

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

Advice Memorandum

DATE: February 27, 2004

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: Brisben Development Co., et al.
Cases 8-CA-33018, 33042, 33043,
33044, 8-CA-33078-1,-2,-3, 33129

512-5009-6700

512-5009-6733

512-5009-6767

The Region submitted this BE & K¹ case for advice as to whether the Employer violated Section 8(a)(1) by filing a federal civil rights lawsuit against eight different unions. The Employer filed the suit in response to complaints the unions had filed with the State of Ohio that alleged the Employer had failed to comply with the state's prevailing wage requirements.

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by filing the civil rights suit. The suit was baseless because it was unsupported by facts or law and was retaliatory in that it was baseless and directed at the unions' protected activity of seeking improved working conditions by petitioning a state administrative agency.

FACTS

The State of Ohio awarded Brisben Development Co. (the Employer) the public contract to construct low-income housing, which became known as the Timber Lake Apartments Project, in Avon, Ohio.² As a condition of being awarded

¹ BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002).

² The charges filed in these cases also name Brisben Development, Inc., Timber Lake Apartments, Ltd., and Brisben Timber Lake, Inc. as Charged Parties. The Employer

the public contract as the general contractor, the Employer agreed to pay the residential prevailing wage rate that the Ohio Department of Commerce (ODC) set for each relevant job classification. In August or September 2001, after construction on the project had begun, the Unions filed complaints with the state alleging that the Employer was not paying the state-established prevailing wage rates. The state began investigating the Unions' complaints.

In late October 2001, the Employer filed suit against ODC in federal court for the Southern District of Ohio to counter the State's prevailing wage investigation. The Employer's initial complaint alleged that Ohio Revised Code § 176.05, which sets forth how the prevailing wage rates at public housing projects are established, was unconstitutional "on its face."³ Ohio Revised Code § 176.05 states, in relevant part,

(A) (1) Notwithstanding any provision of law to the contrary, the rate of wages payable . . . to persons employed on a [residential construction] project . . . shall be determined [by the following procedure]. . . . An association representing the general contractors or subcontractors that engage in . . . residential construction in a certain locality shall negotiate with the applicable building and construction trades council in that locality an agreement . . . that sets forth the residential prevailing rate of wages . . . for each of the occupations employed on those projects.

(A) (2) Notwithstanding any residential prevailing rate of wages established prior to July 1, 1995, if, by October 1, 1995, the parties are unable to

established all of these entities for the purpose of building the Timber Lake Apartments Project.

The Charging Parties in these cases include: Bricklayers Local 5, Cement Masons Local 404, Electrical Workers (IBEW) Local 38, Ohio & Vicinity Regional Council of Carpenters, Painters District Council No. 6, Plumbers Local 42, Plumbers Local 495, and Roofers Local 44. These unions will be referred to collectively as "the Unions."

³ A different section of the Ohio Revised Code governs the setting of prevailing wage rates at commercial construction projects funded by public monies.

agree under division (A) (1) of this section as to the rate of wages payable for each occupation . . . the director of commerce shall establish the rate of wages payable for each occupation.

The Employer generally alleged that the statute was unconstitutional and should not be enforced because it improperly delegated to private parties, particularly the Unions, the public function of establishing prevailing wage rates applicable to residential construction projects financed by the state.

The Employer amended its federal complaint in December 2001 and in February and March 2002. In the December 2001 amendments, the Employer for the first time named the Unions as co-defendants. The Employer also added a cause of action under 42 U.S.C. § 1983 that the Unions, who allegedly became state actors when the state delegated to them the authority to set the residential prevailing wage rates, had violated the Employer's civil rights. The Employer asserted that the Unions had deprived it of property without due process of law by setting, and then having the state enforce, prevailing wage rates which exceeded actual market wage rates. The Employer asserted that it was entitled to recover about \$500,000 from the Unions.

In the March 2002 amendments,⁴ the Employer added the allegation that Ohio Revised Code § 176.05 was unconstitutional "as applied." Specifically, the Employer alleged that there was an unconstitutional delegation of authority to the Unions because ODC, without exercising any discretion, adopted as the residential prevailing wage rates those set forth in copies of collective-bargaining agreements submitted by the Unions.

In April 2002, the Unions filed motions to dismiss the allegations against them pursuant to Fed. R. Civ. P. 12(b)(6). The Unions all asserted that because the Employer's complaint had failed to show that they were state actors or had acted under color of state law, which is a prerequisite for finding a private party liable under 42 U.S.C. § 1983, the district court should dismiss the complaint allegations relating to them because the allegations failed to state a claim upon which relief could

⁴ The Employer, in its February 2002 amendments, dropped Roofers Local 44 from the list of Union defendants apparently because the Section 1983 claim was time barred as to that union.

be granted. On September 26, 2002, the district court granted the Unions' motions to dismiss.

