United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 12, 2023

S.A.M.

TO: Paula S. Sawyer, Regional Director
Region 27

FROM: Richard A. Bock, Associate General Counsel
Division of Advice

SUBJECT: Kona Grill
Case 27-CA-294651

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The Region submitted this case for advice as to whether a refusal-to-hire or refusal-to-consider violation can be found where an applicant chooses to withdraw from the hiring process based on an unlawful statement made during the applicant's interview for employment—specifically, that employee wage discussions are prohibited. We conclude that existing doctrines—namely, the yellow-dog contract precedents as well as the Hobson's Choice constructive discharge theory—should be extended to find a violation in such circumstances. Thus, the Region should urge the Board to find a constructive refusal-to-hire violation where: (1) an applicant reasonably believes the employer has placed an unlawful condition on their hire or employment, by having explicitly or implicitly communicated during the hiring process that Section 7 activity is incompatible with employment; (2) the applicant removes themselves from consideration because of that unlawful condition; and (3) the applicant would have been hired but for their withdrawal from the hiring process. Likewise, the lesser constructive refusal-to-consider violation should be found where only the first two prongs are satisfied. Furthermore, the Region should use this case as a vehicle to clarify the standard for a Hobson's Choice-based violation; that is, urge the Board to make clear that an employee's reasonable belief that employment or hire is conditioned on the

forfeiture of Section 7 rights is sufficient to establish that the employee faced an untenable choice, and that the condition need not be "clear and unequivocal."

We conclude that the Employer placed an unlawful condition on the Charging Party's hire, that the Charging Party withdrew from consideration because of that condition, and that the Charging Party would have been hired but for [redacted] withdrawal. Alternatively, we conclude that the employer refused to consider the Charging Party for hire because [redacted] withdrew from the hiring process. Accordingly, the Region should (b) (5) [redacted] urge the Board to clarify the Hobson's Choice standard.[1]

FACTS

Kona Grill ("the Employer") is a restaurant chain with a location in Denver, Colorado. The Charging Party, who has about (b) (6), (b) (7)(C) of experience working in (b) (6), (b) (7)(C), applied for a (b) (6), (b) (7)(C) position in response to an active listing on Indeed advertising the position. (b) (6), (b) (7)(C) selected for an interview, which was conducted by the restaurant's (b) (6), (b) (7)(C) manager on (b) (6), (b) (7)(C), 2022. After preliminary questions about the Charging Party's work history, the manager raised the subject of pay and benefits. The (b) (6), (b) (7)(C) manager informed the Charging Party that the Employer maintained a policy prohibiting employees from discussing their wages with one another because it causes strife.[2] The Charging Party stated that such a policy is illegal and the (b) (6), (b) (7)(C) manager replied that it is not. The Charging Party reiterated that the policy is illegal, and the (b) (6), (b) (7)(C) manager responded by explaining the rationale behind the policy—namely, that workers with different levels of experience earn different wages and employee discussions about wages only result in everyone wanting higher compensation. The Charging Party responded that the restaurant was not the place for [redacted] and ended the interview. But for the interviewer's unlawful statement, the Charging Party contends that the job would have likely been offered and accepted.

The Employer's handbook states, under the sections concerning confidentiality and social media guidelines, that those policies are "not intended to preclude or dissuade employees from engaging in legally protected activities such as discussing wages, benefits, or other terms and conditions of employment, or other

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[1] Pursuit of doctrinal change here is appropriate given the Region's conclusion that the Employer committed a related violation by virtue of its rule/policy that discussion of wages is prohibited. *See infra* note 2.

[2] The Region has already found merit to this statement as a violation of Section 8(a)(1) and did not submit that issue for advice.

legally-required activities." At no point during the hiring process did the Employer provide the handbook to the Charging Party.

ACTION

We conclude that the Employer violated Section 8(a)(1) by conditioning the Charging Party's hire on the forfeiture of Section 7 rights and constructively refusing to hire [redacted] (or, alternatively, constructively refusing to consider [redacted]) after [redacted] withdrew from the hiring process. These violations are premised on expansions of two existing doctrines: extending the yellow-dog contract theory of violation to encompass employment conditioned on foregoing protected concerted activity and/or extending the Hobson's Choice theory of constructive discharge to the hiring context. Applying these theories, the Board should find a constructive refusal-to-hire violation where: (1) an applicant reasonably believes the employer has placed an unlawful condition on their hire or employment, by having explicitly or implicitly communicated during the hiring process that Section 7 activity is incompatible with employment; (2) the applicant withdraws from consideration because of that unlawful condition; and (3) the applicant would have been hired but for their withdrawal from the hiring process. Likewise, the Board should find a lesser refusal-to-consider violation where only the first two prongs are satisfied. Finally, in litigating the Hobson's Choice theory, the Region should also ask the Board to clarify the legal standard such that a constructive discharge (or a constructive refusal to hire, as in this case) is established where an employee or applicant reasonably believes employment or hire is conditioned on forfeiting Section 7 rights.

