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

Advice Memorandum

DATE: September 11, 2006

TO : Victoria E. Aguayo, Regional Director
Region 21

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

SUBJECT: Wayne Jimenez Concrete, Inc. 512-5009
Case 21-CA-37188 512-5036-6729
512-5036-8316
524-5046
712-5028-7500

The Region submitted this case for advice on whether the Employer violated Section 8(a)(1) and (3) of the Act when, because of an employee's pro-Union activities, the Employer's supervisor evicted him from an apartment building the supervisor, as opposed to the corporate Employer, individually owned. [*FOIA Exemptions* 2 and 5 .]

We conclude that the supervisor was acting as the Employer's agent when he evicted the pro-Union employee and that the Employer, based on that conduct, violated Section 8(a)(1), but not Section 8(a)(3). [*FOIA Exemptions* 2 and 5 .]

FACTS

I. Background

Wayne Jimenez Concrete, Inc. (the Employer) hired Luis Garcia in 1989 to work as a day laborer in Riverside, California. After he began working, Garcia moved into an apartment building owned by the Employer's supervisor, Jose Jimenez. The building, which contains four apartments, is located just under three-quarters of a mile from the Employer's facility. Garcia did not sign a lease, and initially paid $100 per month in rent.

When Garcia first moved into the apartment building, he lived in a unit occupied by his father, who also worked for the Employer, and 28 other individuals consisting of employees and their families and friends. At the time, another unit in the building was similarly occupied by a mix of Employer employees and their families and friends and the remaining two units were occupied by non-employees.

During Garcia's tenancy in this building, a majority of the building's occupants worked for the Employer.[1]

By about 1993, all of the other tenants had vacated the unit Garcia lived in, leaving only Garcia and his wife and stepdaughter as tenants. Garcia's rent had increased to $300 or $350 per month. After one more rent hike in about 1995, it did not change until about 2004, when it increased to $500 per month. Throughout Garcia's tenancy in the unit, the Employer automatically deducted his rent from his weekly paycheck.

II. Garcia's Discharge and Eviction

On October 31, 2005, Southern California District Council of Laborers (the Union) presented the Employer with a Union authorization petition signed by the Employer's employees.[2] Supervisor Jose Jimenez (hereinafter Jose) called Garcia into his office and showed him a copy of the petition. Jose asked if Garcia had signed the petition and Garcia responded that he had. Jose then stated,

> You're a [expletive] wetback that has no rights in this country. You're an ungrateful dog. You don't even have a license. After all I've done for you. You've been terminated immediately and you must also leave my apartment. Go ahead and tell your lawyers everything I've said. I have enough money to buy them out. You've been terminated so fill out your timecard and leave.[3]

After this exchange with Garcia, Jose conducted a mandatory meeting with the rest of the employees. During that meeting, Jose interrogated employees about their Union activities, implied that continued employment was conditioned on abandoning support for the Union, threatened employees with discharge because of their Union support, threatened employees with plant closure if they continued to support the Union, and physically assaulted one employee.

---

[1] Garcia believes that Jose Jimenez offered vacant units to the Employer's employees before offering them to non-employees because he occasionally heard Jose offer vacant units to employees while at work.

[2] All subsequent dates are 2005 unless otherwise indicated.

[3] Employee Ismael Santillan overhead this conversation and corroborated Garcia's account of what Jose said.

After the mandatory meeting, Jose approached Garcia as he was filling out his timecard in the yard. When Jose asked Garcia if he had finished, Garcia said that he had and that he was making a copy. When Jose asked if the copy was for Garcia's attorney, Garcia replied yes. After Garcia handed Jose his timecard, Jose asked if Garcia was drunk. Garcia said no and that Jose could test him. Jose said it was not necessary and then walked behind some equipment and pulled out beer cans. Jose asked Garcia if the beer was his, and Garcia said it was not. Jose then replied,

> Anyway, you've been terminated and I want you to leave my apartment. I want you to leave my apartment you [expletive] wetback. And for being a [expletive] wetback, I'm not going to pay you anything, because you have no rights. You owe me a lot of favors, because I've helped you out by getting you a job.

