

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 20, 2003

TO : Alvin P. Blyer, Regional Director
David Pollack, Regional Attorney
John J. Walsh, Assistant to the Regional Director
Region 29

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: McDaniel Ford, Inc.,
McDaniel Automotive Group, Inc.,
and C. Richard McDaniel
Case 29-CA-25039

This case was submitted for advice as to whether the Employer's ongoing civil lawsuit against an adjudicated discriminatee is baseless and retaliatory under a Bill Johnson's¹ analysis. We conclude that the Employer's lawsuit is baseless and the Employer filed the lawsuit for a retaliatory motive. We further conclude that even if the lawsuit was reasonably based, there is sufficient evidence to assert that the suit would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, and therefore the suit violated Section 8(a)(1).

FACTS

McDaniel Ford, Inc. (the Employer) is a car dealership engaged in the sale and service of new and used cars, and is owned by C. Richard McDaniel. Since February 1988, the Employer has recognized Local 259, UAW, AFL-CIO (the Union), as the representative of its employees in a unit that included:

All service shop employees employed by the Employer, excluding service advisors, office clerical employees, new and used car salespersons, guards, watchmen, professional employees and supervisors as defined in the Act.

The Employer first employed Leon Balsam, the Charging Party, in November 1994 as a service department employee. In early 1995, Balsam signed a union membership card after the Employer refused to provide him any benefits. When the

¹ Bill Johnson's Restaurant, Inc., 461 U.S. 731 (1983).

Union presented the Employer with Balsam's union membership card, the Employer rejected the Union's attempt to sign Balsam as a union member. The Employer said that only shop employees were unionized and not parts department employees. After having several conversations with Balsam about withdrawing from the Union, including a discussion about providing Balsam benefits if he withdrew from the Union, the Employer terminated Balsam. The Employer claimed that the termination was because it was closing down its parts department.

In January 1997, the Board decided that the Employer violated Section 8(a)(1) and (3) when it terminated Balsam, and ordered the Employer to reinstate Balsam and make him whole with regard to earnings and benefits.² Subsequently, the United States Court of Appeal of the Second Circuit enforced the order.

On April 13, 1998, the Employer reinstated Balsam to the position of utility person.³ During the second week after he returned to work, Balsam publicly refused to do certain of his job tasks, held up a copy of the Board Order, and insisted that the Government would protect him from having to perform those duties. On April 27, the Employer issued Balsam a written warning for insubordination when he refused to sweep the technician's lunch and locker rooms. According to the Employer's service manager, Balsam crumpled up the written warning. Balsam was absent the afternoon of April 29, and missed work on May 1, because of illness.

After returning to work on May 4, the parts director observed Balsam in the back of the Employer's shop "just sitting doing nothing." When he approached Balsam and asked if he was alright, Balsam replied "as a matter of fact, no. Did you ever feel run down and tired? Well, that's how I feel." Balsam also told the manager that the only reason he was working was so he could receive his benefits and that his doctor had advised him not to work. On May 5, the parts director told Balsam to sweep the bathroom, lunchroom and steps. Balsam stated that he was not going to sweep and walked away. Other employees, including the shop steward, witnessed this incident. When Balsam was asked again to sweep by the service and parts

² See McDaniel Ford, Inc., 322 NLRB 956 (1997).

³ The parties agreed that the utility person position was the closest to Balsam's old position, which no longer existed.

director, he walked away and refused to respond. The director then informed Balsam that he was fired.⁴

Before the Region issued its Compliance Specification involving Balsam's earlier discharge, it investigated Balsam's reinstatement and subsequent discharge. The Employer cooperated in the investigation and submitted affidavits from the service manager and the service and parts director along with a copy of the written warning given to Balsam. Based on this investigation, the Region concluded that the Employer lawfully reinstated Balsam and lawfully discharged him for insubordination, and therefore that Balsam's backpay period, from his earlier discharge, ended with his April 13, 1998 reinstatement.

