



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant  
v.  
Wayne Farms, LLC,  
Respondent.

OSHRC Docket No. **14-1672**  
Mandatory Settlement Proceedings

**Order Denying Election of Party Status**

On November 25, 2014, the Southern Poverty Law Center's Immigrant Justice Project (SPLC) filed an election of party status under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act), and Commission Rule 20(a), seeking party status on behalf of nine unnamed employees of Respondent, Wayne Farms. Wayne Farms objected to the request on the grounds the SPLC is not the authorized employee representative for the affected employees at the facility referenced in the citations in this matter and the Commission rules do not allow election of party status by anonymous individuals. During a telephone conference conducted pursuant to the Commission procedures for settlement proceedings, 20 C.F.R. § 2200.120, counsel for the Secretary represented the Secretary does not object to the election of party status. On December 19, 2014, the SPLC filed its Response to Respondent's Objection. In that document, the SPLC named three of the nine individuals seeking party status, but in so doing raised a new issue with regard to all nine individuals.

Because the SPLC's response raised new issues and presented new facts not previously known to Respondent or the Secretary, the Court ordered the parties to file a statement with regard to their respective positions on the election of party status of Beatriz Navedo, Cristoffel Gonzalez-Lopez, Ana Rivas, and six unnamed individuals with supporting memorandum of law. Respondent filed its position statement again objecting to the election of party status. The Secretary indicated he did not object to the election of party status, but filed no statement of the Secretary's position with regard to the issues before me.

Having considered the positions and arguments of Respondent and Beatriz Navedo, Cristoffel Gonzalez-Lopez, Ana Rivas, and six unnamed individuals, the Election of Party Status by Nine Employees of Wayne Farms is hereby **DENIED**.

This matter is before the Commission pursuant to § 10(c) of the Act on Wayne Farm's notice of contest filed on October 31, 2014. On November 18, 2014, Chief Judge Covette Rooney assigned this matter to the undersigned for Mandatory Settlement Proceedings pursuant to Commission Rule 120. The Secretary filed his Complaint on November 19, 2014 and Wayne Farms filed its Answer on December 12, 2014. The SPLC, as representative of Beatriz Navedo, Cristoffel Gonzalez-Lopez, Ana Rivas, and six unnamed individuals, seeks to participate in the proceeding pursuant to §10(c) of the Act and Commission Rule 20(a), including participation in the Mandatory Settlement Proceedings.

The Commission has recognized the "right of employees to elect party status is conferred by the Act, which requires that '[t]he rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings.'" *Georgia-Pacific*, 15 BNA OSHC 1127 (No.89-2713, 1991), *quoting*, 29 U.S.C. § 659(c). Both affected employees and authorized employee representatives may elect party status under Commission Rule 20(a). Commission Rule 1(g) defines an authorized employee representative as "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees." No party disputes the Retail, Wholesale and Department Store Union, local 932, is the authorized employee representative for bargaining unit employees at the facility that is the subject of the citations. To date, the Retail, Wholesale and Department Store Union, local 932, has not elected party status in this matter. Under Commission Rule 22(b), because the authorized employee representative for Wayne Farms employees has not elected party status, affected employees could elect party status in the same manner as employees who are not members of a collective bargaining unit. Such affected employees could appear through the SPLC under Commission Rule 22(a).

To elect party status, however, the individual seeking to do so must be an "affected employee" as that term is defined in the Commission Rules.<sup>1</sup> Commission Rule 1(e) defines an affected employee as "an employee of a cited employer who is exposed to or has access to the

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<sup>1</sup>The Act uses the term "affected employees" as well, but does not define that term.

hazard arising out of the allegedly violative circumstances, conditions, practices or operations.” Navedo, Gonzalez-Lopez, and Rivas each contend they are former employees and worked on the debone line. According to the SPLC’s submission, two of the unnamed employees also worked on the debone line. Item 1 of Citation 1 alleges a general duty clause violation with regard to employees on the debone line. Therefore, during their employment, each of these individuals was exposed to the hazards at issue. It is also undisputed Navedo, Gonzalez-Lopez, and Rivas are no longer employed by Respondent. The salient question then is whether former employees who were once exposed to a hazard are “affected employees.” The Commission has not definitively ruled on whether a former employee may elect party status. Nor does the legislative history of the Act or Commission Rules provide any guidance.