Jose continued, "I'm not going to pay you anything for being a [expletive] wetback. Leave my yard or I'll put the police on you." Jose then pushed Garcia out of the yard. As Garcia departed, Jose said, "Don't worry I'll fire you one by one because I don't want ungrateful [expletive] wetbacks at my company."

After his discharge, Garcia continued to live in his apartment. On about November 8, Garcia received by mail a document entitled, "60-DAY NOTICE TO TERMINATE TENANCY." The next day, Garcia met with Jose's wife, Grace Jimenez, in her office and stated that he had received the 60-day notice and that he had $500 cash with him to pay the rent. Grace said that she could not take his money. When Garcia asked why not, she told him to speak with Jose.

Garcia called Jose and explained that he went to see Grace to pay the rent, but that she would not accept his money. Jose said, "I don't want you to pay me the rent, I want you to leave for being with the [expletive] Union." When Garcia requested that Jose "give me a chance because my wife is sick," Jose replied, "Go to the Union so that they can rent you an apartment," and hung up. Garcia tried to contact Jose on two other occasions to discuss his eviction from the apartment, but could not reach him.

On about December 2, Grace Jimenez filed a "3 DAY NOTICE TO PAY RENT OR QUIT," which stated that Garcia owed $500 in rent (his monthly amount) for December 1 to 31. Garcia does not remember being served with this notice but, in the first week of December, an unidentified person handed Garcia a copy of the 60-day notice. On the same

day, Garcia told Union Organizer Ramirez about the 60-day notice. Ramirez said that he would look at it at the next Union meeting.

In the second week of December, Garcia attended the Union meeting and Ramirez reviewed the 60-day notice. Ramirez told Garcia not to worry about it, that he would not be evicted, and that he would take Garcia to the courthouse so that they could ask for a three-month extension.

On about December 12, Jose filed an unlawful detainer complaint against Garcia in Riverside County Superior Court.[4] The complaint alleged that although Garcia was still residing at the apartment, he had failed to pay rent. It requested "possession" of the premises and that Garcia be required to pay $500 for December's rent, $16.67 for each day Garcia remained in possession beyond December 31, and reasonable attorney's fees.[5]

On about December 16, Garcia and Union Organizer Ramirez filed an answer to the complaint. Garcia allowed Ramirez to fill out the answer form because he believed Ramirez knew what he was doing. Ramirez checked a box on the form stating that Garcia admitted all of the statements of the complaint were true, including that Garcia had been delinquent in paying rent. Although Ramirez failed to check the box under "affirmative defenses" for "offered the rent due but plaintiff would not accept it," he did check the box for "other affirmative defenses" and wrote "wife is extremely sick and eviction comes as retaliation from owner who was also Employer." Garcia admits that he did not read the answer before he signed it.

On about January 9, 2006, Garcia attended his unlawful detainer hearing and Union Organizer Ramirez acted as his interpreter. Also present were Jose and Grace Jimenez and their attorney. When the hearing began, the Jimenez's attorney stated that Garcia owed $1,200 and had to vacate

---

[4] An unlawful detainer action is a special court proceeding that allows for legal eviction. The proceeding usually occurs when a tenant remains in possession beyond lease expiration or cancellation. If successful, the landlord will obtain a "judgment of possession" requiring the tenant to vacate the apartment. The judgment can be enforced by the local sheriff.

[5] The $16.67 figure represents the $500 monthly rent prorated on a daily basis.

the apartment.[6] After the judge asked Garcia if he wanted to pay the requested amount, Garcia replied that he did not have the money. Jose then told the judge that he did not want any money from Garcia and that he only wanted Garcia to leave the apartment. The judge stated that he did not understand what was going on but concluded that Garcia owed the Jimenez's $1,200. The judge also stated that he felt bad that Garcia's wife was sick, but that Garcia had nine days to vacate the apartment.

On about January 18, 2006, Garcia and his family left the apartment and moved in with Garcia's father, who lives in Riverside, California. After about three weeks, because of insufficient space, Garcia's wife and stepdaughter moved to stay with her brother in Stockton, California. Garcia still lives with his father and pays him $300 per month in rent. Garcia's brother currently works for the Employer and has moved into Garcia's old apartment.

