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

Advice Memorandum

DATE: June 19, 2008

TO :	Stephen Glasser, Regional Director Region 7	512-5036-6720-7200 512-5081-1700 512-5081-3300
FROM :	Barry J. Kearney, Associate General Counsel Division of Advice	512-5081-6700 512-5081-7000 512-5082-5000
SUBJECT:	SEIU Healthcare Michigan Case 7-CA-50953	524-3325-1400 524-3325-2100 524-3325-7000 524-3325-9200

The Region submitted this case for advice as to whether an employer violates the Act by conditioning a Section 2(11) supervisor's return to work from a medical leave of absence upon his completion of a questionnaire regarding his participation in the filing of unfair labor practice charges against the Employer and in the Board's investigation of those charges.

We conclude that the Region should amend the existing complaint in this case to allege that, even if the Charging Party is a Section 2(11) supervisor, the Employer violated Sections 8(a)(1) and (4) by refusing to return him to work based upon his participation in the filing and processing of unfair labor practice charges and violated Section 8(a)(1) by coercively interrogating him about his activities related to the filing of unfair labor practice charges.

FACTS

The Charging Party began work for SEIU Healthcare Michigan ("the Employer") in June 2007.[1] The Employer is a labor organization, and the Charging Party is an attorney, hired to handle grievance arbitrations.

In September, the Charging Party contacted the United Steel Workers Union ("the USW") about representing the Employer's employees. The USW began meeting with employees and obtaining authorization cards. Then, on October 2, the USW filed a petition in Case 7-RC-23143, seeking to represent a unit of the Employer's professional and nonprofessional employees. On October 5, the Employer conducted a staff meeting, at which the Employer's president voiced opposition to the USW, in part, because

[1] All dates are in 2007 unless otherwise indicated.

the USW is represented by the same law firm -- Miller Cohen PLC -- that formerly represented the Employer. The Charging Party accused him of committing unfair labor practices by his statement. Later that same day, the Charging Party began a pre-approved medical leave of absence for knee-replacement surgery.

In the meantime, the USW and individual employees filed a series of charges against the Employer in six separate cases. One of these charges, filed by the USW on October 17, named the Charging Party as a discriminatee. [*FOIA Exemptions* 6, 7(C), and 7(D)
.] All of these cases except one resulted in nonsolicited, pre-complaint, adjusted withdrawals; the Region dismissed the remaining charge. Moreover, the USW withdrew its petition in Case 7-RC-23143 as a result of a non-Board settlement.

On November 19, the Charging Party notified the Employer that he could return to work on December 3 with certain restrictions. On November 29, the Employer responded that it was not yet prepared to discuss his return. The Charging Party then notified the Employer on December 3 that he could return to work with no restrictions on his ability to perform his job assignments. On December 17, the Employer informed the Charging Party that it required more information before he could return. In response, the Charging Party filed the initial charge in this case, on December 21. Then, on January 8, 2008, the Employer electronically mailed a questionnaire to the Charging Party stating that his response was required before his "status and request to return to active employment" could be considered. The Charging Party subsequently amended his charge on February 8, 2008 to add allegations based upon the questionnaire.

The Employer contends that the Charging Party is a Section 2(11) supervisor. After determining that the Charging Party is not a Section 2(11) supervisor, on March 27, 2008 the Region issued complaint alleging that: (1) the Employer violated Section 8(a)(1) by coercively interrogating the Charging Party by requiring him to answer questions in the questionnaire about his and other employees' union sympathies and activities and his and other employees' activities relating to the filing of unfair labor practice charges; and (2) the Employer violated Sections 8(a)(1), (3), and (4) by refusing to return the Charging Party to work because of his union sympathies and activities and his participation in a Board investigation.

The Region requests advice as to whether the complaint should be amended to allege that the Employer violated the Act based upon questions 52 through 57 of the questionnaire even if the Charging Party is deemed a Section 2(11) supervisor. Questions 52 through 57 are as follows:

52. Do you admit that SEIU was not aware in December of 2007 that you had supposedly assisted the USW in filing unfair labor practice charges? If denied, set forth in full the basis upon which you assert that SEIU was aware of your supposed involvement.

53. Did you assist the law firm Miller Cohen PLC, or any of its attorneys, in preparing or filing unfair labor practice charges against SEIU and on behalf of the USW or on behalf of any individual other than yourself? If yes, did you volunteer that assistance or was that assistance solicited by representatives of that firm?

54. Did you, while employed by SEIU, encourage any individual or organization to file or pursue claims for damages or any other relief against the SEIU?

55. Did you, while employed by SEIU, encourage any individual or organization to assist any entity or individual in pursuing claims for damages or any other relief against the SEIU?

56. Do you admit that it would be a legal ethics violation for you to have assisted the USW, or any individual, in filing claims against the SEIU while you served as the senior in-house counsel for SEIU?

