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

Advice Memorandum

DATE: April 24, 2007

TO : Helen Marsh, Regional Director
Region 3

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

SUBJECT: DCS Sanitation Management
Case No. 3-CA-25904

This case was submitted for advice on whether DCS Sanitation Management, Inc. (DCS or the Employer) violated the Act when it made an unsolicited call to Tyson Foods, Inc. (Tyson) advising Tyson that DCS had previously terminated Manuel Rama-Valdez (Rama) for misconduct, causing Tyson to terminate Rama. The case was also submitted for advice on whether the Region may use evidence relating to Rama's prior discharge from DCS for evidentiary purposes in litigating the present charge.

We conclude that the Employer violated Section 8(a)(1) of the Act by calling Tyson and causing Tyson to terminate Rama because he had engaged in union activity while employed by the Employer. Further, we conclude that Section 10(b) does not prohibit the Region from using facts surrounding Rama's employment with the Employer as background evidence in the litigation of the current unfair labor practice charge. Therefore, absent settlement, the Region should issue complaint against the Employer for causing Tyson to discharge Rama based on his union activity while employed by the Employer.

FACTS

The Employer is a national sanitation management company that provides services to Tyson throughout the country, including Tyson's plant in Buffalo, New York, the only facility involved herein. The Employer's managers and employees perform their cleaning services in the Tyson plant, also occupied by the Tyson staff. The service contract between the Employer and Tyson contains two clauses that are relevant to this matter. One clause forbids either party from hiring anyone who has left the other's employment within the prior six months. The second clause forbids either party from ever hiring anyone who has been terminated by the other for misconduct. The contract does not define the term misconduct.

The Region's investigation revealed that the motive behind the Employer's decision to contact Tyson and cause Rama's termination stems from Rama's involvement in a 2005

Teamsters Local 264 (the Union) organizing campaign at DCS. Rama supported the Union throughout the organizing campaign by attending union meetings, speaking favorably of the Union and serving as the Union's observer during the July 21, 2005 election. The campaign concluded with the Union's victory in the election. Events occurring on the night of the election led directly to Rama's termination, which was the subject of an earlier unfair labor practice charge (3-CA-25499).

On the night of July 21, 2005, the union election concluded between 12 and 12:30 a.m. and Rama began working his shift at that time; however, Rama had clocked-in at 9 p.m. when he arrived at the plant to serve as observer. After Rama left the polling area, his supervisor Mike Tagliareno began following him around the plant waving Rama's time card and yelling at him regarding his start time. Rama approached the Employer's Spanish speaking supervisor, Adolpho Rodriguez, to complain about Tagiareno's behavior. Rama also told Rodriguez that he was not feeling well and wanted to leave work. Rodriguez gave him permission to leave and he left. Rama returned to the plant on July 22, 2005, and met with Tagliareno and Rodriguez who told him he was terminated because of last night.[1]

The Union filed a charge on Rama's behalf, and the Region found merit to the allegation that DCS had unlawfully discharged Rama for his union activity and issued a Section 8(a)(1) and (3) complaint.

On December 23, 2005, prior to trial, the Employer and Rama reached a non-Board settlement, which included withdrawal of the charge. The non-Board settlement

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[1] The Employer presents a much different account of the events on July 21, 2005. Tagliareno claims that he merely said to Rama that he would not be paid for the three hours he acted as election observer. Further, Rodriguez denies giving Rama permission to leave. The Region would credit Rama based on corroborating testimony by a co-worker. Rodriguez also alleges that after leaving, Rama met with a union representative and made obscene gestures that Rodriguez observed from the lot's security cameras. However, Rama states that he made the obscene gestures on July 22, 2005, after he was discharged. [*FOIA Exemptions* 6, 7(C), and 7(D)] corroborates that he and Rama met on July 22, 2005, and Tagliareno corroborates [*FOIA Exemptions* 6, 7(C), and 7(D)] that the obscene gesture occurred on July 22, 2005.

provided that Rama waive his right to reinstatement. The settlement also acknowledged that both parties "have negotiated a full settlement of all actual and potential, known and unknown, disputes between the Employer and Rama relating to any and all conduct by the Employer prior to the date of this Agreement, including but not limited to disputes arising out of or relating to Rama's employment with the Employer or the cessation of that employment" (Settlement Recital Part B). As consideration for this waiver, Rama received $7,700. The settlement does not require that Rama's termination be expunged from his employment record or that the Employer be required to provide a neutral reference to prospective employers.

On March 11, 2006, Rama applied for and gained employment with Tyson. During his shift on March 14, 2006, Rodriguez and other employees of the Employer became aware that Rama was now employed by Tyson. Rodriguez then contacted the Employer's corporate headquarters and informed human resource officials that Rama was employed by Tyson and working on the plant premises. On the morning of March 15, 2006, a DCS supervisor approached [*FOIA Exemptions* 6, 7(C) and 7(D)], Tyson's plant manager, and reported his suspicion that Tyson was contractually prohibited from employing Rama.