III. Related Unfair Labor Practice Case

On May 22, 2006, the Region issued a consolidated complaint against the Employer in Cases 21-CA-37072, et al. The allegations in that complaint stem from the Employer's unlawful response to the Union organizing campaign, including Jose's interrogations of and threats to employees during the mandatory meeting at the Employer's facility on October 31. The complaint alleges that the Employer violated Section 8(a)(3) by discharging Garcia and two other employees, and by laying off three additional employees. The trial for those consolidated cases currently is scheduled for October 30, 2006.

ACTION

We conclude that Jose Jimenez acted as the Employer's agent when he evicted Garcia and that the Employer therefore violated Section 8(a)(1), but not Section 8(a)(3). [*FOIA Exemptions* 2 and 5 .]

I. Supervisor Jose Jimenez Acted as the Employer's Agent in Seeking and Obtaining Garcia's Eviction

[6] The exact amount that the Jimenez's sought was $1,186.03, which represents $500 in rent for December, $150.03 in rent for the first nine days in January 2006, and $536 for attorney's fees and other costs.

In Teamsters Local 670 (Stayton Canning), the Board held, among other things, that an independent pharmacy and medical clinics were agents of the respondent-union.[7] The parties' contract required the employer to contribute to a trust fund that provided qualified employees with health insurance coverage that they were free to use with any service provider. The union rented office space in the same building as a pharmacy, dental clinic, and eye clinic that were open to the general public and used by union members. The pharmacy and clinics were separate legal entities from the union, but the union's executive board and the board of directors for the three businesses were the same.[8]

During contract negotiations, the union called a strike but many members crossed the picket line and asked the union to make them financial core members.[9] Shortly after reaching a new contract and "non-discrimination" strike settlement, the union's executive board voted to deny financial core members services at the pharmacy and clinics. The same group of individuals, now sitting as the board of directors for the pharmacy and clinics, then voted to refuse to provide services to financial core members.[10] When actually refusing to provide services, the pharmacy and clinics explained that they had received orders from the union to deny services to financial core members.[11]

In holding that the pharmacy and clinics were union agents when they refused to provide services, the Board agreed with the ALJ's reliance on the following factors: (1) the three businesses, although not owned or operated by

---

[7] 275 NLRB 911 n.2, 914-15 (1985), enfd. 856 F.2d 1250 (9th Cir. 1988).

[8] Employees covered by the parties' contract who used this pharmacy had no out-of-pocket costs because it accepted the trust fund's 90% co-payment as payment in full. If employees had used any other pharmacy, they would have had to pay the additional 10% for their medications. Also, in contrast to other service providers, the two clinics billed the trust fund for services and only required covered employees to pay a minimal co-pay, rather than make them pay the full amount and wait for reimbursement from the fund. Id. at 914 & n.2.

[9] Id. at 913.

[10] Id.

[11] Id. at 915.

the union, were held out to the public as the union's businesses, (2) the same individuals served on the union's executive board and the board of directors for the three businesses, (3) the policy of refusing to service financial core members did not benefit the businesses, only the union, (4) the union's top official indicated to the employer that he could affect the pharmacy's business policy, (5) the pharmacy would provide services to financial core members when instructed to do so by the union's office manager, and (6) pharmacy and clinic employees explained to those being denied services that it was based on instructions from the union.[12] Thus, because the pharmacy and clinics were agents of the union, the union violated Section 8(b)(1)(A) by breaching the strike settlement and discriminating against financial core members in a way that tended to coerce their exercising the Section 7 right to refrain from being full union members as opposed to remaining financial core members.[13]

The same factors relied upon to find an agency relationship between distinct legal entities in Stayton Canning are present here. First, although the corporate Employer did not own the apartments, it automatically deducted Garcia's rent from his weekly paychecks. Thus, the Employer held itself out to Garcia as being involved in the administration of the apartment building. Further, Garcia testified that Jose occasionally offered vacant units to employees while at work. Second, as with the interlocking directorate in Stayton Canning, Jose was a common decisionmaker for both the Employer and the apartment building, showing that the Employer's interests could be served in how the apartments were managed. Third, and perhaps most important, it is clear that Jose evicted Garcia solely to further the Employer's anti-Union campaign. Jose's comments on October 31 made clear that but for Garcia's support for the Union, he would not have been evicted from the apartment.[14] Unlike the Employer,

---

[12] Id. at 914-15.

