



SUPREME COURT INVALIDATES ACTION TAKEN BY FORMER NLRB GENERAL COUNSEL MARCH 2017

The National Labor Relations Board's General Counsel is an important position. The General Counsel is, among other things, the NLRB's chief prosecutor and sets the Agency's prosecutorial agenda. The GC is appointed by the President and must be confirmed by the Senate.

In June 2010, President Obama directed Lafe Solomon to serve as the acting GC and Mr. Solomon served in that role until October 2013. On January 5, 2011, President Obama formally nominated Mr. Solomon to serve as the GC, but he was never confirmed by the Senate. President Obama eventually withdrew Mr. Solomon's nomination and nominated current GC, Richard Griffin. The Senate confirmed Mr. Griffin on October 29, 2013, although he did not replace Mr. Solomon until November 4, 2013.

In January 2013, an NLRB Regional Director, acting on Mr. Solomon's behalf, issued an unfair labor practice complaint against a company called Southwest Ambulance. Southwest's defense included the claim that the complaint was invalid because Mr. Solomon did not have the authority to act as GC after he had been nominated in January 2011. According to Southwest, the Federal Vacancies Reform Act of 1998 (FVRA) prohibited Mr. Solomon from performing the duties of the

GC after having been nominated to fill that position on January 5, 2011. The NLRB rejected Southwest's arguments and ruled that Southwest had violated the National Labor Relations Act when it unilaterally ceased paying a longevity bonus after its collective bargaining agreement had expired.

The case made its way to the United States Court of Appeals for the District of Columbia Circuit, where the court [decided](#) in Southwest's favor. The court agreed with Southwest that FVRA prohibited Mr. Solomon from serving as the acting General Counsel after he had been nominated for the GC position and that the complaint issued against Southwest was invalid, as was the NLRB's decision that Southwest violated the NLRA when it ceased paying a longevity bonus.

In a 6-2 [decision](#) (Justices Sotomayor and Ginsberg dissented), the Supreme Court affirmed the D.C. Circuit's decision and ruled that the complaint issued against Southwest on Mr. Solomon's behalf was invalid under FVRA. The Supreme Court's decision is an interesting read for students of statutory construction and those who are curious about the history of the FVRA. For labor law practitioners, the decision is important for the practical issues it raises.



CLIENT ALERT

Southwest prevailed because the complaint against it was issued on behalf of a GC who did not have the appropriate authority. But what about other complaints issued during the period from January 5, 2011 to November 4, 2013? Are those complaints, and NLRB decisions based on them, likewise invalid? That question was not before the Supreme Court, but the D.C. Circuit provided some guidance when it explained that complaints issued by Mr. Solomon in violation of FVRA were voidable, but not void. The appeals court viewed its decision as narrow:

...we do not expect [the court's decision] to retroactively undermine a host of NLRB decisions. We address the FVRA objection in this case because petitioner raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding. We doubt

that an employer that failed to timely raise an FVRA objection—regardless of whether proceedings are ongoing or concluded—will enjoy the same success.

Thus, at least according to the D.C. Circuit, complaints issued during the time Mr. Solomon acted as GC in violation of FVRA are not subject to challenge absent a timely FVRA objection. Whether other courts of appeal or the Supreme Court agree remains to be seen. Many of the complaints issued during Mr. Solomon's ill-gotten appointment likely have been fully resolved by now and are not likely candidates to be revived based on the *Southwest* decision. But litigants with active NLRB cases involving complaints issued between January 5, 2011 and November 4, 2013 should consider raising a "FVRA defense" if they have not already done so.