On June 19, 2001, the Second Circuit issued a supplemental judgment that enforced a supplemental order by the Board awarding Balsam, exclusive of interest, \$36,439 for backpay, \$457.47 for unreimbursed medical expenses and \$6,082, payable on his behalf to the Union's pension fund.⁵ On October 4, 2001, the Region sent a demand letter to the Employer requesting prompt compliance with the supplemental order. On October 31, the Employer filed a Chapter 7 bankruptcy petition claiming to have no assets. The Employer listed the NLRB as one of several unsecured creditors, which included the owner, C. Richard Ford, his accountant and his attorney.

Within one year of filing for bankruptcy, the Employer transferred all of its holdings to the owner, who then transferred those assets to a new corporation, known as McDaniel Automotive Group, Inc. d/b/a McDaniel Ford. The successor company failed to satisfy the NLRB debt but satisfied the debts owed to the owner, his accountant and his attorney. The Employer never notified the NLRB as a creditor about the transfer of its assets to the successor company, even though such notice is required under the Bulk Sales Act. The bankruptcy trustee concluded, and notified the Employer through counsel, that because the Employer failed to comply with the Bulk Sales Act, if the Employer did not fully satisfy its obligations under the NLRB judgment the trustee would pursue the owner and the successor company for satisfaction of the Employer's obligations.

⁴ Under the current collective bargaining agreement, the Employer has the right to terminate an employee without notice for insubordination.

⁵ McDaniel Ford, Inc., 331 NLRB 1645 (2000).

On February 28, 2002, during an out-of-court discussion, the owner admitted that he had filed the bankruptcy petition to avoid paying Balsam's backpay. Under the threat of a trustee-initiated Bulk Sales Act suit, he agreed to satisfy the Employer's indebtedness to the NLRB by paying the judgment in full with interest.

That same day, the Employer initiated a civil action against Balsam in the Supreme Court of the State of New York seeking \$20,000 in compensatory damages and \$100,000 in punitive damages. The complaint alleged that the Employer had rehired Balsam pursuant to the Board Order, and that at the time Balsam was rehired he stated that he was physically and mentally capable of performing the job of utility person, when he knew or should have known that he was not physically and mentally able to perform the job. The complaint further alleged that between April 13, when Balsam was reinstated, and May 5, the date he was discharged for insubordination, he caused "repeated disruptions" resulting in substantial loss of production in the amount of not less than \$5,000 per week in actual damages. The complaint further alleged that Balsam's actions, in failing to perform his duties, were malicious and done with intent to injure the business of the Employer, thereby entitling the Employer to \$100,000 in punitive damages.

During the current investigation, the Employer's counsel told Regional Office personnel that the Employer was entitled to seek a "set-off" without the Board's interference, since the lawsuit was a private matter between an employer and former employee. In explaining the compensatory damages sought, the Employer stated that it had included Balsam's wages and benefits at \$440.00 per week, one hour per day of supervision by the service director at \$60 per hour, two hours per day of other management personnel's time at \$40 an hour, and one hour per day of lost mechanic productivity at \$75 per hour. The Employer has refused to further explain the hourly rates or answer questions about the substance of the civil action.

ACTION

We conclude that the Employer's lawsuit is baseless and that the Employer filed the lawsuit for a retaliatory motive. We further conclude that even if the lawsuit was reasonably based, there is sufficient evidence to assert that the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome" such that an argument can be made that the lawsuit violated Section 8(a)(1).

In Bill Johnson's,⁶ the Supreme Court held that the NLRB cannot generally halt the prosecution of a reasonably based lawsuit. The Court held that First Amendment considerations insulate the filing and prosecution of such a lawsuit from being enjoined or punished as an unfair labor practice, even if the lawsuit was filed to retaliate unlawfully against an employee.⁷ The Court held that the Board cannot ordinarily halt the prosecution of a lawsuit unless: (1) the lawsuit lacks a reasonable basis in fact or law, and (2) the plaintiff filed the suit with a retaliatory motive.⁸

