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

# Advice Memorandum

DATE: February 14, 2003

TO: Rochelle Kentov, Regional Director
Margaret Diaz, Regional Attorney
Karen K. LaMartin, Assistant to Regional Director
Region 12

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

SUBJECT: StaffMate, Inc.
Case 12-CA-21179 512-0125-9800
512-5096-8000

This case was submitted for advice concerning 1) whether the Employer violated Section 8(a)(1) by filing a criminal trespass complaint against a non-employee union organizer who had entered its facility to use the restroom; and 2) whether the Employer violated Section 8(a)(1) when its manager, in the presence of two job applicants, punched the union organizer in the mouth.

We conclude that the Employer's criminal trespass complaint was reasonably based and did not violate the Act. We further conclude that the Employer violated Section 8(a)(1) when its manager punched the union organizer in the mouth in front of two job applicants.

## FACTS

The Employer (StaffMate, Inc.) supplies employees to the Gold Kist Poultry plant in Douglas, Georgia. On October 30, 2000,[1] the Union (United Food & Commercial Workers, Local 1996) filed a petition for an election of production and maintenance employees supplied by the Employer to the Gold Kist poultry plant. On November 3, the Region served a Notice of Representation Hearing on the Employer.

In early November, individuals Kristan High and Kawanda Young began helping union organizer Eric Taylor locate Gold Kist employees. On November 6, Taylor drove High and Young to StaffMate to help them seek employment with Goldkist. Taylor initially remained outside in the vehicle while Young and High went into StaffMate's office.

[1] Herein all dates are 2000 unless otherwise indicated.

They approached StaffMate manager Mark Spikes and inquired about employment. Spikes knew High because she had applied for jobs there before, and had relatives who had obtained jobs through StaffMate. Spikes gave them paper on which to write their names and telephones numbers.

Shortly thereafter, Taylor, wearing a shirt with a UFCW union logo, entered the office and asked for the rest room. Chip Spikes, another StaffMate manager, pointed him to the rest room. When Taylor emerged, Chip noticed the union logo on Taylor's shirt and asked whether Taylor was "with the Union." Taylor replied that he was not. According to job applicant High,[2] when Spikes realized that Taylor was a union representative, he asked High and Young whether they were with him, then said, "are you fucking crazy? The Union ain't shit." He then ordered Taylor to leave and told him that "you ain't moving fast enough, mother fucker." According to Young, after realizing that Taylor was with the Union, Spikes "got in Taylor's face" and said "get the hell out of our office." Taylor, along with Young and High, started moving toward the door, followed by Spikes. Taylor reached the porch, turned around, and Spikes punched him in the mouth.[3]

Young and High brought Taylor back to his motel, and then to the hospital, where he received stitches. The police met the three at the hospital and took their statements.

On November 6, Chip Spikes applied for a criminal trespass warrant against Taylor with the magistrate of Boyd County, Georgia. On November 7, Taylor applied for a criminal warrant against Spikes, alleging simple battery. On November 8, the Magistrate Judge held a hearing on both charges. As part of his testimony, Spikes stated that when he saw the shirt and realized that Taylor was with the Union, he "got nervous" because he knew that the Union was trying to organize StaffMate's employees, that it had "filed a petition against us with the NLRB," and that StaffMate's lawyer had told them not to "let any union people in your property."

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[2] [*FOIA Exemptions 6, 7(C), and 7(D)* ] in their testimony at the criminal hearing discussed below.

[3] Spikes contended that Taylor made provocative comments as he walked out, and that he punched Taylor after Taylor turned around and bumped him. Taylor denied making provocative comments or bumping Spikes as he walked out.