Based upon the plain language of the Act and Commission Rules, as well as consideration of the purpose served by extending party status to employees, the Court concludes former employees may not elect party status under Commission Rule 22(b). A reading of the plain language of the definition of affected employee leads to the conclusion the Commission did not intend to provide for party status to former employees. The language refers to exposure in the present tense. Thus, Commission Rule 22 extends party status only to those individuals currently exposed. Commission Rule 21 provides for intervention by individuals upon filing of a petition setting forth the interest of the petitioner. As such, the Commission drew a distinction between the unique interests of employees who are exposed to the hazards at issue and other interested individuals. Extending party status to employees who are exposed to the cited hazards allows those individuals to protect their own unique interest in ensuring their workplace is safe. *See Donovan v. Oil, Chemical, and Atomic Workers Int’l*, 718 F.2d 1341, 1352 (5<sup>th</sup> Cir. 1983). A former employee no longer shares this unique interest. To the extent a former employee has an interest in the Commission proceeding, he or she may seek participation under Commission Rule 21.

In *Donovan v. Oil, Chemical, and Atomic Workers Int’l*, 718 F.2d at 1350, the Fifth Circuit noted Commission Rule 22 is the equivalent to an intervener of right under Fed. R. Civ. P. 24(a). Fed. R. Civ. P. 24 draws a distinction between intervention of right, pursuant to Fed. R. Civ. P. 24(a), and permissive intervention, pursuant to Fed. R. Civ. P. 24(b). Under Fed. R. Civ. P. 24(a) an individual with an interest that would be impaired or impeded by the disposition of the action

must be permitted to intervene. A current employee who may elect party status under Commission Rule 22(b) is similar to an intervener of right under Fed. R. Civ. P. 24(a) because his or her current employment conditions will be affected by the outcome of the Commission proceeding. The Court finds no equivalent interest for a former employee. Therefore, the Court denies the Election of Party Status of Navedo, Gonzalez-Lopez, and Rivas.

In addition to those named former employees, six unnamed individuals are also seeking party status. The Commission Rules are silent on participation in Commission proceedings by individuals who wish to remain anonymous and the Court has found no precedent for permitting unnamed individuals to participate as parties. As a threshold matter, because these individuals have chosen to remain anonymous from all parties and the Court, the Court cannot determine whether those individuals are current, affected employees.

The question of whether a party may proceed anonymously has been addressed under the Federal Rules of Civil Procedure by several circuits, including the Eleventh Circuit. *See Roe v. Aware Woman Ctr. For Choice, Inc.*, 233 F.3d 678 (11<sup>th</sup> Cir. 2001). In *Aware Woman Center*, the Eleventh Circuit, in keeping with other circuits that have addressed the question, framed the inquiry as a balancing test, weighing the individual's need for anonymity against the "customary and constitutionally-embedded presumption of openness in judicial proceedings" and any prejudice to the opposing party. 233 F.3d at 685. Among the factors courts have considered are whether the litigation involves matters that are highly sensitive or personal as well as whether there is a risk of retaliatory harm. *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189 (2d Cir. 2008).

The six unnamed individuals seek to maintain their anonymity out of fear of reprisal. The Court is mindful the Act protects the confidentiality of those who provide information to the Government. Section 8(f)(1) of the Act prohibits the Secretary from disclosing the names of individuals who file complaints and thereafter request confidentiality. However, nothing in the Act affords such individuals the right to retain that confidentiality **and** exercise their right to participate as parties to a Commission proceeding through a representative. Rather, § 11(c) of the Act provides for protection from retaliation for individuals who choose to participate in such proceedings.

An affected employee who elects party status is entitled to participate fully as a party. *Oil,*

*Chemical, and Atomic Workers Int'l*, 718 F.2d at 1353. For example, as Respondent correctly notes, as a party, these individuals are subject to discovery. Because the individuals insist their identity be concealed, not just from the public, but from Respondent and the Secretary, the Court sees no way to allow the Respondent and the Secretary the discovery to which both are entitled. Nor have the unnamed individuals provided the Court with any information on how such prejudice to the other parties may be cured.

For the foregoing reasons, the Court finds insufficient basis upon which to grant party status to unnamed individuals.

For the foregoing reasons, the Election of Party Status of Nine Wayne Farm Employees is hereby **DENIED**.

SO ORDERED.

**Date: February 27, 2015**

/s/

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**Judge Heather A. Joys**

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