I. The Employer violated Section 8(a)(1) by constructively refusing to hire the Charging Party after placing an unlawful condition on [redacted] hire or employment

a. *The Board's longstanding prohibition on contracts forbidding membership in labor unions*

The Board has long held that requiring a job applicant to sign a declaration disavowing any union membership or affiliation as a condition of hire (a so-called "yellow-dog contract") reasonably tends to restrain and coerce employees in the exercise of their Section 7 rights.[3] Such agreements and their solicitation are

[3] *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991); *New Big Creek Mining Co.*, 105 NLRB 97, 98, 100-01 (1953) (employer unlawfully solicited employees to sign yellow-dog affidavits and unlawfully indicated that job security might depend on whether they sign); *cf. Carlisle Lumber Co.*, 2 NLRB 248, 263-66 (1936) (employer discriminated in regard to terms and conditions by announcing "yellow dog" policy

barred under Section 8(a)(1) and invalid as a matter of law.[4] Furthermore, conditioning employment on such unlawful terms is violative even if the condition is not reduced to writing.[5] When an employer insists that employees forfeit their right to union membership, and an applicant refuses to renounce their affiliation, the Board has found an unlawful refusal to employ.[6] Such a violation can be found even when an individual declines to apply, knowing it would be futile to do so in light of the unlawful condition.[7]

While yellow-dog contracts historically contained explicit language prohibiting union membership or activity,[8] the Board will also find a violation where employees are faced with an implicit choice between employment and retaining their Section 7 rights. For example, in *Eddyleon Chocolate*, an applicant agreed to sign a yellow-dog contract after being asked to do so at the interview, but she was never actually presented with the written agreement.[9] Nonetheless, the Board found that the employer had unlawfully solicited a yellow-dog contract. Given that the employer raised the prospect of working under an illegal contract at the interview and that the employee was asked to make known her willingness to sign as the final question before she was extended an employment offer, the Board

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and by requiring returning strikers to renounce their union affiliation in order to return to reopened mill), *enforced in relevant part*, 94 F.2d 138 (9th Cir. 1937).

[4] *See Eddyleon Chocolate*, 301 NLRB at 887; *Barrow Utilities & Electric*, 308 NLRB 4, 11 n.5 (1992) (noting "all variations of the venerable 'yellow dog contract' are invalid as a matter of law").

[5] *See Eddyleon Chocolate*, 301 NLRB at 887.

[6] *See Carlisle Lumber*, 2 NLRB at 263-66, 277-78 (employer unlawfully refused to employ returning strikers who rebuffed yellow dog terms contained in reemployment application; reinstatement and make-whole relief ordered); *cf. Excel Fire Protection*, 308 NLRB 241, 248 (1992) (employees who refused to sign memorandum conditioning continued employment on accepting employer's transition to non-union status were discharged or constructively discharged).

[7] *See Carlisle Lumber*, 2 NLRB at 266.

[8] *See, e.g., New Big Creek Mining*, 105 NLRB at 100 (yellow-dog affidavit disavowed union membership or intent to join union); *Carlisle Lumber*, 2 NLRB at 264 (yellow-dog application required employees "to renounce any and all affiliation with any labor organization").

[9] 301 NLRB at 887.

observed that the employee could "reasonably have anticipated that her future employment depended on whether she refrained from union activity."[10]

The Board made a similar inference in *Ryder Truck Rental*.[11] There the employer opened a new, nonunion facility and staffed it with four employees who had previously worked at one of its unionized facilities. Prior to being transferred, all four employees were told that the new facility would be nonunion, and one employee was told he would have to "be a nonunion employee" in order to work there.[12] The employer solicited the transferees' signatures on letters explaining the nonunion status of the new plant, but did not explicitly communicate that failure to resign union membership would foreclose the employees' transfer.[13] Nonetheless, the Board affirmed the Section 8(a)(1) and (3) violations because the employer's comments "implicitly suggested to the four transferees . . . that they would have to alter or terminate their relationship with the [u]nion if they wished to secure employment" at the new facility.[14] Thus, the employees faced a "Hobson's choice" of either "securing employment . . . by resigning or withdrawing from the [u]nion" or "foregoing possible employment."[15] Accordingly, the letters were "tantamount" to a yellow-dog contract because applicants had been asked to acknowledge, as a precondition to employment, that the employer was no longer a union contractor.[16]