57. Do you admit that SEIU was not aware in December of 2007 that you had supposedly given testimony in support of a claim before the NLRB? If denied, set forth in full the basis upon which you assert that SEIU was aware of your supposed involvement.

ACTION

We conclude that the Region should amend the complaint to allege in the alternative that, even if the Charging Party is a supervisor under the Act, the Employer violated Sections 8(a)(1) and (4) by refusing to return him to work because of his participation in Board proceedings and violated Section 8(a)(1) by coercively interrogating him in

questions 52 through 57 about his participation in Board proceedings.

The Board ruled in Parker-Robb that supervisors are generally excluded from the protection of the Act, and, therefore, in most circumstances, an employer may discharge a supervisor for engaging in union or concerted activity without violating the Act.[2] Thus, "an employer is generally free to require a supervisor's loyalty to its positions vis-à-vis its employees[.]"[3] On the other hand, in limited circumstances, discipline of a supervisor violates Section 8(a)(1) because it interferes with employees' exercise of Section 7 rights, as when an employer discharges a supervisor for testifying against an employer's interests in a Board or grievance proceeding, for refusing to commit an unfair labor practice, or for failing to prevent unionization.[4] In these circumstances, the Board finds a violation not to protect the supervisor but because of the "need to vindicate" the employees' exercise of Section 7 rights.[5]

At the same time, the Board has held that supervisors are protected under Section 8(a)(4).[6] The Board and the

---

[2] Parker-Robb Chevrolet, Inc., 262 NLRB 402, 404 (1982), review denied sub nom. Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383 (D.C. Cir. 1983).

[3] Pontiac Osteopathic Hospital, 284 NLRB 442, 443, n.6 (1987) (discipline of supervisor for expressing disapproval of management policy that amounted to unfair labor practice was not violative where she was not coerced into violating the law or discouraged from participating in Board procedures).

[4] Parker-Robb Chevrolet, Inc., 262 NLRB at 402-403.

[5] Id. at 403. After Parker-Robb, the Board extended this rationale to find that an employer violates Section 8(a)(1) by disciplining a supervisor in retaliation for his or her relative's independent exercise of Section 7 rights. Advertiser's Mfg. Co., 280 NLRB 1185, 1186 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987); Tasty Baking Co., 330 NLRB 560, 578-581 (2000), enfd. 254 F.3d 114 (D.C. Cir. 2001).

[6] See, e.g., General Services, Inc., 229 NLRB 940, 941-943 (1977), enf. denied mem. 575 F.2d 298 (5th Cir. 1978) (supervisor who files Section 8(a)(3) charge is an

courts have liberally construed the provisions of Section 8(a)(4), recognizing that "if the Board is to perform its statutory function ... its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings."[7] Thus, while Section 8(a)(4) is limited on its face to employees who have filed charges or testified, Section 8(a)(4)'s protections apply as well to applicants and supervisors.[8] Moreover, the scope of Section 8(a)(4) is not limited to the filing of a formal charge and the giving of formal testimony but extends also to the investigative stages of the Board's proceedings.[9] Accordingly, Section 8(a)(4) also protects employees who provide information to the Board in order to assist other employees.[10] As the Supreme Court has noted, Congress

---

"employee" within the meaning of Section 8(a)(4) for the purposes of processing his charge); General Nutrition Center, Inc., 221 NLRB 850, 858 (1975) (employer violated Section 8(a)(4) by discharging supervisor for participating in the filing of a charge and relaying of information to the Board relevant to that charge). See also SNE Enterprises, Inc., 347 NLRB No. 43, slip op. at 26 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007)(collecting cases holding that supervisors are protected under Section 8(a)(4)).

[7] General Services, Inc., 229 NLRB at 941.

[8] Ibid (citations omitted). See also FedEx Home Delivery, Cases 4-CA-33672 & 34189, Advice Memorandum dated May 18, 2006 at 4-8 (authorizing Section 8(a)(1) and (4) complaint based on constructive termination of relationship with joint employer/supervisor for testifying at Board proceeding); Turner Transfer, Case 5-CA-25703, Advice Memorandum dated Apr. 11, 1996 at 2-3 (finding Section 8(a)(1) and (4) complaint warranted because employer constructively discharged independent contractor by reallocating his work after he testified in a representation case).

[9] NLRB v. Scrivener, 405 U.S. 117, 121-125 (1972) (affidavit given to field examiner).