Reasonable Basis

The Court in Bill Johnson's articulated the basic standards for determining whether a lawsuit is baseless. It explained that while "genuine disputes about material historical facts should be left for the state court, plainly unsupported inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."⁹ Further, although the Board must not determine "genuine state-law legal questions," it can enjoin a lawsuit, which is "plainly foreclosed as a matter of law" or otherwise "frivolous."¹⁰

In the instant case, even assuming arguendo that all of the allegations were true, the Employer's lawsuit cannot succeed. The Employer seeks to recover against Balsam for fraudulently misrepresenting facts that induced the employment contract between it and Balsam. Under New York law, a breach of contract is the only viable legal theory under which the Employer may seek recovery for the injury it allegedly sustained. Thus, New York courts consider the employer-employee relationship to be one of contract, express or implied, and the breach of obligations that arise in that context are considered contractual breaches,

⁶ 461 U.S. 731 (1983).

⁷ Id. at 740-744.

⁸ Id. at 731, 742-743.

⁹ Id. at 746, n.11.

¹⁰ Id.

not torts.¹¹ Although New York recognizes a cause of action for tortious fraud in inducing a contract, that cause of action cannot be based solely upon a failure to perform under the contract.¹² Here, the Employer alleged that in order to be reinstated, Balsam misrepresented the status of his health and then, once reinstated, failed to perform his duties because of alleged health problems. Thus, the Employer has alleged that Balsam made fraudulent misrepresentations regarding his ability to perform as a utility person and then failed to properly perform. Since the Employer's claim hinges totally upon Balsam's alleged non-performance of his employment contract, there is no cause of action for fraud.

The alleged damages that the Employer is seeking in this lawsuit - Balsam's wages and benefits, other consequential damages resulting from Balsam's failure to perform, and punitive damages - are not recoverable under a breach of contract cause of action. First, New York courts have routinely dismissed claims filed by employers to recover wages paid during completed employment absent an agreement between the parties providing for such a

¹¹ See Western Electric Co. v. Brenner, 392 N.Y.S.2d 409, 410-411 (1997) where the court, in considering the applicable statute of limitation, held that the employer's cause of action against its employee for breach of the duty of loyalty was essentially a contract claim, despite the employer's characterization of it as a tort claim, since absent the employment contract, there would be no duty of loyalty.

¹² See Wegman v. Dairylea Cooperative, Inc., 376 N.Y.S.2d 728, 732 (1975), where the court held that even though "fraud in the inducement of a employment contract" can be a viable tort claim, there was no such cause of action where an employee claimed he was discharged for refusing to assist in an illegal practice, since all of the employee's allegations related in some way to the employer's failure to meet its contractual obligations. See also Vanderburgh v. Porter Sheet Metal, Inc., 446 N.Y.S.2d 523, 524 (1982), (employer failed to maintain insurance as indicated in company's policy manual but continued to deduct the employees' portion of the premium; court held that since the employees' allegations of fraudulent misrepresentation related only to the performance of the employment contract, there was a breach of contract but not a claim for fraud).

recovery.¹³ Here, the collective bargaining agreement does not contain any such special agreement nor has the Employer alleged that such an agreement exists. Thus, the Employer is not entitled to recoup the wages and benefits paid to Balsam during his completed employment.

Similarly, when an action is grounded in contract, punitive damages are not recoverable unless the action seeks to vindicate a public right.¹⁴ There is nothing in the Employer's complaint that seeks to vindicate a public right. Indeed, the Employer has insisted that the lawsuit is a private matter between an employer and a former employee. Thus, punitive damages clearly are not recoverable here.

Finally, the Employer seeks consequential damages resulting from Balsam's failure to perform adequately as an employee. Under New York law, such consequential damages of contract breach are not available unless they were

¹³ See Kleinfeld v. Roburn Agencies, Inc., 60 N.Y.S. 2d 485 (1946) (employer filed counterclaim seeking to recover salary based upon a breach of loyalty and obligation of good faith theory for employee's misconduct; court held that since there was no special agreement allowing such a recovery the counterclaim was insufficient); Gaetjens v. Gaetjens, Berger & Wirth, 151 F. Supp. 701, 703 (1957) (employer alleged counterclaim for recovery of salary that employee not entitled to compensation received when employee breached employment contract by engaging in competing business; court held counterclaim failed to state facts upon which relief could be granted since no showing of special agreement allowing recovery of salary); Haggerty v. Burkey Mills, Inc., 211 F.Supp 835, 839-840 (1962) (action to recover commission paid under oral contract where employer claimed employee has solicited its customers in violation of employment contract; court held that employee was not obligated to repay salary and commissions already received absent special agreement).

