

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

BURNETT SPECIALISTS, §
STAFF FORCE d/b/a STAFF §
FORCE PERSONNEL SERVICES, §
ALLEGIANCE STAFFING CORP., §
LINK STAFFING, and LEADINGEDGE §
PERSONNEL, LTD., §
Plaintiffs, §

v. §

Civil Action No. _____

JENNIFER A. ABRUZZO, in her §
official capacity, UNITED STATES §
OF AMERICA, and NATIONAL §
LABOR RELATIONS BOARD, §
Defendants. §

COMPLAINT

Plaintiffs Burnett Specialists, Staff Force d/b/a Staff Force Personnel Services, Allegiance Staffing Corp., Link Staffing, and LeadingEdge Personnel, Ltd. seek relief from this Court against Defendants, NLRB general counsel Jennifer A. Abruzzo, in her official capacity, the United States of America, and National Labor Relations Board (“NLRB”).

INTRODUCTION

This lawsuit challenges a federal agency’s unlawful attempt to silence employer speech in violation of the First Amendment.

On April 7, 2022, Defendant Abruzzo, the General Counsel of the National Labor Relation’s Board, issued guidance announcing a new interpretation of “unfair labor practices” under the National Labor Relations Act (“NLRA”), and that she would be taking action to enforce this new interpretation. The new interpretation prohibits employers from speaking to employees about unionization.

Because this new interpretation directly restricts employer speech on the basis of its content, viewpoint, and speaker, Plaintiffs, who operate companies where union organization attempts have taken place, seek a declaration that this new guidance interpreting “unfair labor practices” is unconstitutional and an injunction preventing Defendants from taking action under this new interpretation against Plaintiffs’ businesses.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) because this action arises under the United States Constitution; 28 U.S.C. § 1346(a)(2), because this suit constitutes a civil action against an executive department of the United States; and 5 U.S.C. §§ 702 and 706 (providing for judicial review of agency action), and because this matter involves questions arising under the Administrative Procedure Act (“APA”).

2. This Court has the authority to grant declaratory relief under 28 U.S.C § 2201 and preliminary and permanent injunctive relief under 28 U.S.C. § 2202.

3. Venue is proper within this judicial district pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions asserted by Plaintiffs arose within this judicial district. Venue is proper within the Sherman Division pursuant to 28 U.S.C. § 124(c)(3).

PARTIES

4. Plaintiff Burnett Specialists (“Burnett”) is a staffing agency that has clients in Collin and Denton Counties. It also operates in the Dallas-Fort Worth, Houston, Austin, San Antonio, and El Paso metro areas. It provides temporary workers for companies in a wide variety of fields, including medical, accounting, clerical, legal, supply chain, customer service, and engineering.

5. Plaintiff Staff Force, Inc., d/b/a Staff Force Personnel Services (“Staff Force”) is a staffing agency with clients in Collin and Denton Counties. It is the largest private staffing agency in Texas and operates in Dallas-Fort Worth Houston, San Antonio, Austin, McAllen, Laredo, Brownsville, and El Paso. It also has one branch in Phoenix, Arizona. It provides workers for clients in the manufacturing, food production, warehouse, light industrial, and distribution fields.

6. Plaintiff Allegiance Staffing Corp. (“Allegiance”) is a staffing agency that currently has clients in Collin and Denton counties. It also operates in the Dallas-Fort Worth, San Antonio, Houston, El Paso, and De Soto metro areas and has thirty-three additional offices in fourteen other states. It provides workers for clients in warehousing, supply chain, e-commerce, and fulfillment fields.

7. Plaintiff Link Staffing (“Link”) is a staffing agency that operates in the Dallas-Fort Worth and Houston metro areas. It provides workers in the industrial sector, including skilled craftsman, manufacturing, semi-skilled, and unskilled labor.

8. Plaintiff LeadingEdge Personnel, Ltd. (“LeadingEdge”), is a staffing company serving in the San Antonio and Austin metro areas. It specializes in administrative office placements.

