

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

NOVA SOUTHEASTERN UNIVERSITY

and

LOCAL 11, SERVICE EMPLOYEES
INTERNATIONAL UNION

CASES: 12-CA-25114
12-CA-25290
12-CA-25298

**RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S
RESPONSE TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Respondent, Nova Southeastern University ("Nova"), by and through its undersigned counsel, Fisher & Phillips, LLP, hereby files its reply to Counsel for the General Counsel's Response to Respondent's Motion for Partial Summary Judgment.¹

Respondent's Motion for Partial Summary Judgment should be granted. As set forth in Respondent's original Motion, Counsel for the General Counsel is unable to show the existence of a material issue of genuine fact precluding summary judgment.

I. CLERICAL ERROR WAS EXCUSABLE NEGLIGENCE

In her Response, Counsel for the General Counsel states that Nova's motion was not filed with the Board in Washington, as required by Section 102.24. Nova learned by Counsel for the General Counsel's telephone call that its motion was not before the Board, as intended. Counsel for Nova made a clerical error when electronically filing the Motion by selecting the Division of Judges rather than the Board as to whom the Motion should be routed.

¹ Although not explicitly provided for in the Rules and Regulations, the Board's practice is to permit the moving party to file a reply brief. See *Baker Electric*, 170 LRRM 1436, 1437, n.4, 330 NLRB 521 (2000); *Unifirst Corp.*, 174 LRRM 1025, 341 NLRB No. 1 (2004) (Shaumber, dissent).

However, Counsel for the General Counsel timely received Nova's Motion and had an opportunity to respond. No party will be prejudiced by the Board considering Nova's Motion despite this clerical error, which was excusable neglect. Nova respectfully asks that the Board not deny its Motion for the technical deficiency and consider it on the merits.²

II. ANSWER TO ORIGINAL COMPLAINT WAS SUPERSEDED

Counsel for the General Counsel suggests that Nova's Motion should be denied because Nova admitted that Todaro was in fact an agent of Nova through its Answer to the Original Complaint. However, the Regional Director consolidated three separate charges and filed a Consolidated Complaint, which included additional allegations regarding Todaro. Nova's Answer to the Consolidated Complaint denies that Todaro was an agent of Nova at all relevant times.

Nova's original answer was filed on February 8, 2007. In a letter dated March 9, 2007, counsel for Nova informed Counsel for General Counsel that Mr. Todaro was not an agent of Nova prior to February 18, 2007, and that any allegations concerning him should be dismissed. Following this, additional charges and amended charges were filed against Nova, which culminated in the Consolidated Complaint on August 28, 2008. Nova's Answer to the Consolidated Complaint supersedes its prior answer to the original Complaint. Furthermore, even had a Consolidated Complaint not been filed, Nova would have had the ability to amend its answer to reflect that Todaro was not an agent of Nova prior to being hired on February 18, 2007. *See Howard R. Singer*, 122 LRRM 1124, 1125, 278 NLRB 902 (1986) (holding that amended answer superseded and/or cured deficiencies of original answer); *Len Martin Corp.*,

² Nova notes that Counsel for the General Counsel did not comply with Section 102.24(b) in filing her response. The Rule states that the opposition to a motion for summary judgment must be filed no later than 21 days prior to the hearing. As the hearing is currently scheduled for November 17, 2008, the Response was due October 27, 2008, but was instead filed on October 30, 2008.

124 LRRM 1109, 282 NLRB 482 (1986) (amended answer superseded original answer). Nova's current Answer denies that Todaro was an agent of Nova at all relevant times. Therefore, Nova's Motion for Partial Summary Judgment should not be denied on this ground.

III. PROPER SUMMARY JUDGMENT STANDARD

The Counsel for the General Counsel misstates the appropriate standard by which the Board may consider Nova's Motion for Partial Summary Judgment. The standard cited by Counsel for the General Counsel in *Detroit Newspapers*, 330 NLRB 524, 535, n.7 (2000), analyzes a motion to dismiss, and not a motion for summary judgment. Whereas a motion to dismiss requires the Board to accept all factual allegations as true, a motion for summary judgment requires a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Counsel for the General Counsel's reliance on *Bloomfield Healthcare Center and New England Health Care Employees*, 352 NLRB No. 94, 184 LRRM 1378 (2008) is misplaced. In *Bloomfield*, the Board found that the respondent had the ability to litigate the validity of a certification at a prior representation proceeding, and because the respondent had no new evidence or special circumstances, it could not litigate the issue in the unfair labor practice proceeding where it had admitted it refused to bargain. This decision did not hold that the Board uses a motion to dismiss standard when deciding on a motion for summary judgment. Instead, as noted in Nova's Motion, the Board relies on the federal standard in analyzing a motion for summary judgment. *See Standby One Associates*, 118 LRRM 1538, 1538, 274 NLRB No. 140 (1985).

Nova has relied on the proper standard in arguing its Motion for Partial Summary Judgment and has submitted record evidence in the form of an affidavit, as well as a personnel action form. Counsel for the General Counsel has failed to offer any rebuttal evidence in

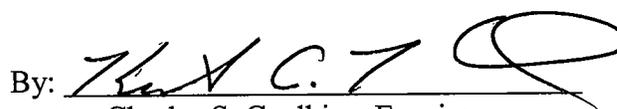
response to Nova's Motion. Accordingly, Nova has demonstrated that there is no issue of material fact regarding the agency of Todaro and summary judgment should be granted in its favor with respect to the alleged actions of Todaro taken prior to February 18, 2007.

IV. CONCLUSION

Based on the foregoing, Nova respectfully requests that the Board enter an order granting it partial summary judgment as to Paragraph 10.

Date: November 4, 2008

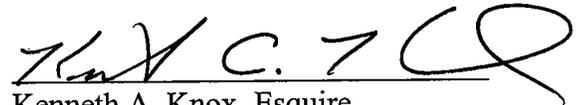
FISHER & PHILLIPS LLP
450 East Las Olas Boulevard
Suite 800
Fort Lauderdale, Florida 33301
Telephone: (954) 525-4800
Facsimile: (954) 525-8739

By: 
Charles S. Caulkins, Esquire
(Fla. Bar No. 0461946)
David M. Gobeo, Esquire
(Fla. Bar No. 0016565)

*Attorneys For Nova Southeastern
University*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF has been filed electronically with the Board and copies furnished to Susy Kucera, Esq., National Labor Relations Board, Federal Building, 51 SW 1st Avenue, Room 1320, Miami, Florida, 33130-1608, and Katchen Locke, Esquire, Associate General Counsel, SEIU International, 101 Avenue of the Americas, 19th Floor, Office of the General Counsel, New York, New York 10013 by facsimile and by United States Mail, First Class, postage prepaid.


Kenneth A. Knox, Esquire

Date: November 4, 2008.