

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

Advice Memorandum

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Region 7

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SUBJECT: Haworth Inc. 625-3350-9700
Case GR-7-CA-44346 775-8718

This case was submitted for advice as to whether a severance agreement signed by the alleged discriminatee bars the Region from issuing complaint based upon an unfair labor practice charge filed by the Union.

We conclude that, under the Board's Independent Stave¹ analysis, the charge is not barred by the severance agreement because: (1) the Union never agreed to be bound by the agreement; and (2) the agreement was executed prior to the filing of the unfair labor practice charge. We further conclude that Section 10(b) does not bar complaint in the instant case.

FACTS

Brian Rexford was employed at Haworth, Inc. (the Employer) for many years. In 1997, and again in 2000, Rexford actively supported organizing efforts at the Employer by the United Automobile, Aerospace and Agricultural Implement Workers of America (the Union). Neither organizing effort led to recognition or the filing of a petition for a representation election.

On January 19, 2001,² Rexford received his annual performance appraisal for calendar year 2000. He received a total of 22 points, the lower limit of the "meets expectations" category. Rexford protested this rating with a written appeal. In response to Rexford's repeated inquiries about his appeal's status, Rexford was repeatedly

¹ Independent Stave Co., 287 NLRB 740 (1987).

² All dates hereinafter are in 2001, unless otherwise noted.

told that his appeal had not been decided and was given assurances that it would be acted upon.³

On May 1, when Rexford returned from a scheduled vacation, he was notified that the Employer was terminating him, along with a number of other employees, due to a decline in business. The Employer selected employees for termination according to a variety of criteria, including their point totals in their most recent evaluations. Everyone in Rexford's department and shift who received his evaluation rating of 22 or below was terminated; everyone who received a rating of 23 or higher was retained.⁴

All terminated employees were required to sign a "Waiver and Release Agreement" in order to receive severance pay and benefits. Rexford executed the agreement on May 3. The agreement provided, inter alia, that:

[The employee] waives, releases and forever discharges Haworth . . . from all claims that [the employee] has against Haworth occurring before the date s/he signs this Agreement.

* * * * *

This waiver, release, and covenant not to sue includes all claims arising from [] employment with, or termination of employment from Haworth, all claims for reinstatement, reemployment or

³ Rexford's persistence in pursuing this appeal appears to have been motivated by his prior success in appealing a low rating. Rexford was initially given a rating of 22 in his 1999 annual appraisal. That rating was eventually raised four points after Rexford appealed.

⁴ It is not clear how much discretion the Employer exercised in determining the number of employees to be terminated or in identifying the individuals who were chosen for termination, beyond merely choosing those who had the lowest evaluation ratings. If the evidence indicates that the Employer exercised substantial discretion in making these decisions, this would provide an additional rationale for concluding that Section 10(b) does not bar complaint in the instant case or, if such discretion was exercised discriminatorily, for finding a violation of Section 8(a)(3).

consideration for same, [and] all claims for lost and future wages . . .

* * * * *

[The employee] specifically waives, discharges, and covenants not to sue based on any claim arising out of any law prohibiting any form of discrimination, including, but not limited to: Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; Michigan's Elliot-Larsen Civil Rights Act; Michigan's Persons with Disabilities Civil Rights Act; the Whistleblowers Act; the Americans with Disabilities Act; the Employee Retirement Income Security Act; the Equal Pay Act; the Family and Medical Leave Act; Executive Order 11246 and its implementing regulations; the Rehabilitation Act of 1973; the Vietnam Era Veterans' Readjustment Assistance Act; and any other federal, state, or local civil rights law.⁵ . . . By signing this Agreement, [the employee] knowingly and voluntarily gives up all such claims and promises never to sue over any such claims nor accept any monetary award arising out of such claims.

* * * * *

[The employee] acknowledges that this Agreement sets forth the entire agreement between the parties, and shall be final and binding as to all claims that have been or could have been advanced on member's behalf against Haworth, even if [the employee] later learns of facts about which [the employee] was unaware or mistaken, or changes his/her mind.