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[10] *Id*. (citing *Gilberton Coal Co.*, 291 NLRB 344, 348 (1988) (employer reasonably led applicant to conclude that hire and employment were conditioned on refraining from expressly supporting the union where, after applicant was prompted to reveal his favorable impression of unions, supervisor responded, "[t]hat's not a very good thing to say to me"), *enforced mem.*, 888 F.2d 1381 (3d Cir. 1989)).

[11] 318 NLRB 1092 (1995).

[12] *Id*. at 1093.

[13] *Id*. at 1093 & n.6 (transferees asked to sign letter stating "I also understand that this will be a non-union position and am very much interested in going to work there if in fact it is non-union").

[14] *Id*. at 1095. The ALJ additionally found that the "nonunion remarks were designed to induce the potential transferees . . . into withdrawing from, or terminating their membership in, the [u]nion" and achieved their intended outcome, as the three transferees who were union members requested honorary withdrawal cards from the union. *Id*.

[15] *Id*.

[16] *Id*. at 1095 n.9.

Finally, in *Adco Electric*,[17] in the context of an interrogation violation, it was also recognized that unlawful conditions on hire may be communicated implicitly. There the employer "in effect" presented an applicant with yellow-dog terms where the interviewer gave him the handbook, which stated that the employer's policy is to remain nonunion, told him that a union would not be tolerated at the company, and then unlawfully questioned him about his union membership.[18] Although the interviewer never explicitly conditioned the applicant's hire on agreeing not to join a union, it was observed that "[a]ny job applicant smart enough to find the restroom would have no trouble understanding that message—no union supporter will be hired."[19]

b. The longstanding doctrine deeming a "quit" a constructive discharge where an employee resigns rather than comply with an unlawful condition

A constructive discharge is a quit or resignation that the Board treats as a discharge because of the circumstances in which it occurs.[20] Under the Hobson's Choice line of cases, an employee's voluntary resignation will be considered a constructive discharge when an employer conditions the employee's continued employment on the employee abandoning their Section 7 rights and the employee quits rather than comply with the condition.[21] While the Hobson's Choice must be "clear and unequivocal" and not left to "inference or guesswork" by the employee,[22] more recently the Board has emphasized that an employer need not "literally" or

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[17] 307 NLRB 1113 (1992), *enforced*, 6 F.3d 1110 (5th Cir. 1993).

[18] *Id.* at 1117.

[19] *Id.*

[20] *Intercon I (Zercom)*, 333 NLRB 223, 223 (2001).

[21] *Id.*; *see also Atlas Mills*, 3 NLRB 10, 15-17 (1937) (employees, who had threatened to strike in response to employer's refusal to bargain with designated representative, were effectively discharged when supervisor stated that "t]hose who want to stay with [the employer] without any outsider, all right; the others leave, go and get your pay"; "The real alternative, inherent in the situation itself, was clear: either to give up connection with [the union] and abandon their legitimate weapon, the strike, or leave the respondent's employ. To condition employment upon the abandonment by the employees of the rights guaranteed them by the Act is equivalent to discharging them outright for union activities.").

[22] *Intercon*, 333 NLRB at 224 n.9 (quoting *ComGeneral Corp.*, 251 NLRB 653, 657 (1980), *enforced*, 684 F.2d 367 (6th Cir. 1982)).

"explicitly" present the dilemma to an employee.[23] The Board views the factual circumstances from the employee's perspective in determining whether an employee was faced with a Hobson's Choice.[24]

For example, in *Intercon*, an employee who had discussed union organizing with her coworkers received a written warning, which informed her that termination was the next step if she did not improve her "negative attitude" within four days.[25] Finding the employee's subsequent resignation to be a constructive discharge under the Hobson's Choice doctrine, the Board observed that "negative attitude" was a euphemism for pro-union activity and that by conditioning her continued employment on an improved demeanor, the employer had "effectively told [the employee] that she had 4 days to abandon her pro-union attitude if she wanted to preserve her job."[26] This conduct, the Board determined, led the employee to "reasonably believe that continuing to support the [u]nion and continuing her employment were incompatible," even though the employer did not "literally state" this condition.[27] The Board thus concluded that the employer's message was "unmistakable," that the Hobson's Choice was "clearly and unequivocally conveyed," and that the employee "understood [the] choice and resigned to avoid it."[28] It therefore rejected the ALJ's conclusion that the employer's "words and conduct" must "expressly convey" the dilemma for there to be a Hobson's Choice.[29]

