

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

Advice Memorandum

DATE: October 31, 2003

TO : Alan Reichard, Regional Director
Region 32

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

SUBJECT: Extra Space Storage
Case 32-CA-20774-1

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by causing the arrest of a union representative handbilling on the Employer's property.

We conclude that the Employer violated Section 8(a)(1) under both Lechmere and Bill Johnson's. Under California law, the Employer did not have a sufficient property interest to exclude the Union from its property. Therefore, the Employer was not reasonably based in causing the Union representative's arrest, and the arrest was retaliatory because it was aimed at protected activity.¹

FACTS

The Employer, Extra Space Storage, recently began operating a storage facility in Tracy, California. The storage facility is located on land that was once a section of the parking lot for a large manufacturing facility. The Employer owns the parcel of land on which the storage facility is located, as well as a concrete bib that serves as a parking and driveway area for the facility. The Employer maintains an office on its property, located next to the storage units. The storage units are enclosed with a gate and access to the units is controlled with a keypad. An asphalt area lies between the street and the Employer's property, and the Employer possesses an easement for ingress and egress over the asphalt parcel.

The Employer had contracted with a non-union contractor, Diede Construction, for the construction of the storage facility. During the construction, Robert Fenton, a business representative for Carpenters Local Union 25, noticed the Diede signs on the job and had spoken with

¹ It is not necessary to address whether the Employer unlawfully threatened the Union with arrest, since that allegation is not raised in the charge.

Diede's workers on the jobsite about their wages and benefits. In Fenton's view, those wages and benefits were below area standards.

The construction was complete and the Employer opened its facility for business sometime in June, 2003.² On July 16, Fenton and three other Union members arrived at the Employer's facility, parked their cars on the asphalt parking area, and walked over to the keypad for the gate into the storage area. The Union people stood there from about 7:00 a.m. to around 9:30 a.m. distributing handbills to the few people entering their storage units that morning. The handbills asked consumers to boycott the Employer because it used Diede Construction to build its facilities and Diede pays wages and benefits below area standards. According to Fenton, at some point someone identifying himself as the manager approached the Union and asked what they were doing. Fenton showed him a copy of the handbill and the manager said he would rather they handbill out near the street. Fenton asserted that he had a right to be there, and the manager said okay, and asked that the Union not bother the customers.

At approximately 9:30 a.m., Fenton moved over toward the office, and stood about five feet from the door. He gave handbills to two people going into the office. Fifteen minutes later the Tracy Police arrived. After some discussion with both Fenton and the Employer's manager, the police officer told Fenton that if he did not leave the property he was going to be arrested. Fenton refused to leave. The police officer then arrested Fenton and took him to the police station for booking. He received a criminal citation for misdemeanor trespassing. Although the matter was set for trial, after several continuances the district attorney dropped the charges "in the interest of justice."

ACTION

The Region should issue complaint, absent withdrawal, alleging that the Employer violated Section 8(a)(1) by refusing to allow the Union representative to peacefully handbill on the Employer's property, and by causing his arrest. California labor policy limits the Employer's right to prohibit peaceful Union handbilling on its property. Therefore, the Employer had no reasonable basis

² All dates are in 2003.

for causing the arrest, and the arrest was retaliatory motivated.

In Lechmere, Inc. v. NLRB, the Supreme Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by non-employee organizers."³ In order to assert a Lechmere privilege, an employer must have a sufficient property interest under the applicable state law to exclude others and make refusal to vacate the property at the employer's request a "trespass."⁴ As relevant here, current California labor law and policy limits private property interests to exclude others.⁵ Specifically, under the Moscone Act (Cal. Code of Civ. Proc. Section 527.3), the right of property owners to exclude others from the exterior areas surrounding business establishments must be subordinated to the rights of persons engaging in peaceful labor activities directed at those establishments.⁶ In Winco Foods, Inc., the Board

³ 502 U.S. 527, 537 (1992). See also Leslie Homes, Inc., 316 NLRB 123, 127-28 (1995) (extending Lechmere rationale to nonemployee area standards activity), rev. denied 68 F.3d 71 (3d Cir. 1995).

