

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

Advice Memorandum

DATE: January 18, 2001

TO : Curtis Wells, Regional Director
Region 16

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

SUBJECT: K.O. Steel Foundry and Machine
Case 16-CA-20789

This case was submitted for advice on whether the Employer's state court lawsuit, which the Employer withdrew after the court declined to issue a temporary restraining order, violated Section 8(a)(1).

On August 25, employee Limon who had been an active Union supporter was going on a regular break. The Employer's Human Relations Manager Rapoza told Limon that Rapoza would write him up for not wearing proper eye protection. According to Limon, he twice told Rapoza "ok" but that Limon first wanted to take his break. Rapoza eventually replied that Limon need not take his break because he was already "terminated." Limon asserts that, during a subsequent discussion between Rapoza and the Employer's President, Rapoza stated that he had intended to give Limon a write-up, but that he now was going to terminate him by saying that Limon had beat him up. [FOIA Exemptions 6, 7(C), and 7(D)] he heard Rapoza further say that Rapoza was going to get the other union wetbacks soon. According to Rapoza's version of this incident, after Rapoza advised Limon of the write-up for improper eye protection, Limon both threatened Rapoza and used his right shoulder to brush up against him, knocking Rapoza off his balance. Rapoza filed a police report stating that Limon had threatened and "brushed up" against him.

On August 31, the Employer filed a state court suit against Limon seeking a temporary restraining order (TRO) and permanent injunction enjoining Limon from (1) committing any act of physical contact, violence or property damage; (2) communicating with employees or company representatives in a coarse, threatening, vulgar and offensive manner; (3) making any verbal or written threat; (4) coming within 500 feet of the Employer property, or the private residences of Rapoza or the Employer's President; and (5) committing any act prohibited by the Texas Penal Code. On September 8, a state court judge denied the Employer's request for a TRO,

ruling that there was "not a probable right or probable injury in the matter." The judge otherwise allowed the Employer to continue the suit and set a trial date. However, on December 13, the Employer advised the Region that the Employer had officially dropped all proceedings pertaining to any kind of injunctive relief against Limon

Rapoza stated that he believed a TRO against Limon was necessary based upon events occurring after the Union's campaign in 1997 and 1998. Rapoza states that after an August 1997 election which the Union lost, Rapoza's wife received obscene phone calls advising her to tell Rapoza to back off. Rapoza also states that in May or June of 1998, he was physically assaulted by three unidentified individuals, one of whom allegedly told Rapoza to tell the Employer's President that this could happen to him. Finally, Rapoza states that more recently in March 2000, Limon allegedly asked Rapoza where the Employer's acting president was because Limon wanted to "kick his ass" for promising money but not delivering it.¹

[FOIA Exemptions 6, 7(C), and 7(D)]

] he believed that Limon intentionally shoved Rapoza with his right shoulder. Francki also stated that he had never before seen Limon act in a threatening or violent manner. Employee Garza also observed the August 25 incident and also [FOIA Exemptions 6, 7(C), and 7(D)] Limon shoved his shoulder into Rapoza's side at the upper arm area. [FOIA Exemptions 6, 7(C), and 7(D)] Limon had not been a violent man in the past.

On October 31, 2000, the Region issued a Section 8(a)(3) complaint against Limon's discharge.² On November 14, the Union filed the instant charge alleging that the Employer sought the TRO and preliminary injunction against Limon because of his Union activities.

We conclude that the Employer's lawsuit is unlawful as meritless and retaliatory to the extent that the Employer prosecuted its lawsuit until withdrawing it, i.e., to the

¹ Employee Garza states that in March 2000, Limon made the same remark to him about the Employer's acting president.

² The hearing on Limon's discharge is scheduled for January 29, 2001. The hearing is consolidated with Union objections to the election held on July 21, 2000 which the Union lost.

extent that the Employer sought a TRO which the state court denied.

In Bill Johnson's Restaurants on remand, the Board noted the Supreme Court's admonition that deference should be given to the state court judgment unless the plaintiff can provide a cogent explanation for refusing to do so.³ The Board has consistently applied this principle without regard to the nature of the state court judgment adverse to the plaintiff.⁴ Thus, when a lawsuit is no longer pending and the plaintiff did not prevail on the merits, the Board does not again address whether the lawsuit lacked a reasonable basis in fact and law and instead proceeds to determine whether the lawsuit was filed with a retaliatory motive.⁵

The Board uses a different procedure, however, when a lawsuit is withdrawn without any adjudication on the merits, holding that withdrawal of a claim results in a rebuttable presumption that it lacks merit.⁶ The plaintiff-respondent then has "the burden of rebutting the inference that the suit lacked merit . . ." Vanguard, 300 NLRB at 255.

In the instant case, the Employer's request for a TRO was meritless because it was denied by the court. Regarding the request for a temporary injunction, the Employer's withdrawal of this claim raises the rebuttable presumption under the Vanguard Tours that this claim also lacked merit. On the other hand, the Employer appeared to have had a basis

³ Bill Johnson's Restaurants, 290 NLRB 29, 31 (1988), citing 461 U.S. at 749 fn. 15.

⁴ See Summitville Tiles, 300 NLRB 64, 65 (1990), and H. W. Barss, 296 NLRB 1286, 1287 (1989), citing Phoenix Newspapers, 294 NLRB 47 (1989) (summary judgment); Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enf. 934 F.2d 1288 (2d Cir. 1991) (dismissal on merits); Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir.1994) (motion to dismiss).

⁵ Summitville Tiles, supra, at 66.

⁶ Vanguard Tours, 300 NLRB 250, 255 (1990), enf. denied in pertinent part 981 F.2d 62 (2d Cir. 1992).

for initially seeking a temporary injunction given the prior threats by Limon and his brushing up against the Employer's Human Relations Manager Rapoza. It is not clear, therefore, whether or not the Employer may be able to overcome the Vanguard presumption. We conclude that it is essentially irrelevant whether or not the Employer could sustain its burden of proof and overcome that presumption because, once the Employer withdrew that claim before Limon had to defend against it. The only claim for injunctive relief which Limon was forced to effectively defend was the Employer's seeking of the TRO, which the court indeed found to have been meritless. Thus we would not also attack as unlawful the withdrawn claim for a temporary injunction.

We further conclude that the Employer filed the lawsuit and thus sought the TRO with a retaliatory motive. The Employer has clear antiunion animus against Limon, exemplified by the outstanding Section 8(a)(3) complaint and Rapoza's statement that he was "going to get the other union wetbacks soon." The baselessness of the seeking of the TRO is another element showing retaliatory motive. In addition, the Employer immediately sought the TRO six days after it unlawfully discharged Limon. Thus the Employer took both actions against Limon virtually simultaneously and apparently for the same reasons. The Region has already concluded that the Employer's asserted grounds for Limon's discharge were pretextual, and that the discharge instead was discriminatorily motivated. Since the Employer immediately sought injunctive relief for the same reasons, the injunction lawsuit also was pretextual and also is retaliatory against Limon's Union activity.⁷

In sum, the Employer violated Section 8(a)(1) by seeking a meritless TRO in retaliation against Limon's union activity.

B.J.K.

⁷ We note in addition that the Section 8(a)(3) charge over Limon's discharge was filed on August 29, 2000, two days before the Employer filed its meritless claim for a TRO. The timing of lawsuit on the heels of the Board charge is another indicium of the Employer's retaliatory motive.