[13] Id. at 911 n.2, 916-17, citing General Motors Corp. v. NLRB, 373 U.S. 734, 742 (1963).

[14] The Employer asserts that Jose only sought to evict Garcia because, as Garcia admitted in the state court unlawful detainer action, he failed to pay rent. This defense is without merit. The evidence shows that on November 8, Jose would not accept Garcia's rent payment solely because he supported the Union's campaign to organize the Employer's workforce. Thus, the Employer, through its agent, sought to evict Garcia solely because of his pro-Union activities.

Jose received no benefit as a landlord from evicting Garcia, who had never been late paying rent because the Employer automatically deducted it from his weekly paycheck.[15] Based on these factors, we conclude that Jose acted as the Employer's agent in evicting Garcia from his apartment because of his support for the Union.

II. The Employer, by the conduct of Supervisor Jose Jimenez, Violated Section 8(a)(1) by Seeking and Obtaining Garcia's Eviction Because He Engaged in Union Activity

In Kohler Co., the Board explicitly affirmed the ALJ and held that the employer violated Section 8(a)(1) by serving eviction notices and evicting striking employees who leased rooms in a hotel operated by the employer.[16] The hotel was located across the street from the employer's plant. Occupancy was not limited to employees, employees were not required to reside there, and employees received no preferential treatment, such as lower rent, in comparison to non-employee tenants.[17] After the strike began, the employer served eviction notices only on the eight strikers residing at the hotel, and physically evicted two who did not comply, to make room for active employees.[18] The employer did not seek to evict any of the non-employee tenants and the strikers were not singled out because they had failed to pay rent.[19] Based on these facts, both the ALJ and the Board concluded that residence at the hotel was not a term or condition of employment because, in short, it did not depend on working for the employer. Non-employees were equally likely to reside at the hotel and employees were not charged less rent due to their status as employees. Thus, the employer did not

---

[15] See also Service Employees Local 1-J (Shor Co.), 273 NLRB 929, 930-31 (1984) (contractually created trust fund's action of suspending benefits of decertification petitioner attributable to union because suspension did not serve fund's interest, but did serve union's interest).

[16] 128 NLRB 1062, 1092-93, 1186-89 (1960), enfd. in relevant part 300 F.2d 699, 701 (D.C. Cir. 1962), cert. denied 370 U.S. 911.

[17] Id., 128 NLRB at 1186.

[18] Id. at 1186-87.

[19] Id.

violate Section 8(a)(3).[20] However, because the employer had singled out strikers for eviction, and thereby unlawfully restrained their right to strike, it did violate Section 8(a)(1).[21] The Board noted that in any event, the remedy would be the same under Section 8(a)(1) or 8(a)(3).[22]

The facts of Kohler are very similar to those here. Although Jose's apartments were located near the Employer's facility, there is no evidence that employees were required to live there or that occupancy was limited to employees. Indeed, it appears that since Garcia moved into the apartment building in 1989, non-employees regularly leased one of more of the four units in the building. Moreover, there is no clear evidence that employees were given preferential treatment over non-employees, either because non-employee residents were charged higher rent than employee tenants or because the Employer had an established policy of first offering vacant units to its employees.[23] Therefore, we conclude that leasing an apartment from Jose was not a term or condition of employment within the meaning of Section 8(a)(3). However, as in Kohler, we conclude that the Employer, through Jose's conduct, interfered with Garcia's Section 7 rights in violation of Section 8(a)(1) by evicting him from his apartment because

---

[20] Id. at 1092, 1188.

[21] Id. at 1188-89. See also L.J. Williams Lumber Co., 96 NLRB 635, 635-36 & n.2 (1951), supplementing 93 NLRB 1672, 1676, 1690 (1951) (where complaint failed to plead 8(a)(3) violation, Board found 8(a)(1) violation when employer evicted employee from employer-managed house because of his pro-union activities), enfd. 195 F.2d 669 (4th Cir. 1952).