¹⁴ New York University v. Continental Insurance Co. et al., 639 N.Y.S.2d 283, 315-316 (1995) (to recover punitive damages for breach of contract, conduct directed at plaintiff must have been tortious and "morally reprehensible," and must have been part of a pattern of conduct directed at public generally); See also The American Medical Assoc., et al., v. United Healthcare Corp., et al., 2002 WL 31413668, at 12 (S.D.N.Y. Oct. 23, 2002); Dairylea Cooperative, Inc., 376 N.Y.S.2d at 734.

foreseeable and within the contemplation of the parties when the contract was made.¹⁵ Here, there is nothing in the collective bargaining agreement that would allow the Employer to seek such damages nor has the Employer alleged that the parties discussed the recovery of such damages at the time Balsam was hired or rehired. Moreover, the Employer cannot successfully argue that these payments to supervisors, managers, and other employees were damages resulting from Balsam's misconduct when these payments would have been made regardless of Balsam's misconduct.

Thus, assuming the Employer has brought a technically viable claim against Balsam, the Employer has failed to demonstrate that it could recover any of the damages it seeks to recover. Under these circumstances, we conclude that the lawsuit depends on "plainly foreclosed" legal theories and is baseless.

Retaliatory Motive

Having concluded that the lawsuit is baseless, we also conclude that the lawsuit was filed for a retaliatory motive. Retaliatory motive under Bill Johnson's can be proven from evidence that the lawsuit is baseless,¹⁶ that the plaintiff seeks punitive damages,¹⁷ or from the plaintiff's prior animus towards the defendant's exercise of conduct protected by the Act.¹⁸

Here, all of these factors are present, including the seeking of punitive damages in an amount that is five times

¹⁵ See, e.g., Atkins Nutritionals, et al., v. Ernst & Young, LLP, 301 A.D.2d 547, 549 (2003).

¹⁶ Bill Johnson's Restaurant, Inc., 461 U.S. at 747; Phoenix Newspapers, 294 NLRB 47, 49 (1989); Diamond Walnut Growers, 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085, 149 LRRM 2400 (9th Cir. 1995).

¹⁷ Phoenix Newspapers, 294 NLRB at 49-50; H.W. Barss, 296 NLRB 1286, 1287 (1989); Diamond Walnut Growers, 312 NLRB at 69.

¹⁸ See Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288, 138 LRRM 2312 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); H.W. Barss, 296 NLRB at 1287.

the alleged compensatory damages.¹⁹ In addition, the facts that the lawsuit was filed only one week after the Employer finally agreed to pay the backpay it owed, and that it was filed four years after the alleged damages occurred, demonstrate retaliation against Balsam for exercising his protected right to file charges with the Board. The Employer further displayed its retaliatory motive when its owner made the statement that he had filed for bankruptcy in order to avoid paying Balsam the Board ordered backpay.

Furthermore, the Employer's filing of a lawsuit that had no chance of yielding any financial recovery indicates that the suit was filed to impose the costs of litigation on Balsam, regardless of outcome. Indeed, the Employer continues to maintain this lawsuit [*FOIA Exemptions 6 and 7(C)*]

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Accordingly, we conclude that complaint should issue, absent settlement, because the Employer filed a baseless lawsuit in retaliation against Balsam for filing charges with the Board after the Employer unlawfully discharged him. Furthermore, we conclude that even if the lawsuit was reasonably based, there is sufficient evidence to assert that the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome" and therefore that it violated Section 8(a)(1).

B.J.K.

¹⁹ Summitville Tiles, Inc., 300 NLRB 64, 65 (1990).