Shortly thereafter, Tom Murray, the Employer's president, also contacted Tyson's plant manager. Murray informed [*FOIA Exemptions* 6 and 7(C)] that the Employer had fired Rama for misconduct during the summer of 2005, and stated that Tyson had violated the service contract by hiring him. [*FOIA Exemptions* 6 and 7(C)] then reviewed the service contract and verified that it prohibited Tyson from employing anyone that the Employer had terminated for misconduct.[2] Rama was discharged from Tyson on March 16, 2006.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by calling Tyson and causing Rama's discharge for his union activity during his employment with the Employer. We also conclude that the waiver clause in the non-Board settlement agreement does not preclude the Region from litigating the instant charge. Finally, we conclude that Section 10(b) does not bar the Region from using facts relating to Rama's prior employment with the Employer to

[2] [*FOIA Exemptions* 6, 7(C), and 7(D)] he nothing of Rama's union activity or the prior NLRB charge.

demonstrate unlawful motive in the current unfair labor practice litigation.

Initially, we agree with the Region that there is sufficient evidence to demonstrate that the Employer called Tyson and sought Rama's termination in retaliation for his earlier union activity. First, it is well-established that Rama played a visible role of union supporter during the organizing campaign. Second, the timing of the termination, one day after the union won the election, supports an inference of unlawful motive. Third, the Employer explains Rama's termination as a result of his leaving the plant on July 21, 2005 without his supervisor's permission; however, Rama insists he had permission to leave and Rama's position is corroborated by a co-worker. Fourth, the Employer asserts that Rama's poor work history, including multiple instances of similar conduct, led to Rama's termination; however, during his employment, Rama suffered no discipline for such conduct and was promoted to "lead person," which is the highest non-supervisory position at DCS. Fifth, the Employer asserts that Rama's obscene gestures toward the security cameras occurred on July 21, 2005 and also contributed to the decision to terminate; however, both Rama and Tagliareno, a DCS supervisor, testified that any such gesture occurred on July 22, 2005, after his termination. Sixth, the Employer made an unsolicited call to Tyson, and misrepresented that Rama was terminated for "misconduct" such that hiring Rama constituted a breach of the service contract, when in fact Rama was terminated for his union activities. Finally, the Employer's decision to contact Tyson was discriminatory and unprecedented, as the Employer acknowledges that some of its terminated employees subsequently went to work for Tyson within the same plant and DCS never before contacted Tyson to discuss the applicability of the service contract.[3] Considering all the above factors, the evidence

[3] The Employer asserts that none of these individuals had engaged in "misconduct." The Region's investigation revealed that one of the former employees whom Tyson hired had been fired by DCS for failing to follow the lock-out tag-out procedure and that Tyson was never contacted. The Employer has asserted that such conduct was not "misconduct." On another occasion, however, the Employer successfully opposed another terminated employee's unemployment compensation claim by asserting that the failure to abide by the lock-out tag-out procedure constituted "misconduct."

demonstrates that the Employer's motive for calling Tyson was Rama's union activity.

An employer violates 8(a)(1) by directing another employer with which it has business dealings to discharge or otherwise affect the working conditions of the latter employer's employees because of their union activity.[4] In Dews Construction,[5] the Board considered a fact pattern similar to that presented in the instant case and held that the employer violated Section 8(a)(1). There, Ezekial Davis, sole proprietor of East Star, signed a contract to perform painting services for Dews Construction. Elliot Schneider, president of Dews, told Davis at the time of the contract negotiation that the job was non-union. During the job a local union staged an organizing campaign at the Dews' worksite and two of Davis' workers attended the union meeting. A Dews supervisor witnessed and reported the workers' attendance to Schneider and to Davis, telling Davis that "You better remember how your contract was written,"[6] referring to the non-union language. The Board found Dews' conduct in violation of 8(a)(1).

Here, the Employer contacted Tyson because of Rama's union activity and implicitly directed Tyson to discharge Rama. Thus, the repeated references to the breach of the service contract coupled with the misrepresentation that Rama was terminated for "misconduct" was tantamount to DCS directing Tyson to terminate Rama. Since the Employer contacted Tyson and put Tyson on notice of Rama's "misconduct" in retaliation for his union activity, and this caused Tyson to terminate Rama, that conduct violated Section 8(a)(1).

Although the non-Board settlement agreement signed by Rama included a waiver of the right to file new charges "arising out of or relating to Rama's employment with DCS or the cessation of that employment," and the Board follows a general policy of deferring to waiver provisions in non-Board settlement agreements,[7] that policy will not preclude

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4 Dews Construction Corp., 231 NLRB 182, n. 4 (1977); Holly Manor Nursing Home, 235 NLRB 426, 428, n. 4 (1978); see also, Black Magic Resources Inc., 312 NLRB 667 (1993).

5 231 NLRB 182 (1977).