Similarly, in *Titus Electric Contracting*, the Board found the employer constructively discharged an employee by informing him he must go home to change out of a union shirt.[30] The Board determined that by telling the employee he was

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[23] *Titus Electric Contracting*, 355 NLRB 1357, 1357-58 (2010) (finding Hobson's Choice constructive discharge even though employer "did not explicitly threaten" employee with discharge if he continued to exercise Section 7 rights); *Intercon*, 333 NLRB at 224 (finding Hobson's Choice constructive discharge even though employer "did not literally state" the dilemma).

[24] *Zeigler North Riverside, LLC d/b/a Zeigler Ford of North Riverside*, 370 NLRB No. 41, slip op. at 3 (2020).

[25] 333 NLRB at 223.

[26] *Id.* at 224.

[27] *Id.*

[28] *Id.* at 224 n.9.

[29] *Id.* at 223-24.

[30] 355 NLRB at 1357.

not allowed to work until he changed, the employer had conditioned employment on abandonment of the Section 7 right to wear union insignia in the workplace.[31] It observed that although the employer did not "explicitly threaten [the employee] with discharge," its "message was clear" that the employee would not be permitted to work while wearing the union shirt.[32]

c. To fully effectuate the Act, the Board should extend the Yellow-Dog and Hobson's Choice doctrines to recognize constructive refusal-to-hire and refusal-to-consider violations.

This case presents an opportunity to expand the above doctrines and urge the Board to recognize a constructive refusal-to-hire or refusal-to-consider violation where an applicant withdraws from the hiring process because their hire or employment is conditioned on refraining from engaging in protected concerted activity. Doing so would best effectuate the policies of the Act and afford appropriate relief to applicants who refuse to relinquish their right to engage in protected concerted activity.

The theory underlying the Board's longstanding prohibition on yellow-dog contracts compels a finding that it is an unlawful condition of hire or employment to require applicants or employees to refrain from engaging in protected concerted activity. Improperly limiting or prohibiting Section 7 activity even before an applicant is hired undermines the Congressional purpose behind the NLRA, whether that restriction takes aim at union affiliation or protected concerted activity.[33] The right of employees to join a union is fundamentally intertwined with

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[31] *Id.* at 1358.

[32] *Id. See also Earthgrains Co.*, 334 NLRB 1131 , 1131-32 (2001) (employer gave employee Hobson's Choice by stating he would have received an earlier denied promotion "if he would leave the union alone," notwithstanding that employer did not "literally threaten" discharge), *enforcement denied in relevant part sub nom. Sara Lee Bakery Group, Inc. v. NLRB*, 296 F.3d 292 (4th Cir. 2002); *Mayrath Co.*, 132 NLRB 1628, 1629-30 (1961) (Hobson's Choice found where "reasonable inference" from instruction to take off union buttons or "leave" was that if employees did not, they would be terminated), *enforced in relevant part*, 319 F.2d 424 (7th Cir. 1963); *Atlas Mills*, 3 NLRB at 17 (choice "inherent in the situation itself" was to abandon union or leave employment where employer told employees they could stay "without any outsider" or leave and get their pay).

[33] *See Meyers Industries*, 281 NLRB 882, 883 (1986) (*Meyers II*) (observing "Congress gave employees affirmative protection from employer reprisal for collective activity"; "it is protection for joint employee action that lies at the heart of the Act"), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *Shorewood Manor Nursing Home*, 217 NLRB 331, 338 (1975) (finding that a "proper

their right to engage in protected concerted activity, such that damage incurred by one necessarily weakens the other.[34] Just as discrimination in hiring based on union affiliation is "a dam to self-organization at the source of supply,"[35] hiring practices that eliminate applicants who might take the first steps toward self-organization—that is, who might engage in protected concerted activity, such as discussing wages—likewise serve to preemptively stifle union organizing.[36] In other words, extending the yellow-dog prohibition to hiring that is contingent on the forfeiture of protected concerted activities would prevent employers from discriminating against union activity by proxy, as well as better effectuate the Act's independent promise that safeguards employees who band together for mutual aid or protection.[37] Since the Board has found an unlawful refusal to employ where strikers were denied reemployment because they refused to accept yellow-dog terms—and ordered reinstatement and backpay[38]—it follows that a refusal-to-hire or refusal-to-consider violation should lie when an applicant refuses to relinquish their right to engage in protected concerted activity in order to obtain employment.