9. Defendant United States of America is a government entity.

10. Defendant National Labor Relations Board (“NLRB”) is an agency of the United States.

11. Defendant Jennifer A. Abruzzo is the General Counsel of the NLRB sued in her official capacity.

FACTS

A. *The NLRA's regulatory scheme.*

12. Congress initially passed the NLRA in 1935. The purpose of the act is to prevent unfair labor practices by those engaged in interstate commerce. *Foster Bros. Mfg. Co. v. NLRB*, 85 F.2d 984, 986 (4th Cir. 1936).

13. NLRA rulemaking is subject to the APA. 29 U.S.C. § 156.

14. The NLRA creates two separate entities with separate responsibilities and authorities under the statute.

15. The General Counsel has unilateral authority to investigate charges of unfair labor practices. If she determines a violation has occurred, she has unilateral authority to issue and prosecute complaints before the NLRB. 29 U.S.C. § 153(d).

16. The initiation of a complaint is a serious affair. Unless the parties agree to a settlement, the complaint will be resolved by an adversarial hearing before an administrative law judge that may include briefing, oral argument, testimony, and cross-examination. 29 C.F.R. § 101.10.

17. While the adjudication is ongoing, the General Counsel can seek an injunction preventing the challenged practice until the complaint is resolved. 29 U.S.C. § 160(j).

18. The NLRB is responsible for “the *adjudication* of complaints.” *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (emphasis in original).

19. Appeals from an adjudication by the NLRB are limited. An aggrieved party may file a petition for review in the court of appeals. 20 U.S.C. § 160(f). The NLRB’s factual conclusions will be upheld if supported by substantial evidence. *Id.*

20. Because of the gravity of investigations and complaints, the General Counsel's announcements of new interpretations of "unfair labor practices" are taken seriously by the business community.

21. Once the General Counsel declares that she intends to prosecute certain activities as unfair labor practices, businesses are left to either comply with that interpretation or risk prosecution.

B. The General Counsel announces a new interpretation of the National Labor Relations Act.

22. On April 7, 2022, Defendant Abruzzo issued a memorandum explaining that she intends to prosecute employers for unfair labor practices for merely speaking about unionizing when employees are required to "convene on paid time" or "cornered by management while performing their job duties." See Exhibit A, Jennifer A. Abruzzo, *The Right to Refrain from Captive Audience and other Mandatory Meetings*, Memorandum GC 22-04 (April 7, 2022) (the "Guidance Memo") attached for reference and incorporated herein.

23. Upon information and belief, the goal of announcing this new interpretation was to chill employers from speaking about unionization attempts with their employees.

24. The General Counsel's announcement and subsequent legal action made national news, with numerous legal commentators noting that employers would no longer be able to speak with their employees about unionization attempts.

25. On April 11, 2022, Defendant Abruzzo made good on her memorandum's promise to prosecute employers for requiring employees to attend meetings where employers discuss unionizing. See Exhibit B, *Cemex Construction Materials*, 28-CA-230115, 45-66 (April 11, 2022) (Plaintiffs note they do not agree with the assertions in the brief).

C. Plaintiffs' First Amendment Activities are restricted.

26. Plaintiffs operate staffing agencies in Texas and in other states. Generally, their business model is based on providing temporary or temp-to-hire workers for other firms.

27. Plaintiffs have a small amount of permanent staff that coordinate placements for thousands of temporary staff that are sent to clients' worksites.

28. Plaintiffs do not believe that unionization is generally in the best interest of their employees or their business model.

29. As such, Plaintiffs have historically opposed unionization of their work force.

30. For example, in the past, an electricians' union attempted to unionize several hundred of Plaintiff Burnett's workers at a job site. Plaintiff Burnett responded by hiring legal counsel to help navigate a proper response. Ultimately, Plaintiff Burnett simply shared factual information about the union that included, among other things, the salary of the union president. Sharing this information would be illegal under the new guidance.

31. In the past, Plaintiffs have discussed concerns about unionizing openly with their employees on paid time.

32. If future attempts were made to unionize Plaintiffs' work forces, Plaintiffs would hold meetings on paid time to explain the harm of unionization and hear from workers how Plaintiffs can improve the workplace.

33. Due to the threat posed by Defendant Abruzzo's new interpretation of unfair labor standards, however, Plaintiffs have not held such meetings nor spoken to employees about unionization.

COUNT I

AGENCY ACTION VIOLATES PLAINTIFFS' FIRST AMENDMENT RIGHTS

34. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

35. An agency conclusion regarding the applicability of federal law is final agency action if it marks the end of the decision-making process and all that is left is prosecution.