6 Id.

7 See e.g., First National Supermarkets, 302 NLRB 727, 727-28 (1991).

the Region from litigating the instant charge. The Board has suggested that any release expressly waiving the employee's future rights to file charges relating to events occurring after the signing of a settlement agreement would be unlawful.[8] And, the Board will interpret language that is ambiguous as to duration to give it a lawful interpretation. Thus, in First National Supermarkets,[9] where the waiver regarding future charges "arising out of [the individual's] total employment...and termination"[10] could have been interpreted to bar future claims, the Board interpreted it as only barring claims stemming from conduct that occurred prior to the signing of the agreement. It specifically concluded that the release did not bar a future charge based on an unlawful recommendation to a prospective employer because such a charge would involve conduct subsequent to the release.[11]

The DCS settlement agreement includes an ambiguous general waiver of Rama's right to sue DCS, which is similar to the First National provision. Applying First National, the Board will interpret the waiver language as exclusively relating to events occurring prior to the signing of the agreement. Interpreted in this manner, the waiver would be valid and the Board would defer to it. However, such a waiver would have no bearing on the instant charge because it attacks conduct that DCS committed after signing the agreement.

Finally, in litigating the 8(a)(1) violation, Section 10(b) will not bar the Region from using evidence surrounding Rama's July 2005 discharge.[12] In Bryan

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[8] Coca-Cola Bottling Co., 243 NLRB 501, 502 (1979); see also, Construction and General Laborers, Local 304, 265 NLRB 602, 606-07 (1982).

[9] 302 NLRB 727 (1991).

[10] Id. at 727.

[11] Id. at 728.

[12] Rama filed the current unfair labor practice charge on June 7, 2006, nearly 11 months after his discharge from the Employer.

Manufacturing,[13] the court held:

> Occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose, Section 10(b) ordinarily does not bar such evidentiary use of anterior events.[14]

In determining whether evidence may be admitted under the Bryan Manufacturing rule, the Board must determine whether the General Counsel is attempting to litigate the prior events as violations/necessary elements of a violation, or is merely relying on such events to shed light on an Employer's motivation regarding a more recent incident.

In Grimmway Farms,[15] a case factually similar to the instant case, the Board found that the evidence regarding a pre-10(b) event was admissible to shed light on the unlawful motivation behind the second act. On Memorial Day 1990, the employees of Grimmway Farms walked off the job because the employer had refused their demand of increased wages for working the holiday. The employer unlawfully terminated all the employees and deemed them ineligible for rehire in each of their employment files. None of the employees filed an unfair labor practice charge at the time of termination. During the last six months of 1991, Grimmway Farms began hiring and many of these former

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[13] 362 US 411 (1960).

[14] 362 US at 416-17; see e.g., Kaumagraph Corp., 316 NLRB 793, 794 (1995) (statements made more than six months prior to filing of charge not alleged as violations of the Act, but proffered as background evidence shedding light on respondent's motivation in relocating unit work); Grimmway Farms, 314 NLRB 73, 74 (1994) (under 10(b) the Board may not give controlling weight to events outside six month period; however, evidence as to such events may be considered as background to shed light on a respondent's motivation for conduct within the 10(b) period); 3 State Contractors, Inc., 306 NLRB 711, 716 (1992).

[15] 314 NLRB 73 (1994).

employees applied for rehire.[16] All were denied rehire based upon their earlier work stoppage and the note in their files deeming them ineligible for rehire. The Board permitted the inclusion of evidence regarding the legality of the prior terminations because it shed light on the employer's motivation for the failure to rehire within the 10(b) period.[17]

Here, as in Grimmway, the Region does not seek to litigate Rama's unlawful discharge, but rather seeks to introduce evidence surrounding the discharge to "shed light" on the motive underlying the later attempt to secure Rama's discharge by the Employer. All conduct alleged to be unlawful – i.e., the Employer's call to Tyson, referencing a breach of the service contract and misrepresenting that Rama had been terminated for misconduct - occurred within the 10(b) period. Moreover, the prima facie case does not depend solely on evidence of motive from outside the 10(b) period.[18] Thus, within the 10(b) period, there is evidence of pretext in that the call to Tyson was unprecedented and inconsistent with the Employer's treatment of other similarly-situated former employees. In these circumstances, it is appropriate that evidence relating to events outside the 10(b) period be admitted as background evidence to "shed light" on the true character of matters related to the instant charge.

Accordingly, absent settlement, the Region should issue a Section 8(a)(1) complaint.[19]

B.J.K

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[16] Grimmway Farms began hiring workers 13 months after the workers' discharges, which was clearly outside the 10(b) period.

[17] 314 NLRB at 74 (citing Bryan Manufacturing, 362 US at 416-17).

[18] See Rikal West, 266 NLRB 551, 568 (1983), enfd. 721 F.2d 402 (1st Cir. 1983); Kaumagraph Corp., 316 NLRB at 794.

[19] [*FOIA Exemptions* 2 and 5

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