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construction [of Section 7] is that the employees shall have the right to engage in concerted activities even though no union activity be involved" (quoting *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948)).

[34] *Cf. Alliance Mechanical, Inc.*, 356 NLRB 1044, 1052 (2011) (unlawful yellow-dog policy was "designed to interdict employees who wish to utilize their statutory right to union membership, together with the connected activities, organizational or not, which the Act guarantees").

[35] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

[36] *See, e.g., Parexel International, LLC*, 356 NLRB 516, 518 (2011) ("Discussions about wages are often the precursor to organizing and seeking union assistance."); *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995) ("discussion of wages is protected concerted activity because wages are . . . 'the grist on which concerted activity feeds'" (quoting *Scientific-Atlanta, Inc.*, 278 NLRB 622 (1986)), *enforcement denied in part*, 81 F.3d 209 (D.C. Cir. 1996); *Triana Industries, Inc.*, 245 NLRB 1258, 1258 (1979) (noting that wage discussions "may be necessary as a precursor to seeking union assistance").

[37] *See Triana*, 245 NLRB at 1258 ("An employer who restrains employees in the exercise of rights guaranteed them under Section 7 violates the Act no less because his employees have chosen to exercise those rights independent of union representation.").

[38] *See Carlisle Lumber*, 2 NLRB at 266, 277-78.

The same result can be reached by extending the Hobson's Choice theory of violation to the hiring context.[39] Just as with a constructive discharge—where an employee quits rather than agree to refrain from engaging in Section 7 activity—an applicant who withdraws from the hiring process when faced with an unlawful condition on hire or employment has simply exercised their right to be free from unlawful interference. Given that a constructive discharge is fundamentally a resignation whose circumstances demand a more nuanced analysis, an applicant's choice to remove themselves from consideration because of an unlawful condition on hire or employment warrants a similar approach. In either case, it is the employer's unlawful conduct that impedes the employee from continuing or securing employment.

Extending these existing doctrines, the Board should find that employers commit a constructive refusal to hire where: (1) an applicant reasonably believes that the employer placed an unlawful condition on their hire or employment, by having explicitly or implicitly communicated during the hiring process that Section 7 activity is incompatible with employment; (2) the applicant withdraws from the process because of that unlawful condition; and (3) the applicant would have been hired but for their withdrawal from the process.[40] Likewise, a lesser constructive refusal-to-consider violation should lie where only the first two prongs are satisfied.[41]

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[39] The close connection between these two lines of authority is evident in *Ryder*, where the ALJ recognized that employees were faced with a "Hobson's choice" when presented with letters that were tantamount to a yellow-dog contract. 318 NLRB at 1095 & n.9. *See also Excel Fire Protection*, 308 NLRB at 248 (finding, in the alternative, that employees who refused to sign memorandum conditioning continued employment on employer's non-union status were constructively discharged).

[40] *Cf. Alliance Mechanical,* 356 NLRB at 1044 nn.2-3, 1052 (adopting, in absence of exceptions, refusal-to-consider violation where applicants were required to sign yellow dog contracts "or otherwise renounce union representation as a condition of being hired," but affirming no refusal-to-hire violation where employer would not have hired applicant regardless of his union affiliation).

[41] It follows that neither violation would be established where an employee terminates the hiring process for reasons separate from an unlawful condition, such as in response to other unfair labor practices. Thus, this theory of violation is consistent with the line of precedent finding no Hobson's Choice constructive discharge where employees' resignations were not prompted by an unlawful condition. *See, e.g., ComGeneral*, 251 NLRB at 658 (employee who quit in response to firing of other pro-union employees was not given Hobson's Choice where he was not "told to forgo union activity or leave" and belief that he would be discharged was

Such a framework would best effectuate the Act. First, it would recognize and appropriately compensate applicants for harm caused by an employer. Ordering an employer to rescind its unlawful policy and cease imposing the unlawful condition is not enough to put the applicant back in the position they would have been in but for the employer's unlawful conduct—with a job free from coercive rules or policies—if it can be shown that they would have been hired, together with backpay for wages that would have otherwise been earned. Second, it would provide a much more effective deterrent against hiring practices that filter out applicants who are inclined to exercise their Section 7 rights. Such practices are akin to a "preemptive strike" designed to suppress future protected activity—a violation of Section 8(a)(1) under extant law that affords the discharged employee make-whole relief.[42] The policy rationale underpinning such a violation is equally applicable where an applicant withdraws from the hiring process based on a reasonable belief that their hire or employment would be conditioned on forfeiting their Section 7 rights.

d. The Employer unlawfully conditioned the Charging Party's hire or employment on forfeiture of Section 7 rights, constructively refused to hire (b) (6), (b) (7)(C) *or, in the alternative, constructively refused to consider* (b) (6), (b) (7)(C)

Applying the foregoing framework, we conclude that it is appropriate to pursue a constructive refusal-to-hire allegation in this case and, in the alternative, a constructive refusal-to-consider allegation.