[22] See Kohler Co., 128 NLRB at 1093, n.53. The ALJ also held that the employer had violated Section 8(a)(3) by evicting striker Faas from a house that he had leased from the employer. The ALJ based his conclusion on a clause in an expired lease that stated Faas' tenancy was based on his working for the employer. Id. at 1189. The Board reversed and held that the employer had violated only Section 8(a)(1) by evicting Faas. The Board reasoned that Faas' residency was not a term or condition of employment because the new lease did not contain the old clause and the evidence failed to show that Faas was given preferential treatment, such as lower rent, due to his status as an employee. Id. at 1092-93.

[23] Garcia merely stated that he believed the Employer had such a policy because he recalled occasions when Jose had offered vacant units to employees while at work.

he had engaged in pro-Union activities. And, as in Kohler, finding a Section 8(a)(1) violation rather than a Section 8(a)(3) violation does not alter the remedy we authorize below.[24]

The preceding analysis is consistent with the Board having occasionally held that an employee's ability to lease employer-owned housing is a term or condition of employment. However, the lease arrangements there constituted a "valuable incident of the employer-employee relationship"[25] or an "emolument of value."[26] Thus, in those cases the tenants of the employer's housing had access to those properties solely as a result of the employment relationship. For instance, in Florida Citrus Canners Cooperative, only employees or their families were permitted to rent company-owned housing.[27] In American Smelting & Refining Co., the employer constructed a company town near its remote mine operation that was inhabited almost exclusively by employees.[28] Finally, in Lehigh Portland Cement Co., the ALJ concluded that the

---

[24] Although the Region also questioned whether the Employer violated Section 8(a)(1) because Jose, its agent, initiated the state court unlawful detainer action against Garcia, finding such a violation would not add to the requested remedy. Therefore, we need not reach the issue.

[25] Florida Citrus Canners Cooperative, 124 NLRB 1182, 1182 (1959) (finding 8(a)(3) violation where employer evicted or attempted to evict striking employees from company-owned housing), enf. denied on other grounds 288 F.2d 630 (5th Cir. 1961), revd. NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962); American Smelting & Refining Co., 167 NLRB 204, 204 n.1, 211 (1967) (finding rental rates of company-owned housing was mandatory bargaining subject and that employer unlawfully refused to bargain over those rates), enfd. 406 F.2d 552 (9th Cir. 1969).

[26] See Lehigh Portland Cement Co., 101 NLRB 529, 529 n.2, 536 (1952) (finding rental rates of company-owned housing was mandatory bargaining subject and that employer unlawfully refused to bargain over those rates), enfd. 205 F.2d 821 (4th Cir. 1953).

[27] See 124 NLRB at 1182, 1210.

[28] See 167 NLRB at 205-06. The only non-employees were five or six individuals, including a minister, barber, and grocery store clerk, who serviced the town's needs. Id. at 206.

circumstances, including nominal rents and the short supply of housing near the employer's plant, "necessarily obliged" employees to lease company-owned housing.[29]

In contrast to the preceding cases, it is not clear here that the ability to rent an apartment from Jose stemmed solely from an employment relationship with the Employer. Although the automatic deduction of rent from employee paychecks clearly is a benefit of employment, the issue here is whether the tenancy itself is a term or condition of employment. We do not believe that the proximity of the apartments to the Employer's facility or their availability to other employees is sufficiently analogous to situations where the Board held that the lease of company-owned housing was a term or condition of employment. [*FOIA Exemptions* 2 and 5

.[30]

III. [*FOIA Exemptions* 2 and 5 .]

[*FOIA Exemptions* 2 and 5

.[31]

]

---

[29] See 101 NLRB at 536.

[30] [*FOIA Exemptions* 2 and 5

.]

[31] [*FOIA Exemptions* 2 and 5

.]

[*FOIA Exemptions* 2 and 5, cont'd. .[32]

.][33]

B.J.K.

---

[32] [*FOIA Exemptions* 2 and 5

.]

[33] [*FOIA Exemptions* 2 and 5

.]