule.

The Board correctly found that the failure to post a notice of rights may be considered by the Board as a factor in the equitable tolling analysis.

A. The statute of limitations is subject to tolling.

The courts have widely held that the failure to post a notice of employee rights is relevant to tolling under Title VII—and every other similar statute. 76 Fed. Reg. at 54,033-34 (D.A. 041-42) (citing exemplary cases involving the ADA, FLSA, FMLA, etc.). And, as Plaintiff Employers must acknowledge, the Supreme Court "analogize[s] Title VII and the NLRA with regard to the general concept of equitable tolling." Plaintiff Employers' Response Br. 26; *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). Plaintiff Employers give no valid reason or support for treating NLRA tolling differently from every other statute.[2]

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[2] In rebuttal, Plaintiff Employers cite *Tipler v. E.I. DuPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971), and *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969) (*see* Plaintiff Employers' Response Br. 25). Neither case supports their point. *Tipler* simply explains that it would be inappropriate to rigidly apply the doctrine of res judicata and collateral estoppel to Title VII proceedings conducted after an NLRB proceeding because "certain discriminatory practices that are valid under the National Labor Relations Act may be invalid under Title VII." The case has nothing to do with equitable tolling. 443 F.2d at 128-130. Neither does *Pettway*. There, the court noted that Title VII's "protective

B. Tolling does not require "affirmative misconduct."

Plaintiff Employers mistakenly claim that tolling requires "affirmative misconduct" by the defendant. Plaintiff Employers' Response Br. 26. As Judge Posner has explained, although affirmative misconduct is one ground for tolling, there are other grounds as well. *Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 450-51 (7th Cir. 1990).[3] As discussed previously, courts have long recognized that failure to post required notices of statutory rights is a factor that may warrant equitable tolling. *See, e.g., Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46-47, n.8 (1st Cir. 2005) ("the employer's violation of the

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provisions" are broader than those of the NLRA and FLSA, but "[n]otwithstanding these differences, abundant support can be found under such Acts for the conclusion here that protection must be afforded to those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment." 411 F.2d at 1005-07.

Additionally, Plaintiff Employers do not attempt to defend the district court's untenable distinction between regulatory and statutory notices. *See* NLRB Principal Br. 58-59.

[3] Plaintiff Employers' conflate equitable estoppel (also known as fraudulent concealment) with other bases for tolling. *See Cada*, 920 F.2d at 450-51 (describing the differences between tolling, estoppel, and the discovery rule). Specifically, they try to import limits from the estoppel cases into tolling more generally, "blur[ring] the distinction between the two." *Mercado*, 410 F.3d at 47 n.8. But even the cases that Plaintiff Employers rely upon (Response Br. 26) recognize the significance of the distinction. For example, *Washington v. WMATA*, 160 F.3d 750, 752 (D.C. Cir. 1998), distinguished between equitable estoppel and other bases for tolling: "Although Washington asserts equitable tolling, under this circuit's case law, his claim may be more accurately characterized as one for equitable estoppel" because he alleged that employer statements had "lulled" him into inaction. *Accord Dove v. WMATA*, 402 F. Supp. 2d 91, 97 (D.D.C. 2005).

posting duty [i]s a possible alternative path to equitable tolling" because "the employer effectively has prevented the plaintiff from learning of his legal rights by failing to post the required notice."). For these reasons, the Board's Rule is appropriate.

C. The burden of proof does not shift.

Finally, Plaintiff Employers argue by *ipse dixit* that Section 104.214(a) shifts the burden of proof. The Board's position to the contrary should be sufficient response. NLRB Principal Br. 53-56 (citing *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002)). The burden of proof for tolling under Section 104.214(a) remains on the proponent. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-21 (2012). *Mercado*, 410 F.3d at 46-48, is the Board's model for the Rule, and the Rule will not shift the burden of proof.

CONCLUSION

For these reasons, and for those in the Board's Principal & Response Brief, the district court should be affirmed in part and reversed in part, and the Rule upheld in its entirety.

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)

1. This final reply brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because this reply brief contains 2,103 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This final reply brief complies with the typeface requirements of Fed. R. App. P. 28.1(e)(2)(C) and the type style requirements of Fed. R. App. P. 32(a)(6) because this final reply brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, Font 14.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, the Board's Final Reply Brief was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

I certify that the foregoing document was served electronically on the following counsel for Plaintiff Employers, as well as on counsel for the amici in this case, most of whom have consented to electronic service (with the exception of Professor Charles Morris, who received the brief by email and first-class mail Christine Owens, who received the brief by first-class mail, and Nancy Schiffer and Lynn Rhinehart, who received the brief by email (with their consent):

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