In granting the Unions' motions to dismiss, the district court analyzed whether the Employer's complaint allegations established that the Unions were state actors. The court first held that the Employer had not alleged that the Unions had performed any acts pursuant to Ohio Revised Code § 176.05(A)(1) that would render them liable as state actors under 42 U.S.C. § 1983. The Employer had not alleged the existence of the requisite agreement, which is described in subsection (A)(1), for setting the prevailing wage rates. The court stated that the pleadings, construed in favor of the Employer, only alleged that the Unions had submitted to ODC copies of labor contracts they had with other private parties and that ODC treated those contracts as the requisite agreement. The court held that this did not establish that the Unions were state actors because the Employer did not allege how ODC relied upon the Unions' submission of the contracts to establish prevailing wage rates.

The court also held that the Employer had not alleged that the Unions had performed any acts pursuant to Ohio Revised Code § 176.05(A)(2) that would make them state actors. The court applied three different legal tests for finding state action: the public function test, the state compulsion test, and the symbiotic relationship/nexus test. In general, the court concluded that the Employer's complaint was deficient under each test because it only alleged that the Unions were submitting "information" to ODC.⁵ The court found that the complaint did not allege that ODC's director, once presented with the Unions' information, relinquished his statutory authority to set the residential prevailing wage rates.

⁵ The Employer's March 2002 complaint alleged generally that the Unions had submitted "information" to ODC. As stated earlier, the complaint specifically alleged that the Unions had submitted to ODC copies of labor contracts they had with other private parties. The complaint also specifically alleged that the Unions had special access to ODC's website to electronically submit the rates to be posted as the prevailing wage rates. The district court stated that this was the electronic submission of the rates contained in the Unions' privately negotiated labor contracts.

In January 2003, the Employer appealed the court's grant of the Unions' motions to dismiss. By April or May 2003, the Employer had closed its offices and ended all of its business operations, but it had not dissolved or declared bankruptcy. In late June 2003, the Employer voluntarily moved to dismiss its appeal. On July 8, 2003, the Sixth Circuit Court of Appeals issued an Order dismissing the appeal. At some point, SunAmerica Corp., the Employer's limited partner in the Timber Lake Apartments project, satisfied the \$160,000 claim that the State of Ohio had brought against the Employer for failing to pay the residential prevailing wage rates.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by amending its federal complaint to allege a civil rights violation against the Unions. The suit was baseless because it was unsupported in fact or law and was retaliatory in that it was baseless and directed at the Unions' protected activity of seeking to improve working conditions by petitioning a state administrative agency.

In order to find that a completed, unsuccessful lawsuit violates the Act, the following elements normally must be satisfied: (A) the lawsuit must not have been reasonably based in fact or law, and (B) the lawsuit must have been filed with a retaliatory motive.⁶ Both of these elements have been satisfied here.

A. The Employer's Civil Rights Claim Against the Union Was Not Reasonably Based in Fact or Law.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded lawsuit to be an unfair labor practice.⁷ Previously, in Bill Johnson's, the Court had articulated two standards for evaluating lawsuits, one for ongoing suits and one for

⁶ See BE & K Constr. Co. v. NLRB, 536 U.S. at 529-532, 536; Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 744 (1983). Although not relevant here, the BE & K court also suggested that a reasonably based lawsuit could be unlawful if it would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity. 536 U.S. at 536-537.

⁷ 536 U.S. at 527-528.

concluded suits.⁸ For ongoing lawsuits, the Bill Johnson's Court held that the Board may halt the prosecution of the suit if it lacks a reasonable basis in fact or law and was brought for a retaliatory motive.⁹ For concluded suits, the Court held that if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive.¹⁰ Thus, even if a concluded suit had been reasonably based, the Board could find an unfair labor practice if the suit was unsuccessful and retaliatory.

In BE & K, the Court rejected the Bill Johnson's standard for adjudicating whether unsuccessful but reasonably based lawsuits violated the Act.¹¹ The Court reasoned that the standard was overly broad because the class of lawsuits punished included a substantial portion of suits that involved genuine petitioning protected by the Constitution.¹² The Court indicated that the Board could no longer rely on the fact that the lawsuit was ultimately without merit, but must determine whether the lawsuit, regardless of the outcome, was reasonably based.¹³

Because the Court in BE & K did not rearticulate the standard for determining whether a lawsuit is baseless, the standard set forth in Bill Johnson's remains authoritative. Under Bill Johnson's, the Board may go beyond the bare pleadings to determine whether a lawsuit is baseless because it relies on unsupportable facts or unsupportable inferences from facts, and to determine whether the suit presents "plainly foreclosed" or "frivolous" legal issues.¹⁴

⁸ 461 U.S. 731, 747-749 (1983).