⁴ Bristol Farms, 311 NLRB 437, 438-39 (1993); Johnson & Hardin Co., 305 NLRB 690, 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

⁵ Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980).

⁶ Id. at 378.

California state constitutional freedom of speech guarantees also limit private property interests where the property is akin to a public forum. Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979) (solicitation at privately owned shopping center protected by state constitution), affd. 447 U.S. 74 (1980). Here, however, we agree with the Region that the California constitution would not privilege the Union's activities on the Employer's property, as it is a stand-alone facility that does not function as a Pruneyard public forum. See Trader Joe's Company v. Progressive Campaigns, Inc., 73 Cal.App.4th 925, 86 Cal.Rptr.2d 442 (1 Dist. 1999); Waremart v. Progressive Campaigns, Inc., 102 Cal.Rptr.2d 392 (3 Dist. 2000), order granting review and deferring consideration of case, 105 Cal.Rptr.2d 386 (2001); Young v. Raleys, 89 Cal.App.4th 476, 107 Cal.Rptr.2d 172 (3 Dist. 2001), order granting review, 111 Cal.Rptr.2d 335 (2001).

found that California law limited the respondent's right to exclude union handbillers from outside its store.⁷

Applying these principles, we conclude that the Employer did not have a sufficient property interest under California law to exclude the Union from peaceful consumer handbilling. The Union was handbilling only on the exterior portions of the Employer's property. As discussed above, California law privileges Union activity conducted on the exterior areas surrounding a business establishment. Although the Employer claims that the Union's conduct was disruptive, there is no evidence that the activity was anything but peaceful, protected consumer handbilling.⁸ Nor did the conduct breach any heightened security concern the Employer might claim over its storage units as the Employer concedes that the Union never made any attempt to enter either the office or the area beyond the locked gate.

Since the Employer did not possess a sufficient property interest to exclude the Union, we also conclude that the Employer had no reasonable basis for causing Union representative Fenton's arrest. Initially, we agree with the Region that the arrest raises First Amendment considerations under the Supreme Court's decision in Bill Johnson's.⁹ In Johnson & Hardin Co.,¹⁰ the Board stated that filing a criminal complaint with governmental officials is, like filing a civil lawsuit, "an aspect of the right to petition the Government for redress of grievances."¹¹ Johnson & Hardin is thus consistent with BE

⁷ 337 NLRB No. 41, slip p. at 1 (2001). The Board rejected the argument that California's limitation on property interests is either preempted or violates the Equal Protection clause of the Constitution. Id., slip op. at 1 and n.3. That case is currently pending enforcement in the D.C. Circuit.

⁸ Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983); Winco Foods, 337 NLRB No. 41, slip op. at 5.

⁹ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

¹⁰ 305 NLRB 690, 691 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995) (Bill Johnson's analysis, used to evaluate lawfulness of alleged retaliatory civil suits, applied to criminal trespass complaints).

¹¹ 305 NLRB at 691.

& K,¹² where the Court observed that "the right to petition extends to all departments of the Government."¹³

In BE & K, the Court reconsidered the circumstances under which the Board could find a "completed" lawsuit to be an unfair labor practice.¹⁴ In Bill Johnson's, the Court appeared to articulate two standards for evaluating alleged retaliatory lawsuits: one for ongoing suits and one for concluded suits.¹⁵ Bill Johnson's held that the Board may, consistent with the First Amendment, only halt prosecution of an ongoing lawsuit if it lacks a reasonable basis in fact or law and was brought with a retaliatory motive.¹⁶ The Court stated that a concluded lawsuit which resulted in a judgment adverse to the plaintiff, or which was withdrawn or otherwise shown to be without merit, could be attacked as an unfair labor practice if it was filed with a retaliatory motive.¹⁷ Thus, under Bill Johnson's, it appeared that the Board could find that a completed lawsuit, even if reasonably based, was an unfair labor practice if it was unsuccessful and was filed to retaliate against the exercise of rights protected under the Act.