As an initial matter, we find that the Employer imposed an unlawful condition during the interview since the Charging Party reasonably believed that (b) (6) hire or employment was predicated on the abandonment of Section 7 rights. The interviewer's unlawful statement that the Employer prohibits discussions about wages among its employees[43] signaled to the Charging Party that such

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speculative). And it is also consistent with the Board's recognition that there is no constructive discharge when an employee quits in protest against general unfair labor practices. *See Intercon*, 333 NLRB at 224 ("Not every case where an employee quits in reaction to an unfair labor practice constitutes a constructive discharge."); *Kogy's Inc.*, 272 NLRB 202, 202 (1984) (employees who quit in protest against unlawful promulgation of rules were not constructively discharged where Board rejected ALJ's finding that employer conditioned continued employment on abandonment of right to discuss work-related matters amongst themselves).

[42] *Parexel*, 356 NLRB at 518-19.

[43] *See, e.g., Ground Zero Foundation d/b/a Academy for Creative Enrichment*, 370 NLRB No. 22, slip op. at 6 (2020) (employer violated Section 8(a)(1) by telling employee that its handbook prohibited wage discussions, regardless of whether there was such a policy in the handbook); *Jeannette Corp.*, 217 NLRB 653, 653-54 &

conversations are incompatible with employment at the restaurant. Even after the Charging Party asserted that such a policy is illegal, the interviewer doubled down on the policy by reasserting its lawfulness and explaining the rationale behind it. This further suggested to the Charging Party that relinquishment of that core Section 7 right was non-negotiable. The Board has repeatedly held that employers need not literally state the dilemma it presents to employees through such statements, nor explicitly assert the consequences for failing to conform.[44] That the Employer did not openly inform the Charging Party that [redacted] hire or employment depended on refraining from discussing wages does not dull the natural implication of the interviewer's statements. The very act of raising this supposed "policy" in the context of the employment interview—especially where it was in conflict with the handbook[45]—indicates that the Employer's purpose was to determine whether the Charging Party would conform to the unlawful condition.[46] Further, the manager's conveyance of the policy supports the Charging Party's reasonable belief that [redacted] hire was contingent upon the abandonment of Section 7 rights; had the Employer not been prepared to offer the Charging Party employment, albeit conditioned on this unlawful policy, the manager would have had no reason to communicate the policy at all. The Charging Party understood the choice inherent in the situation and ended the interview to avoid it.[47]

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n.4, 656 (1975) (employer's unwritten rule prohibiting wage discussions to prevent unhappiness amongst employees unlawful), *enforced*, 532 F.2d 916 (3rd Cir. 1976).

[44] *See Ryder*, 318 NLRB at 1093 & n.6, 1095 & n.9; *Eddyleon Chocolate*, 301 NLRB at 887; *cf. Adco Electric*, 307 NLRB at 1117.

[45] That the handbook states that the Employer's policies are not intended to dissuade employees from engaging in legally protected activities including wage discussions is clearly insufficient to dispel the coercive message conveyed during the interview since it was never provided to the Charging Party and there is no evidence that the interviewer discussed the policies contained therein during the interview. Additionally, it should be noted that the handbook the Employer made available during the investigation was most recently updated in October 2021. The interview at issue took place in April 2022. Accordingly, the interviewer's statement that employees are prohibited from discussing wages amounts to an announcement of a new rule and/or a modification of the Employer's handbook.

[46] *See Adco Electric*, 307 NLRB at 1117; *Eddyleon Chocolate*, 301 NLRB at 887.

[47] *Cf. Intercon*, 333 NLRB at 224 n.9 (employee "understood th[e] choice and resigned to avoid it"); *Ryder*, 318 NLRB at 1095 (that transferees requested withdrawal from union shortly after employer said new facility would be nonunion demonstrated that unlawful condition was understood).