In early September, one of the Employer's former supervisors informed Rexford that upper-level management had directed that his 2000 evaluation be lowered, and had affirmatively decided that his appeal would not be acted upon, and that both decisions were contrary to the recommendations of Rexford's immediate supervisors that Rexford be given a higher evaluation rating. The ex-supervisor also stated that the plant manager had indicated months before the May 1 terminations that he wanted to make

⁵ The agreement elsewhere also specifically waives claims under the Worker Adjustment Retraining and Notification Act and the Age Discrimination in Employment Act.

sure Rexford was included in any future reduction in force. Rexford shared this information with the Union representative who had worked with him during the 1997 and 2000 organizing efforts. The Union then filed the instant charge.

The Region has found that, as a factual matter, Rexford's 2000 appraisal was discriminatorily lowered at the instigation of upper-level management and that, although there was agreement among mid-level supervisors that Rexford's appeal had merit, upper-level management expressly decided to deny the appeal by not acting upon it. The only issue submitted for advice is the effect of the severance agreement executed by Rexford. The Region has determined to issue complaint in the instant case, absent settlement, unless such action is barred by the severance agreement.

ACTION

We conclude that, under the Board's Independent Stave analysis, the charge is not barred by the severance agreement or by Section 10(b).

The Severance Agreement

In Hughes Christensen Co.,⁶ the Board announced that the validity of severance agreements containing waiver and release language should be governed by the same standards as private, non-Board settlements under Independent Stave. In Independent Stave, the Board outlined the factors to be considered in determining whether to defer to a private non-Board settlement. The Board stated that it would examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements.⁷

In the instant case, the third and fourth factors set forth in Independent Stave support deferral: There is no

⁶ 317 NLRB 633 (1995).

⁷ 287 NLRB at 743.

allegation of evidence of any fraud, coercion, or duress by any party in executing the severance agreement, and the Employer has no demonstrated history of violations of the Act or breaches of past unfair labor practice settlement agreements. The only issues involve the first two factors, the lack of agreement by the Charging Party Union, and whether the agreement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation.

The lack of agreement by the Charging Party Union clearly weighs against deferral. We note that, in all of the cases in which the Board has applied the Independent Stave factors to an employee's severance agreement, the charges were filed by a union or by other employees, none of whom was a party to the severance agreement.⁸ In Clark, Webco, and Weldun, where the Board refused to defer to the severance agreement, the identity of the charging party was one of the factors on which the Board relied in refusing to defer. Even in Hughes Christensen, where the Board did defer, the Board noted that this factor supported non-deferral but concluded that it was outweighed by the other factors in that case.⁹

Regarding the second Independent Stave factor, i.e., whether the agreement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation, the Board has given great weight to the timing of the severance agreement relative to the unfair labor practice charge. In Hughes Christensen, the Board based its decision on the fact that the union's

⁸ Clark Distribution Systems, Inc., 336 NLRB No. 60 (2001); Webco Industries, 334 NLRB No. 77 (2001); Weldun International, 321 NLRB 733 (1996), enfd. mem. in pertinent part 165 F.3d 28 (6th Cir. 1998), enfd. 936 F.2d 178 (5th Cir. 1991), cert. denied 502 U.S. 1090 (1992); Hughes Christensen, supra.

⁹ 317 NLRB at 636. Significantly, the Board may have considered this factor to have been weaker in Hughes Christensen because the discriminatees in that case had constituted the charging party union's employee bargaining committee as well as its chairman and members of the grievance committee. While the Board did not expressly rely on this link between the individual discriminatees and the charging party union, the Board may have been influenced by it because the Board subsequently noted these facts in Weldun International, 321 NLRB at 734, fn. 6.

unfair labor practice charges had already been filed, investigated, and dismissed by the Regional Director at the time the waivers were signed. This circumstance greatly strengthened the argument for deferral since the employees were giving up less at that stage of the litigation than if charges were still being investigated.