[10] Metro Networks, 336 NLRB 63, 66-67 (2001) (nonassistance and nondisclosure provisions in severance agreement violated Sections 8(a)(1) and (4) by prohibiting employee

adopted Section 8(a)(4) to insure that "*all* persons" with information regarding unfair labor practices will "be completely free from coercion" against providing such information to the Board.[11] This "complete freedom is necessary" because "the Board does not initiate its own proceedings" and enforcement of the Act is entirely dependent upon individuals filing charges and providing evidence.[12]

Consistent with this broad interpretation of Section 8(a)(4), the Board repeatedly has found Section 8(a)(1) violations based upon discipline of supervisors for participation in Board proceedings. Thus, in H.H. Robertson Co., the Board held that an employer violated Section 8(a)(1) by constructively discharging a Section 2(11) foreman for revealing the existence of an unfair labor practice to employees, providing related information to the Board, and assisting employees in utilizing the Board's processes.[13] Similarly, discharge of supervisors for expressing an intent to testify in Board proceedings violates Section 8(a)(1).[14] And, under Parker-Robb, the discharge of a supervisor for testifying against an employer's interests at a Board proceeding violates Section 8(a)(1).[15]

---

from cooperating with Board in investigation and litigation of others' unfair labor practice charges).

[11] Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967) (emphasis added), quoted in Metro Networks, 336 NLRB at 66.

[12] NLRB v. Scrivener, 405 U.S. at 122 (citations omitted).

[13] H.H. Robertson Co., 263 NLRB 1344, 1345 (1982). The Board found it unnecessary to determine whether the discharge also violated Section 8(a)(4). Id. at 1345, n.5.

[14] Oakes Machine Corp., 288 NLRB 456, 457-458 (1988), enfd. in pert. part 897 F.2d 84 (2d Cir. 1990); Orkin Exterminating Co., 270 NLRB 404, & n.5 (1984) (finding it unnecessary to reach the question of whether the discharge also violated Section 8(a)(4)).

[15] See, e.g., SNE Enterprises, Inc., 347 NLRB No. 43, slip op. at 1, 28 (finding it unnecessary to adjudicate Section 8(a)(4) violation where employer found to violate Section

Applying these principles here, we conclude that, for the same reasons that the Region determined that the Employer's refusal to return the Charging Party to work violates Section 8(a)(1) and (4) if he is an employee under the Act, that conduct violates Section 8(a)(1) and (4) even if he is deemed a statutory supervisor. As in H.H. Robertson Co., the Employer here has constructively discharged the Charging Party for revealing the existence of an unfair labor practice charge, assisting employees in utilizing the Board's processes, and providing information to the Board.[16]

We also conclude that the posing of questions 52 through 57 to a statutory supervisor constitutes unlawful interrogation under Section 8(a)(1). Although interrogation of supervisors about union and other protected concerted activities does not violate Section 8(a)(1),[17] we find that interrogation directed to a supervisor's involvement in the filing of unfair labor practice charges and the Board's investigative processes violates Section 8(a)(1) for the same reasons that discipline of supervisors for participating in the Board's processes is subject to Section 8(a)(4). As the Board in Metro Networks and the Supreme Court in Nash v. Florida Industrial Commission stated, *all* persons must "be completely free from coercion" against providing information to the Board.[18]

8(a)(1) by discharging supervisor for testifying adversely to employer's position at objections hearing).

[16] See H.H. Robertson Co., 263 NLRB at 1345. While the Board found it unnecessary to determine whether there was also a Section 8(a)(4) violation in that case, here the Region should nevertheless allege such a violation. See Turner Transfer, Case 5-CA-25703, Advice Memorandum at 3-4, n.7 (authorizing a Section 8(a)(1) and (4) complaint even though the Board has "on occasion" noted that a Section 8(a)(4) finding is unnecessary where the remedy would be the same for a Section 8(a)(1) violation).

[17] See, e.g., Metropolitan Transportation Services, 351 NLRB No. 43 (2007), slip op. at 5.

[18] Metro Networks, 336 NLRB at 66, quoting Nash v. Florida Industrial Commission, 389 U.S. at 238.

Specifically, question 53 directly requests information about the Charging Party's participation in the filing of unfair labor practice charges. Similarly, questions 54 and 55 seek information regarding his assistance in the filing or pursuit of "claims for damages or any other relief" against the Employer; assuming that the Region is prepared to argue that such "claims" include unfair labor practice charges, these questions also directly request information about the Charging Party's participation in Board proceedings.[19] Questions 52 and 57 request admissions that the Employer was not aware that the Charging Party assisted the USW in filing unfair labor practice charges and provided testimony in support of a "claim before the NLRB," or, alternatively, an explanation of his assertion that the Employer was aware of his involvement; these questions therefore also require the Charging Party to discuss his involvement in the filing and investigation of charges. Finally, question 56, requesting an admission that the Charging Party committed an ethics violation by assisting parties in filing claims against the Employer, like questions 52 and 57, implicitly seeks information about the Charging Party's involvement in Board proceedings.

Accordingly, the Region should amend the complaint in this case to allege that, even if the Charging Party is a Section 2(11) supervisor, the Employer violated Section 8(a)(1) and (4) by refusing to return him to work because of his participation in Board proceedings and violated Section 8(a)(1) by coercively interrogating him in questions 52 through 57 about his participation in the filing of charges and in the Board investigation of those charges.

B.J.K.

---

[19] We note that the use of the term "claim before the NLRB" in question 57 supports this interpretation. [*FOIA Exemptions* 2 and 5

.]