In so finding, we emphasize that it is the employees' perspective that ultimately dictates whether an employer offered a Hobson's Choice.[48] The economic dependence of employees on their employers leads the former to "pick up intended implications of the latter that might more readily be dismissed by a more disinterested ear."[49] Job applicants arguably occupy an even more vulnerable position, which can heighten their intuition about the true stakes intrinsic in certain employer inquiries or cause them to answer in a particular manner out of economic necessity.[50] Here, the Employer highlighted its wage policy after conducting at least a portion of the interview, allowing the Charging Party to reasonably infer that [redacted] future with the Employer depended on [redacted] willingness to abandon [redacted] right to discuss wages and that it would be futile to continue pursuing the job opening if [redacted] were unwilling to refrain from Section 7 activity.[51]

We also find the second and third prongs of the proposed framework satisfied here. The unlawful condition was the reason the Charging Party withdrew from the hiring process. The Charging Party indicates that the unlawful policy caused [redacted] to terminate the interview. Indeed, [redacted] stated to the interviewer that the Employer was not the right place for [redacted] and left on the heels of the back-and-forth about the lawfulness of the prohibition on wage discussions. The fact that the Charging Party pushed back on the lawfulness of the policy, despite being in a vulnerable position, reinforces that [redacted] troubled by it. Furthermore, the Charging Party believes [redacted] would have been offered the job and accepted it but for the exchange about the wage policy. As noted earlier, that the interview progressed to a discussion of wages and benefits, which were raised by the Employer, supports the Charging Party's belief that [redacted] on the verge of being hired. And even if the Employer can show that it would not have hired the Charging Party, it

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[48] *Zeigler Ford*, 370 NLRB slip op. at 3.

[49] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

[50] *See United L-N Glass*, 297 NLRB 329, 329 n.1 (1989) ("the Board has long recognized that [a job] applicant may understandably fear that any answer he might give to questions about union sentiments posed in a job interview may well affect his job prospects'"); *see also Ryder*, 318 NLRB at 1095 (observing that employees who signed letter indicating they understood the position was non-union were "apparently anxious" to obtain permanent employment); *cf. Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1285, 1287 (1995) (employer unlawfully interrogated applicant who agreed to sign union decertification petition after telling employer he needed the job).

[51] *See Eddyleon Chocolate*, 301 NLRB at 887 (employee could "reasonably have anticipated that her future employment depended on whether she refrained from union activity" when employer raised yellow-dog contract during interview).

undoubtedly removed [redacted] from consideration once the Charging Party terminated the interview. Accordingly, a constructive refusal-to-consider allegation can be established in the alternative.[52]

II. The Board should clarify that an employee faces a Hobson's Choice when they reasonably believe employment is incompatible with the exercise of Section 7 rights.

In litigating this case, the Region should urge the Board to clarify the standard for finding a Hobson's Choice violation. The "clear and unequivocal" standard, which originated in *ComGeneral* and has been repeatedly recited as the benchmark, is in tension with other cases that focus on an employee's reasonable interpretation of the circumstances. Accordingly, the Region should urge the Board to clarify that an employee faces a Hobson's Choice when they hold a reasonable belief that the employer has conditioned hire or employment on the abandonment of Section 7 rights—that is, a reasonable belief that exercising Section 7 rights is incompatible with employment.

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[52] We find the *FES* framework inapplicable in these circumstances. *FES*, 331 NLRB 9 (2000), *supplemented* 333 NLRB 66 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002). Just as a constructive discharge is analyzed differently from a discharge, a constructive refusal to hire or consider must be assessed differently from an ordinary refusal to hire or consider. Even if *FES* were applicable, however, we would still find a violation. To establish a discriminatory refusal to hire, the General Counsel must show: (1) that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or that the employer has not adhered uniformly to such requirements or that the requirements themselves were pretextual; and (3) that antiunion animus contributed to the decision not to hire the applicant. *Id.* at 12. The burden then shifts to the employer to demonstrate it would not have hired the applicant notwithstanding their protected activity or union affiliation. *Id.* Here, the first two prongs are easily met. The Charging Party responded to an active listing advertising the Employer's vacant [redacted] position. The Charging Party is currently employed as a [redacted] and has approximately [redacted] of experience in the field. Finally, the Charging Party was not hired after challenging the unlawful prohibition on wage discussions. As such, the Employer knew of the Charging Party's potential for engaging in protected concerted activity and had otherwise already demonstrated animus toward the exercise of such rights through its policy hostile to core Section 7 rights. Further, while the Employer may argue it did not hire the Charging Party because the Charging Party terminated the interview, the Charging Party did so only because of the Employer's unlawful conduct. Thus, this cannot form the foundation of a viable Employer defense.