The Magistrate found probable cause to issue a warrant against Taylor for criminal trespass on the ground that Taylor resisted StaffMate's order to leave the premises. The Magistrate found no probable cause to issue a warrant against Spikes for battery, concluding that his conduct was provoked. On November 8, the state issued a warrant for criminal trespass against Taylor and set the matter for a hearing on a final determination. On June 4, 2001, the Boyd County Solicitor-General dismissed the warrant against Taylor. By letter to the Region of November 20, 2002, the Solicitor-General explained that he had seen the "gash" Spike's punch had left in Taylor's face and "since I could not bring myself to believe that Mr. Taylor's mere failure to leave StaffMate's premises immediately after being told to do so on November 8, 2000 could be as bad as his busted lip, I decided to leave these parties where I found them."

## ACTION

We conclude that the Employer's criminal trespass complaint was reasonably based, and thus did not violate Section 8(a)(1). We further conclude that the Employer violated Section 8(a)(1) by punching union organizer Taylor in the mouth in the presence of the two job applicants.

1. The criminal trespass complaint was not unlawful

Before the Supreme Court's recent decision in B.E.& K. Construction Co. v. NLRB,[4] the Board followed the Court's directives in Bill Johnson's Restaurants, Inc. v. NLRB[5] for determining whether a state-court lawsuit violated the Act. In Bill Johnson's Restaurants, the Court held that the Board may find the prosecution of an ongoing lawsuit unlawful if the suit lacks a reasonable basis in fact or law and was brought with a retaliatory motive.[6] The Court also explained that once the lawsuit was concluded, the Board could find the suit unlawful if the proceedings resulted in a judgment adverse to the plaintiff, or was withdrawn or otherwise shown to be without merit, and was brought with a retaliatory motive.[7] In determining whether

[4] 536 U.S. 516, 122 S.Ct. 2390 (2002)(BE&K).

[5] 461 U.S. 731, 742-743 (1983).

[6] Ibid.

[7] Ibid.

the suit had been filed with a retaliatory motive, the Board could take into account that it lacked merit.[8]

In BE&K,[9] the Court announced that its prior statement regarding concluded lawsuits in Bill Johnson's was dicta. The Court held that a concluded lawsuit may be reasonably based and enjoy First Amendment protection, even though it is ultimately unsuccessful.[10] The Court also reasoned that inferring a retaliatory motive from evidence of animus would condemn genuine petitioning in circumstances where the plaintiff's "*purpose* is to stop conduct he reasonably believes is illegal."[11] The Court left open whether any other showing of retaliatory motive could suffice to condemn a reasonably based, but unsuccessful suit. It intimated that suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for protected activity, may be unlawful.[12]

In the instant case, the Employer's criminal action against Taylor is akin to a concluded, unsuccessful suit because the local Solicitor General dismissed the trespass warrant. Applying BE&K, however, we would conclude that the criminal action was not unlawful because it had a reasonable basis in fact and law. Specifically, the Magistrate ruled that there was probable cause to find that Taylor violated the state criminal trespass statute by resisting the Employer's order to leave the premises. Although the Solicitor General subsequently dismissed the warrant against Taylor, the dismissal was based on a discretionary decision to "leave these parties where [he] found them." Thus, we cannot take the Solicitor General's dismissal as demonstrating that the criminal action lacked a reasonable basis. In these circumstances, and in the absence of any evidence that the suit was filed with a

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[8] Id. at 747.

[9] 536 U.S. 516, 122 S.Ct. 2390.

[10] 122 S.Ct. at 2399-2401, citing Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)(suit may be condemned as violative of Antitrust Act only if it is objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits, and it is subjectively a sham).

[11] Id. at 2401 (emphasis in original).

[12] Id. at 2402.

retaliatory motive to impose the costs of the litigation process regardless of the outcome,[13] we would not allege that the Employer unlawfully filed a baseless lawsuit.

2. The Employer unlawfully punched the union organizer

Employer threats or acts of violence against a non-employee union representative violate Section 8(a)(1) where employees witness the violence or are likely to learn of it, because employees might reasonably regard it as an indication of what will happen to them if they engage in Section 7 activity.[14] Such conduct in the presence of employees is unlawful even when the union representative is not at that moment engaged in protected concerted activity, because the logical inference is that employees who support the union could suffer a similar fate.[15] It may also be immaterial that the union representative was engaging in activities specifically not protected by the Act at the time of the employer's conduct, if onlooking employees could reasonably infer that the employer acted out of union animus, thus restraining the employees' exercise of Section rights.[16] Since applicants for employment are employees

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[13] Ibid.

