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Fifth Circuit Agrees NLRB Micro-Unit Test Here To Stay

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The Fifth Circuit Court of Appeals is the latest federal court of appeals to approve of the National Labor Relations Board's (NLRB) "micro-unit" test first enunciated in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). See our recent post here. The Fifth Circuit case involves a Macy's department store in Massachusetts. The case garnered national attention because many practitioners and prognosticators believed it had the best chance of overturning the NLRB's *Specialty Healthcare* rule. The thought was bolstered because of the Fifth Circuit's apparent willingness to rebuke the NLRB in other contexts, for example its *D.R. Horton, Inc.* decision. Last Thursday, however, those hopes were dashed. In *Specialty Healthcare*, the NLRB found that when a union petitions for a proposed unit of employees and the employer challenges that unit as not being an "appropriate unit," the employer must prove that any employees excluded from the unit share "an overwhelming community of interest" with those in the proposed unit. This NLRB rule essentially shifts the burden to the employer to prove the appropriateness of the unit and sets up a significant evidentiary hurdle for employers when opposing so called "micro-units." The argument against the rule that many have posited is that it makes organizing easier for unions because it allows a union to adopt a "foothold" strategy by organizing an employer's workforce piecemeal. Employers and employer advocates have universally decried this change to the NLRB's traditional organizing rules, arguing among other things that it violates the National Labor Relations Act (NLRA) and the Administrative Procedures Act. Such challenges, however, have thus far fallen flat and the Fifth Circuit placed another nail in that coffin last week. More than four years ago, the United Food and Commercial Workers Union Local 1445 organized a unit of cosmetic and fragrance employees located on two floors of Macy's Department Store in Saugus, Massachusetts. Macy's opposed this "micro-unit" arguing instead for a wall-to-wall unit of all employees for purposes of an election. Macy's obviously hoped that in the much bigger unit the union's chances to win would diminish and this belief was well founded since the union had lost a previous election in 2011 involving all employees at the department store. The NLRB, however, agreed with the union and approved the smaller unit under its *Specialty Healthcare* test. The NLRB's regional director, and then a panel of the board, found Macy's did not prove an overwhelming community of interest, in part because the employer failed to put forth evidence of a sufficient interchange between sales employees in different departments. After certification of the "micro-unit" by the NLRB, Macy's refused to bargain with the union which set the matter up for an appeal that many hoped would create a split in federal circuit court authority. On June 2, however, the Fifth Circuit agreed with the Sixth Circuit's decision in *Kindred Nursing Centers East, LLC v. NLRB*, the Eighth Circuit's decision in *FedEx*

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Freight Inc. v. NLRB, and most recently the Fourth Circuit's decision in *Nestle Dreyer's Ice Cream Co. v. NLRB*, that the NLRB's micro-unit *Specialty Healthcare* rule is lawful. Bottom line: it looks like the NLRB's *Specialty Healthcare* decision is here to stay.