The Supreme Court in BE & K rejected the Board's application of Bill Johnson's for adjudicating unsuccessful but reasonably based lawsuits.¹⁸ The Court found that the Board's reading of Bill Johnson's was overly broad because the class of lawsuits that the Board wished to proscribe included a substantial portion that involved genuine "petitioning" protected by the Constitution.¹⁹ The Court thus indicated that the Board could no longer rely on the

¹² BE & K Construction Company v. NLRB, 536 U.S. 516, 525 (2002) (citation omitted).

¹³ See also Mr. Z's Food Mart, 325 NLRB 871, 871 n. 2, 894 (1998), enf. denied in part, 265 F.3d 239 (4th Cir. 2001); Control Services, 315 NLRB 431, 455-56 (1994).

¹⁴ 536 U.S. 527.

¹⁵ 461 U.S. at 747-749.

¹⁶ Id. at 748-749.

¹⁷ Id. at 747, 749.

¹⁸ 536 U.S. at 528, 532-533, 535.

¹⁹ Id. at 532 ("...even unsuccessful but reasonably based suits advance some First Amendment interests").

fact that a lawsuit was ultimately meritless, but must determine whether it was reasonably based regardless of its outcome on the merits.²⁰

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."²¹ The Court criticized the Board for having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself related to protected conduct that the petitioner believed was unprotected.²² Similarly, the Court reasoned that inferring a retaliatory motive from evidence of a respondent's union animus would condemn genuine First Amendment "petitioning" in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"²³ In *dictum*, however, the Court suggested that an unsuccessful but reasonably based lawsuit could be considered an unfair labor practice if it would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."²⁴

Because the Supreme Court in BE & K did not enunciate the standard for determining whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits remains authoritative. In Bill Johnson's, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.²⁵ Thus, 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."²⁶ Further, just

²⁰ Id. at 539-536.

²¹ Id. at 533-535.

²² Id. at 533 ("...the Board's definition broadly covers a substantial amount of genuine petitioning").

²³ Id. at 534 (emphasis in original), citing Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61 (1993).

²⁴ 536 U.S. at 536-537.

²⁵ 461 U.S. at 744-746.

²⁶ Id. at 746, n. 11.

as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."²⁷ Thus, a lawsuit can be deemed baseless only if it presents unsupportable facts or unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

In the instant case, the Employer's criminal complaint against Fenton is akin to a completed, non-meritorious lawsuit because the district attorney dropped the charges. Without the benefit of a court decree, we evaluate the reasonableness of the lawsuit under California law. The Employer contends that the Union unlawfully trespassed on its property under California law because the Union was engaged in a secondary boycott, and was also engaged in disruptive behavior by moving closer to the office area. Finally the Employer contends that it is a modest retail establishment under Pruneyard, supra, and this privileged the arrest.

Initially, as discussed above, California law clearly privileged the Union's handbilling on the Employer's property. Further, as a matter of undisputed fact and law, the Union was not engaged in a secondary boycott and the Employer does not dispute that the Union's conduct was other than peaceful handbilling. Accordingly, the Employer has no reasonable basis to contend that it had a right to cause the arrest.

We also conclude that the Employer had a retaliatory motive in seeking Fenton's arrest. The Supreme Court's decision in BE & K does not affect the retaliatory motive analysis here because this lawsuit, unlike the suit in BE & K, is baseless. Thus, while the Supreme Court in BE & K rejected the Board's standard of finding a lawsuit retaliatory solely because it is brought with a motive to "interfere with the exercise of protected [NLRA Section 7] rights,"²⁸ the Court's holding is limited to reasonably based lawsuits. With regard to reasonably based lawsuits, that standard would condemn genuine petitioning where a suit was directed at conduct that a plaintiff reasonably believed was unprotected.²⁹ Here, the fact that this

²⁷ Id. at 746.

²⁸ BE & K, 536 U.S. at 533.

²⁹ Id. at 533-534.

baseless arrest was explicitly directed at Fenton's protected attempt to engage in peaceful consumer handbilling is sufficient to establish retaliatory motive.

In sum, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by interfering with the Union's access to the Employer's facility, and by causing the arrest of Union representative Fenton.

B.J.K.