Since Hughes Christensen, the Board has clearly distinguished between severance agreements executed before charges were filed or investigated, and agreements executed after charges were filed, investigated, and dismissed.¹⁰ The Board's analysis of this factor is not limited to an objective assessment of the strength of the unfair labor practice case. Instead, the Board focuses on the discriminatee's intent and ability to evaluate the unfair labor practice case when the discriminatee executed the severance agreement. Thus, the Board has been reluctant to find that an employee "settled" an unfair labor practice charge that was not yet investigated or even contemplated by the parties, as opposed to an actual case that has been filed, investigated, reviewed, and acted upon. Indeed, in every case involving severance agreements that has arisen since Hughes Christensen, the Board has refused to defer to a severance agreement where the severance agreement was executed prior to the filing and investigation of the charge.¹¹ While the circumstances in each of these cases are distinguishable from those in the instant case, these cases emphasize the significance the Board gives to the second Independent Stave factor.¹²

¹⁰ Webco Industries, 334 NLRB No. 77, slip op. at 4; Clark Distribution Systems, Inc., 336 NLRB No. 60, slip op. at 4; Weldun International, 321 NLRB at 734 fn. 6.

¹¹ See Webco Industries, 334 NLRB No. 77, slip op. at 3-4 (2001); Clark Distribution Systems, Inc., 336 NLRB No. 60, slip op. at 4-5 (2001); Weldun International, 321 NLRB at 734 fn. 6.

¹² For example, when the Board refused to defer to a severance agreement in Webco Industries, the Board majority stated that the fact that the severance agreement was executed prior to the filing of a charge was "further reason to find that the agreement does not preclude us from affording relief to [the discriminatee]." 334 NLRB No.77, slip op. at 4.

In the instant case, the absence of both the first and second factors in Independent Stave weigh heavily against deferral. The fact that the Charging Party Union did not agree to be bound by the severance agreement is particularly important because the discriminatory conduct alleged in the instant case affects not only: (1) Rexford's right to be free of such unlawful conduct; and (2) the public interest in the enforcement of the Act generally; but also (3) the Union's interest in protecting employees who choose to participate in Union organizing drives.¹³ Concerning the reasonableness of the "settlement" in the instant case, no charge had been filed or investigated when the severance agreement was executed, as in Webco, Weldun, and Clark. We therefore conclude that this factor, together with the lack of agreement by the Charging Party, is sufficient to demonstrate that the severance agreement does not satisfy the requirements of Independent Stave.¹⁴

¹³ This Union interest is not diminished by the fact that the Employer discriminated against Rexford after the Union's organizing activity apparently had ended. The Union's two attempts at organizing the Employer's employees indicate a continuing Union interest in Rexford and his fellow employees. Moreover, it may be argued that the Union's interest in invoking the Board's unfair labor practice procedures to protect employees who choose to ally themselves with the Union is most significant where, as here, the Union's campaign has been unsuccessful and the Union is unable to protect the employees against discrimination through collective bargaining.

¹⁴ Our conclusion does not mean that an agreement executed prior to the filing and investigation of an unfair labor practice charge can never settle the matter. Where the evidence indicates that the parties to a severance agreement have considered the effect of the agreement upon a potential case, the argument for deferral to that agreement is much stronger than where there is no such evidence. In the instant case, there is no evidence that the Employer and Rexford contemplated or intended to settle the future unfair labor practice case. Instead, the parties' failure to even refer to the Act in the agreement, while specifically naming a plethora of other statutes and regulatory schemes, indicates the opposite.