[14] NLRB v. H.R. McBride, 274 F.2d 124 (10th Cir. 1960) enfg. 122 NLRB 1634 (1959)(the violence, although not directed primarily at the employees, in all probability would be viewed by them as an indication of the dangers and obstacles awaiting them should they in the future show any interest in union organization); Sullivan Surplus Sales, Inc., 152 NLRB 132, 148-149 (1965)(employer's assault against business agent, seen by two employees, violated Section 8(a)(1); the normal effect of the conduct, which so forceably demonstrated to the employees witnessing the attack the intensity of the employer's opposition to the union, is to restrain the exercise of Section 7 rights).

[15] Heavenly Valley Ski Area, 215 NLRB 359 (1974), enfd. 552 F.2d 269 (9th Cir. 1977)(the employer's conduct in flinging the business agent down the stairs was unlawful even though the agent was relaxing in the bar and not presently engaged in concerted activity, since it was observed by employees who either knew or later learned of the business agent's status as a union representative).

[16] See NLRB v. Village IX, Inc., 723 F.2d 1360, 1365 (7th Cir. 1983), enfg. in rel. part 264 NLRB 908, 920-921 (1982)(assaulting a union organizer in the presence of one or more employees violated Section 8(a)(1) even though the organizer had no right to distribute leaflets on private property without the owner's permission, since the employer

entitled to Section 7 protection under the Act, an employer likewise violates Section 8(a)(1) when it engages in such conduct in front of job applicants.[17]

Applying the above principles, we conclude that StaffMate manager Chip Spikes violated Section 8(a)(1) by punching Taylor in the mouth, because he was a union organizer, in the presence of the two job applicants. As applicants High and Young recalled, as soon as Spikes realized that Taylor was a union representative, he got upset, made negative comments about the Union, ordered Taylor out of the office, and then punched him in the mouth. As discussed above, this act of violence was unlawful whether or not Taylor was engaged in protected concerted activity at the time of the altercation, because the two employees witnessing the violence knew that Taylor was a union organizer, and that Spikes punched him for that reason. It was also unlawful even if Taylor's presence on the Employer's property at the time Spikes punched him was an unlawful trespass outside the Act's protection; since the punch was not a reasonable response to such a trespass,[18] High and Young could reasonably conclude that

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assaulted him to prevent him from distributing union leaflets; if the employer had been acting reasonably in self-defense or defense of property a retaliatory inference by an onlooker would have been unreasonable). See also Sullivan Surplus Sales, Inc., 152 NLRB at 148-149 (employer's president was not justified in taking the law in his own hands and forcibly ejecting the agent from the store).

[17] See generally Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)(Section 8(a)(3) applicable to job applicants who were refused employment because of their affiliation with the union); Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959), enfg. 121 NLRB 179, 179-180 (prospective employees are employees for the purposes of the Act); Lucy Ellen Candy Division of F & F Laboratories, Inc., 204 NLRB 121, 123 (1973), enfd. 517 F.2d 551, 552-553 (7th Cir. 1975)(questioning of applicants constituted coercive interrogation in violation of Section 8(a)(1), notwithstanding that some of them never became employees of the company).

[18] Although the Magistrate dismissed the criminal complaint against Spikes on the grounds of provocation, she provided no factual predicate for her finding. Since Spikes, in his own testimony, attributed his anger in large part to the fact that Taylor was a union representative, the Magistrate's provocation finding does not compel the

it was motivated by Taylor's union status, and that a similar fate might befall them if they engaged in Section 7 activity.

Accordingly, we conclude that the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by punching union organizer Taylor in the mouth. The Region should dismiss the charge alleging that the Employer violated Section 8(a)(1) by filing a criminal action against Taylor.

B.J.K.

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conclusion that Taylor engaged in provocative conduct, such as fighting words, or bumping Spikes.