⁹ Id. at 748-749.

¹⁰ Id. at 747, 749.

¹¹ BE & K Constr. Co. v. NLRB, 536 U.S. at 532, 536.

¹² Id. at 532.

¹³ Id. at 535-537.

¹⁴ 461 U.S. at 746. The Board's inquiries are subject to certain constraints. For example, the Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge. Nor may the Board usurp the role of the state judiciary in deciding "genuine state-law legal questions." Id. at 744-746.

In doing this, the Board may draw guidance from a summary judgment decision and reject plainly unsupported inferences from the undisputed facts and/or patently erroneous legal arguments.¹⁵

Here, the Employer alleged that the Unions were state actors liable for damages under 42 U.S.C. § 1983 because they had deprived the Employer of property without due process of law. Section 1983 states, in relevant part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

To state a valid claim under Section 1983 against the Unions, the Employer had to show: (1) that the Unions had deprived it of a federal right, either constitutional or statutory, and (2) that the Unions had acted under color of state law.¹⁶ Arguably, the Employer satisfied the first element because under the applicable statute, the Employer would have been required to pay higher wages to the employees represented by the Unions.¹⁷ However, the Employer's claim as to the second element was not reasonably based in fact or law.

Regarding the second element, the Supreme Court has stated that "although . . . the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow . . . that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth

¹⁵ Id. at 745, fn. 11.

¹⁶ See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999); Bacon v. Petera, 772 F.2d 259, 263 (6th Cir. 1985).

¹⁷ The Fourteenth Amendment of the U.S. Constitution states, in relevant part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Amendment requirement of state action.”¹⁸ Thus, the Court established a two-part test to determine when a private party’s conduct is “fairly attributable” to the state.¹⁹ “First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the state. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.”²⁰ Here, the Employer’s claim that the Unions were state actors was both legally and factually baseless.

A private party is not transformed into a state actor merely by recommending to a state institution how it should proceed on a certain matter.²¹ For example, in NCAA v. Tarkanian, the NCAA informed the University of Nevada, Las Vegas that if it did not suspend its basketball coach, Tarkanian, it could face penalties for his violations of NCAA rules.²² The university suspended Tarkanian, and he brought a Section 1983 action against the university and the NCAA alleging that they were state actors that had deprived him of property without due process of law.²³ Tarkanian argued that the NCAA, which is a private entity, was a state actor because the public university had delegated to the NCAA the authority to adopt rules governing the university’s athletic programs and the authority to enforce those rules.²⁴ The Court held that the NCAA was not a state actor, emphasizing that the NCAA could only take adverse action, such as expulsion from the NCAA, against the university itself.²⁵ The NCAA did not have the

¹⁸ Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 fn. 18 (1982). See also American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. at 50 and fn.8.

¹⁹ Lugar v. Edmondson Oil Co., 457 U.S. at 937.

²⁰ Id. at 937, 941. See also American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. at 50.

²¹ See NCAA v. Tarkanian, 488 U.S. 179, 197-198 (1988).

²² Id. at 186.

²³ Id. at 187-188.

²⁴ Id. at 192.

²⁵ Id. at 196-197.

authority to directly discipline an employee of any state university and it could not become a state actor just because it recommended Tarkanian's suspension to the university, which had other options and was not required to carry out that recommendation.²⁶

The rationale of NCAA v. Tarkanian applies to the Employer's claim under both Ohio Revised Code § 176.05(A)(1) and 176.05(A)(2). In its attack on subsection (A)(1), the Employer failed to allege that the local multi-employer association and the local building and construction trades council had entered into the requisite agreement establishing the residential prevailing wage rates. At best, the Employer alleged that the Unions had submitted to ODC copies of labor contracts they had with other private parties and that ODC had treated those contracts as the requisite agreement. However, the Employer failed to allege any facts suggesting that the Unions had any impact on how ODC treated the information. Moreover, applying the rationale of Tarkanian, even if ODC established the prevailing wages based on the Unions' recommendations, that level of participation would not be sufficient to turn the Unions into state actors.