The "clear and unequivocal" standard was first articulated by an administrative law judge, summarily affirmed by the Board, in *ComGeneral*.[53] In that case, the employer had laid off a number of employees in the wake of organizing activity at its facility. Two employees separately quit during the spate of layoffs, one because he feared he might also be fired along with the other union supporters and the other because she found the employer's treatment of other employees unfair and no longer wanted to work for the company as a result.[54] Neither was deemed to have been constructively discharged because they were not faced with a "clear and unequivocal" Hobson's Choice in which the predicament was "not . . . left to inference or guesswork."[55] The ALJ, affirmed by the Board, reasoned that neither was told to forego union activity or leave the plant, and that the employee who quit for fear of termination had reached a "wholly speculative" conclusion based on the layoffs of other workers.[56]

One of the cases relied on in *ComGeneral* for the "clear and unequivocal" standard, *Masdon Industries, Inc.*,[57] actually supports the notion that an employee's interpretation is relevant to whether a Hobson's Choice exists. There, the employer told striking unrepresented employees it would move the plant to another town rather than recognize a union.[58] In rejecting the constructive discharge allegation, the Board reasoned that the employer did not threaten to discharge the strikers, "nor were [its] remarks so interpreted by the striking employees."[59]

A better standard—reasonable belief—was suggested in *Intercon*.[60] As discussed above, section I.b., there the Board determined that an employee was

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[53] 251 NLRB at 657-58.

[54] *Id.* at 654-56.

[55] *Id.* at 657-58.

[56] *Id.* at 658.

[57] 212 NLRB 505 (1974).

[58] *Id.* at 505-06.

[59] *Id.* at 506.

[60] 333 NLRB 223; *see also Zeigler Ford*, 370 NLRB slip op. at 3 (finding constructive discharge where employer caused employees to "reasonably believe that they had to choose between surrendering their Section 7 rights to union representation and quitting"); *Mayrath*, 132 NLRB at 1629-30 ("reasonable inference" from instruction to take off union buttons or "leave" was that employees would be terminated if they did not comply).

constructively discharged when she was informed she would be imminently terminated unless she improved her "negative attitude," a euphemism for her union activity.[61] The Board recited the "clear and unequivocal" standard before determining that the test was satisfied because the employee "understood the choice and resigned to avoid it."[62] Although the employer did not "literally" state the condition, it "effectively" told her that she had mere days to abandon her pro-union attitude in order to keep her job; therefore, the employer led her to "reasonably believe" that her continued union support was incompatible with continued employment.[63] Thus, the Board relied on the employee's response to the employer's conduct to determine whether the choice was clear and unequivocal.

Considering the above, the Region should urge the Board to clarify the standard underlying the Hobson's Choice doctrine to ensure that employees who reasonably believe they must choose between forfeiting their statutory rights or abandoning their job are afforded relief under the Act. Such an approach is more consistent with the Board's actual application of the Hobson's Choice framework both pre- and post-*ComGeneral*.[64] It would also better recognize the "economic dependence of the employees on their employers," which causes employees (and applicants) to more readily discern "intended implications" behind employer communications.[65] Finally, a reasonableness standard would also prohibit savvy employers from escaping liability for their unlawful conduct so long as they refrain from uttering magic words.[66]

CONCLUSION

Based on the foregoing, the Region should (b) (5) [redacted]

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[61] *Intercon*, 333 NLRB at 224.

[62] *Id.* at 224 n.9.

[63] *Id.* at 224.

[64] *See supra* note 60.

[65] *Gissel*, 395 U.S. at 617; *see also supra* note 50 and accompanying text.

[66] *See Atlas Mills*, 3 NLRB at 17 ("[W]e do not need to find that any specific language was used, or that the choice presented to the employees was phrased in any particular way.").

[67] (b) (5) [redacted] The oral or unwritten ban on wage discussions, (b) (5) [redacted]

(b) (5), (b) (6), (b) (7)(C) urge the Board to apply the proposed framework described above and adopt a reasonableness standard for determining whether an employee is faced with a Hobson's Choice.

/s/
R.A.B.

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involve the same legal theory and arise from the same factual situation and sequence of events. (b) (5) (b) (5) (b) (5) allegation involves employees' right to discuss wages and the Employer's alleged attempt to interfere with that right. (b) (5) (b) (5) The allegations occurred in the same factual setting—a single employment interview—and involved the same people. (b) (5) The Employer's alleged unlawful statement forms the basis for the unlawful condition (b) (5) (b) (5)