Section 10(b)

We further conclude that Section 10(b) does not bar complaint in the instant case. Section 10(b) bars the issuance of a complaint where "the claimed cause of action rests on pre-10(b) period conduct and it would be necessary to find that that conduct violated the Act in order to hold that the Respondents' post-10(b) activities were unlawful."¹⁵ However, the Board will allow the use of pre-10(b) evidence to show a discriminatory motive for allegedly unlawful conduct occurring within the 10(b) period where the ostensible reasons offered for that conduct are equivocal or shown not to be the real reasons.¹⁶ For example, evidence of animus occurring outside 10(b) is admissible to show a discriminatory reason for a discharge based upon pretextual reasons or disparate treatment occurring within 10(b).¹⁷

In the instant case, Rexford was given his evaluation more than six months prior to the filing of the charge. Therefore, although the evaluation was discriminatory, it may not be attacked as an independent unfair labor practice. However, the Employer was ostensibly continuing to consider Rexford's appeal of his 2000 evaluation into the Section 10(b) period (indeed, until Rexford's termination). In fact, the Employer expressly informed Rexford that his appeal was being considered. The instant charge therefore is timely as to the appeal decision.¹⁸

¹⁵ Steelworkers, Local 1114 (Harnischfeger Corporation), 187 NLRB 22, 23 (1970), citing Machinists Local 1424 v. NLRB (Bryan Manufacturing Co.), 362 U.S. 411 (1960). See also, Food, Drug & Beverage Warehousemen, Local 595 (Certified Grocers of California), 218 NLRB 1286, 1291 (1975), and cases cited therein.

¹⁶ See, e.g., Rikal West, Inc., 266 NLRB 551, 568 (1983), enfd. 721 F.2d 402 (1st Cir. 1983); Stafford Trucking, Inc., 154 NLRB 1309, 1310 (1965), enfd. 371 F.2d 244 (7th Cir. 1966).

¹⁷ Where "the ostensible reasons ... are not the real reasons ... consideration of background evidence for the purpose of seeking an explanation of Respondent's true motive is warranted" Rikal West, 226 NLRB at 568.

¹⁸ The Employer's decision not to act on Rexford's appeal is closely related to the discharge allegation in the charge, because the denial of the appeal was an essential

The Employer's refusal to act on the appeal is completely without explanation, and no lawful basis for this action has even been offered. Since the appeal decision requires further explanation, the pre-10(b) evidence may be considered.¹⁹ As determined by the Region, pre-10(b) evidence clearly establishes that the Employer, for discriminatory reasons and to facilitate Rexford's discharge, failed to act on Rexford's meritorious appeal in order to keep his evaluation rating artificially low and then terminated him on that basis.²⁰

part of the Employer's scheme to terminate Rexford. See generally, e.g., Redd-I, Inc., 290 NLRB 1115, 1118 (1988) (for an allegation to be closely related to the charge's specific allegations, each should involve the "same legal theory" and "arise from the same factual situation or sequence of events," and consideration may be given to "whether a respondent would raise the same or similar defenses to both allegations"); Columbia Textile Services, 293 NLRB 1034, 1036 fn. 13 (1989), enfd. mem. 135 LRRM 2872 (D.C. Cir. 1990) (an otherwise untimely charge allegation may be allowed if the allegations in the amended charge are "similar to, and arise out of the same course of conduct as, those alleged in the timely filed charge").

¹⁹ See cases cited, *supra*, fn. 16.

²⁰ The evidence indicates that everyone in Rexford's department and shift who received his evaluation rating of 22 or below was terminated, and that everyone who received a 23 or higher was retained. [*FOIA Exemptions 2 and 5*

Accordingly, the charge is not barred by the severance agreement or Section 10(b) and the Region may issue complaint concerning Rexford's termination, absent settlement.²¹

B.J.K.

²¹ Since the severance agreement signed by Rexford does not bar the Region from issuing a complaint, it likewise does not bar the Region from seeking reinstatement and backpay for Rexford. See, e.g., Webco Industries, 334 NLRB No. 77, slip op. at 4 (severance agreement "does not preclude us from affording relief" to discriminatee). Of course, the severance pay and benefits Rexford actually received should properly be classified as interim earnings and affect any remedy accordingly. See, e.g., Federal Screw Works, 310 NLRB 1131, 1131 fn. 3 (1993); Houston Building Services, Inc., 321 NLRB 123, 123 fn. 3 (1996).