36. Here, Defendant Abruzzo's Guidance Memo signals to Plaintiffs and all employers that they could be subject to charges and a complaint if they speak out against unionization or even provide neutral information such as the NLRB election process and employees' rights.

37. Defendant Abruzzo's intent to apply the new interpretations contained in the Guidance Memo has been confirmed by her subsequent actions against employers before the NLRB.

38. The chilling effect of the Guidance Memo and Defendant Abruzzo's following actions is substantial. This is especially true here because the Guidance Memo appears to be establishing an interpretative rule by adjudication, which could be applied retroactively. *See Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017).

39. Further, it violates Plaintiffs' First Amendment rights to express themselves on the merits of unionization.

40. Perhaps most egregiously, the Guidance Memo discriminates on the basis of viewpoint, speaker, and content—employers may talk about safety and job training but not about unions. Such restrictions are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

41. The Guidance Memo further compounds its constitutional infirmity by being overbroad and vague. It sweeps in non-coercive, non-threatening speech with illegal speech. It also fails to give meaningful guidance as to what constitutes “cornered” employees.

COUNT II

EQUITABLE RELIEF FOR AN ONGOING VIOLATION OF FEDERAL LAW

42. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

43. This Court has authority under Article III of the Constitution to issue an injunction against federal officials acting in their official capacities when that injunction will prevent an ongoing violation of federal law or an ongoing violation of constitutional rights.

44. Defendant Abruzzo is a federal official with authority to interpret and enforce the NLRA. Defendant Abruzzo also oversees and directs other federal officials in the interpretation and application of NLRA.

45. Acting in her official capacity, Defendant Abruzzo published a Guidance Memo declaring the government’s position that certain activities are “unfair labor practices” and that she would take that position in future complaints before the NLRB. Exhibit A.

46. In particular, the Guidance Memo states that employers may not express their views of unionization during meetings employees are required to attend.

47. Defendant Abruzzo, or her agents, have since sought to create this new rule in an action against an employer before the NLRB. *See* Exhibit B.

48. Upon information and belief, Defendant Abruzzo will take this position in the future.

49. This content-based, speaker-based, and viewpoint-based restriction on employer speech violates the First Amendment.

50. By adopting this interpretation of “unfair labor practices,” Defendant Abruzzo chills protected speech.

51. Each day that the Guidance Memo remains in effect, therefore, constitutes an ongoing violation of federal law, which injures Plaintiffs.

52. A declaration from this Court that the Guidance Memo violates the First Amendment and an injunction preventing its enforcement against Plaintiffs would remedy those injuries.

DECLARATORY RELIEF ALLEGATIONS

53. Plaintiffs incorporate the allegations in the foregoing paragraphs as if set forth fully herein.

54. An actual and substantial controversy exists between Plaintiffs and Defendants as to their legal rights and duties with respect to whether the Guidance Memo violates the United States Constitution.

55. The case is presently justiciable because the Guidance Memo applies to Plaintiffs as they are subject to possible prosecution, which Defendant Abruzzo has announced she will begin to enforce.

56. Declaratory relief is therefore appropriate to resolve this controversy.

PRAYER FOR RELIEF

Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, it is appropriate and proper that a declaratory judgment be issued by this Court, declaring that Defendant Abruzzo’s guidance is unconstitutional.

Furthermore, pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, it is appropriate and hereby requested that the Court issue a permanent injunction prohibiting Defendants from enforcing the new interpretation.

WHEREFORE, Plaintiffs pray for judgment against Defendants and that the Court:

- (1) Declare that Defendant Abruzzo's guidance violates the constitution, because it suppresses Plaintiffs' free speech rights;
- (2) Hold unlawful and set aside Defendant Abruzzo's guidance;
- (3) Issue a permanent injunction against the Defendants, as well as all agents, administrators, employees, or other persons acting on behalf of the Defendants, from enforcing the guidance;
- (4) Award Plaintiffs their costs and expenses incurred in bringing this action, including, but not limited to, reasonable attorney fees pursuant to 28 U.S.C. § 2412; and
- (5) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

/s/Chance Weldon

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**Application for admission pending*