Similarly, the Employer did not allege that the Unions had performed any acts pursuant to Ohio Revised Code § 176.05(A)(2) that would have made them state actors. Subsection (A)(2) gave ODC's director the authority to set residential prevailing wage rates absent the negotiated agreement described in subsection (A)(1). However, as stated earlier, the Employer alleged only that the Unions were submitting copies of labor contracts they had entered into with other private parties and were presenting the wages in those contracts as examples of the relevant prevailing wage rates. The Employer pled no facts indicating either that the Unions were obligated under state law to submit that information or that the state had relinquished its authority to set the prevailing wage rates. In other words, ODC's director remained free to set the prevailing wage rates at the Timber Lake Apartments Project despite the information submitted by the Unions. Thus, as in Tarkanian, while the Unions were submitting

²⁶ Id. at 197-198. See also Siskaninetz v. Wright State Univ., 175 F. Supp.2d 1018, 1025 (S.D. Ohio 2001) (employee of private hospital did not become state actor by providing state university with negative evaluation of plaintiff-student who university then dismissed from its nursing program, because university remained free to use information as it desired).

information to the relevant state agency, the state agency remained free to utilize that information as it desired. Accordingly, there was no factual basis on which the Employer could argue that the Unions were state actors.²⁷

B. The Employer's Civil Rights Claim Against the Unions Was Filed With a Retaliatory Motive.

The Supreme Court's decision in BE & K does not impact the retaliatory motive analysis here because this lawsuit, unlike the suit in BE & K, is baseless. Thus, while the Court in BE & K rejected the Board's standard for finding a lawsuit retaliatory, i.e., because it is "brought with a motive to interfere with the exercise of protected [NLRA §] 7 rights," that holding is limited to cases involving reasonably based lawsuits.²⁸ The Court reasoned that when applied to a reasonably based lawsuit, the Board's standard would condemn genuine petitioning where the suit was directed at conduct that a plaintiff reasonably believed was unprotected.²⁹ Because we are not dealing with a reasonably based lawsuit here, retaliatory motive can be proven from evidence that the lawsuit was baseless.³⁰

²⁷ Cf. Interior Builders, Inc., Case 34-CA-8869, Advice Memorandum dated June 9, 2003 (finding state action prong of Section 1983 claim was reasonably based because plaintiff had alleged sufficient facts to show conspiracy between defendant union and state auditor who previously had served as president of another labor organization with ties to union).

We further conclude that the instant lawsuit, from its inception, was also baseless as to Roofers Local 44, named as a defendant until the Employer removed it from the complaint in February 2002 because its Section 1983 claim was time barred as to that union. Roofers Local 44 had also asserted that it never submitted any information to ODC regarding residential prevailing wage rates.

²⁸ BE & K Constr. Co. v. NLRB, 536 U.S. at 533 (alteration in original).

²⁹ Id. at 533-534.

³⁰ See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. at 747; Petrochem Insulation, Inc., 330 NLRB 47, 50-51 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001); Diamond Walnut Growers, Inc., 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995).

Moreover, a lawsuit aimed directly at protected activity necessarily tends to discourage future protected activity and is, by definition, retaliatory.³¹ Here, the Employer's claim targeted the Unions' protected activity of providing information to and filing complaints with the ODC regarding the residential prevailing wage rates, or the Employer's failure to pay them, at the Timber Lake Apartments Project.³² This further demonstrates that the Employer's claim against the Unions was filed with a retaliatory motive.³³

We would not rely on the Employer's failure to name in its Section 1983 claim other unions and employers not associated with the Timber Lake Apartments Project, but who engage in the process of setting prevailing wage rates for other public housing projects. The Employer would not have been justified in seeking damages from parties who had no relationship to the Timber Lake Apartments Project. Adding those parties would only have made the Employer's claim appear more frivolous.

Finally, we would not assert that the Employer sought punitive damages or that the monetary damages it did seek from the Unions support finding a retaliatory motive. In its complaint, the Employer sought approximately \$500,000 in damages from the defendant Unions as a whole, rather than separately. This figure apparently represented the amount of wages the Employer felt it had overpaid the employees on the project due to the improperly established prevailing wage rates. That figure was not alleged as punitive damages and is not an excessive request for damages given that it applied to the group of all seven unions and that the Employer was found liable for underpaying the employees on the project by \$160,000.³⁴

³¹ Petrochem Insulation, Inc., 330 NLRB at 50.

³² See generally Eastex, Inc. v. NLRB, 437 U.S. 556, 565-567 (1978) (finding that protected activity includes seeking to improve working conditions through resort to judicial, administrative, or legislative forums). See also Petrochem Insulation, Inc., 330 NLRB at 50 (unions petitioning state agencies was protected activity).

³³ See, e.g., Petrochem Insulation, Inc., 330 NLRB at 50.

³⁴ Cf., e.g., Diamond Walnut Growers, Inc., 312 NLRB at 69 (finding that respondent's separate request for \$500,000 in

In sum, the Region should issue complaint, absent settlement, alleging that the Employer's civil rights claim against the Unions violated Section 8(a)(1). [FOIA Exemption 5

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punitive damages in state lawsuit further evidenced retaliatory motive).

³⁵ [FOIA Exemption 5

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