

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Service Employees International Union,

Petitioner,

v.

Case No. 23-1309

National Labor Relations Board,

Respondent.

**DECLARATION OF BARBARA ROSENTHAL IN SUPPORT OF
PETITIONER SERVICE EMPLOYEES INTERNATIONAL UNION'S
RESPONSE TO INTERVENOR'S MOTION TO DISMISS**

1. I, Barbara Rosenthal, declare that I am over eighteen and competent to testify to the facts set forth in this declaration.
2. I am the National Organizing Director of the Service Employees International Union (SEIU). I have held this position since 2017, and have worked for SEIU since 1998.
3. SEIU is a labor union that, together with its constituent unions, represents approximately two million workers. The workers SEIU represents in the private sector are largely governed by the provisions of the National Labor Relations Act (NLRA), and SEIU and its affiliates frequently file unfair labor practice charges with the National Labor Relations Board (NLRB) alleging unlawful conduct by employers.
4. As SEIU's National Organizing Director, I support SEIU organizing campaigns across the country, including in the healthcare, building services, airport, and fast-food industries.

5. SEIU and its affiliates organize workers around – and ultimately seek to engage in collective bargaining over – a host of subjects involving workers’ terms and conditions of employment.
6. These terms and conditions include not only pay and benefits, but also issues like surveillance, dress codes, drug testing, no-strike clauses, and employment discrimination—issues that the NLRB has determined to be mandatory terms and conditions of employment for collective bargaining purposes.
7. In my experience, employers frequently react to workers’ protected, concerted activities by conducting unlawful surveillance, resulting in unfair labor practice charges before the NLRB.
8. Workers also face surveillance when multiple companies control the workplace. For example, according to internal documents reported in the press, McDonald’s Corporation has surveilled franchisee workers organizing with the SEIU-affiliated Fight for \$15 using high tech monitoring tools and “a team of intelligence analysts in the Chicago and London offices” who “keep an eye on the activities of Fight for \$15 labor organizers across the world, figure out which McDonald’s workers are active in the movement, and who they are working with to organize strikes, protests, or attempt to form unions.” Lorenzo Franceschi-Bicchierai & Lauren Kaori Gurley, McDonald’s Secretive Intel Team Spies on ‘Fight for \$15’ Workers, Internal Documents Show, VICE (Feb. 24, 2021) *available at* <https://www.vice.com/en/article/pkdkz9/mcdonalds-secretive-intel-team-spies-on-fight-for-15-workers>. Those tools enabled McDonald’s Corporation to surveil workers who worked directly for one of McDonald’s franchisees.
9. SEIU opposes discrimination on the basis of race, sex, religion, national origin, sexual orientation, and gender identity. SEIU organizes workers around and seeks to bargain about practices and provisions that eliminate discrimination and reduce workplace disparities.
10. In June 2020, SEIU’s International Executive Board adopted a resolution affirming the Union’s support for the Movement for Black Lives. At SEIU’s 2016 Convention, the Union adopted Resolution 106A, in which it committed to becoming an anti-racist organization. Resolution 106A recognizes that “race has historically been one of the most powerful ways to

pit working people against one another” and that “[r]acism is a key way that the wealthy few regularly structure and hijack our economy and government to benefit themselves and disadvantage the vast majority of people, including white people.”

11. In addressing issues such as workplace surveillance and racial discrimination in the workplace, SEIU seeks to alter the behavior of, and collectively bargain with, every employer with control over such issues.
12. In the industries in which SEIU and its affiliates represent workers, there is often more than one entity which shares or co-determines workers’ terms and conditions of employment, and more than one entity that will be responsible for unfair labor practices committed against the union as exclusive representative (for example, by failing to bargain in good faith in violation of Section 8(a)(5)) or against employees the union represents. In such situations, SEIU and its affiliates seek to have all entities that are responsible for those terms and conditions at the collective-bargaining table so that bargaining will be effective, and seek to hold all responsible entities to account for unfair labor practices.
13. Policies related to sex discrimination and sexual harassment are a mandatory bargaining subject, *see Jubilee Mfg. Co.*, 202 NLRB 272 (1973), but are not specifically listed among the “essential” terms and conditions of employment enumerated in the Final Rule, Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (to be codified at 29 C.F.R. § 103.40) (Final Rule).
14. Workers have chosen to organize with SEIU, in some instances, to hold their employers accountable for the prevention of sexual harassment in the workplace. For example, janitorial workers in San Francisco contacted SEIU Local 87 to organize against egregious sexual harassment. The workers were jointly employed by a janitorial contractor, Preferred Building Services (Preferred), and a sole proprietorship, Ortiz Janitorial Services (OJS). Rafael Ortiz, the owner of OJS, repeatedly suggested that improvements in pay and working conditions were contingent on his female employees’ having sex with him. SEIU and the janitorial service workers jointly employed by Preferred and OJS sought, as one of their organizing goals, to have both employers take meaningful steps to end the ongoing harassment.

15. As the example at Preferred/OJS demonstrates, when two employers hold control over the conditions under which workers are subjected to sexual harassment, SEIU seeks to hold both accountable and ultimately reach agreements binding both to meaningful protections that uphold the dignity of workers against such harassment. And when employers retaliate against workers' protected activities protesting harassment, SEIU seeks to hold both accountable in unfair labor practice proceedings.
16. So that all entities will be at the bargaining table with responsibility to bargain over the terms and conditions of employment that they have a right to control, in its comments filed in response to the Board's initial Notice of Proposed Rulemaking, SEIU advocated for a broad understanding of the terms and conditions of employment to be examined when the NLRB considers a joint employer question. Specifically, the SEIU urged the Board to adopt a standard under which joint employer findings would turn on whether the putative joint employer shared or co-determined any of the mandatory subjects of bargaining.
17. Notwithstanding SEIU's advocacy for a broader standard, in its Final Rule, the NLRB rejected the view advocated by SEIU and limited its consideration to enumerated "essential" terms and conditions of employment.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the above statements are true and correct.

Executed this 20 day of February, 2023, in New York, NY


Barbara Rosenthal