

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

Advice Memorandum

DATE: January 6, 2011

TO : J. Michael Lightner, Regional Director
Region 22

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

SUBJECT: Health Professional and Allied Employees,
Local 5030 (Palisade Medical Center)
Case 22-CB-11155

The Region submitted this case for advice as to whether Health Professional and Allied Employees, Local 5030 ("Union") violated Section 8(b)(1)(A) of the Act by distributing a letter to its membership interpreting a directive from the Department of Labor as prohibiting employee Kathleen Fonti ("Fonti") from "giving advice to any union member on union matters or issues" and stating that "it is a punishable offense for any union member to cause Ms. Fonti to violate the terms of her probation by soliciting her advice on union matters or issues." We conclude that the Union did not violate the Act via the letter distributed to its membership because the statements contained therein cannot reasonably be construed as threats and do not constitute "restraint or coercion" under Section 8(b)(1)(A) of the Act. Accordingly, the Region should dismiss this allegation of the charge, absent withdrawal.

BACKGROUND AND FACTS

In December 2009, the Department of Labor ("DOL") found the Union's former president, Fonti, guilty of receiving an illegal loan from the local Union treasury in violation of Section 503 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").¹ Pursuant to a plea agreement, the DOL sentenced Fonti to two years of probation and, for a period of three years, prohibited her from holding or being permitted to hold union office or employment or serving in other prohibited capacities in accordance with the restrictions provided under Section 504 of the LMRDA.²

¹ 29 U.S.C. § 503(a) (2009) ("No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of \$2,000.").

² 29 U.S.C. § 504 (2009).

In light of Fonti's sentencing and the related Section 504 restrictions, the DOL, on or about January 10, 2010, provided the Union with notice of Fonti's sentencing and the following prohibitions imposed on her for three years:

Fonti may not hold any labor organization officer or employee position such as president, vice-president, recording secretary, financial secretary, treasurer, director, trustee, executive board member, business agent, manager, organizer, or clerical employee.

Fonti is also prohibited from holding any position as a representative in any capacity of a labor organization such as a job steward or shop committeeperson. Additionally, Fonti may not hold any position, other than that of a member, involving decision-making authority concerning custody of or control over labor organization funds or assets, or acting as a consultant or adviser to a labor organization.

Other positions Fonti may not hold include labor relations consultant or adviser to an employer, employer organization or labor organization; any position having specific collective bargaining authority or direct responsibility in the area of labor-management relations in a corporation or association; officer, director, agent, or employee of any group or association of employers dealing with any labor organization; any position where you would be entitled to a share of the proceeds of any entity whose activities are in whole or substantial part devoted to providing goods and services to a labor organization; or as an officer, executive or administrative employee of any entity whose activities are in whole or substantial part devoted to providing goods and services to a labor organization.

The DOL further advised the Union of the potential ramifications of a violation of Section 504 by either Fonti or another person placing Fonti in a prohibited capacity. The DOL specifically requested the Union to read the letter at its next executive board and general membership meetings and to prominently post the letter and an enclosed fact sheet for its membership in order to ensure adequate notice concerning this matter.

After posting the DOL letter and accompanying DOL-prepared "Prohibition against Certain Persons Holding Union Office or Employment" fact sheet, the Union apparently received several member requests seeking clarification as to the meaning of the DOL's prohibitions. Thereafter, by letter of March 12, 2010, the Union provided its membership with a clarification of the understood DOL-imposed prohibitions along with a copy of the DOL's January 10, 2010, mailing to the Union. The Union's March 12 letter stated, in relevant part:

This letter is being sent to all Local 5030 members to fulfill the notification requirements contained in the attached letter from the Department of Labor, dated January 10, 2010. Last year, former Local 5030 president Kathi Fonti plead [sic] guilty to misappropriating union funds. She was sentenced to two years of supervised probation. Due to the serious nature of this offense, she has been barred from union membership for a period of three years. During this time she may not hold any position in the Union. It is also a violation of her probation to give advice to any union member on union matters or issues.

According to the Department of Labor, it is a punishable offense for any union member to cause Ms. Fonti to violate the terms of her probation by soliciting her advice on union matters or issues. Please read the enclosed materials carefully so that you are familiar with these restrictions. It is in your best interest, as well as in Ms. Fonti's best interest, that all restrictions are adhered to for the length of time specified.

A few weeks thereafter, Fonti's attorney contacted counsel for the Union and protested the content of the Union's March 12 letter because, in his opinion, the communication "misinterpreted and distorted" the DOL restrictions and sought "to impose illegal, vindictive and petty punishments." Subsequently, the Union sought clarification from the DOL as to whether the Section 504 restrictions upon Fonti preclude her from "acting as a labor advisor or consultant to [bargaining unit] employees" and whether the Union incorrectly clarified the nature of the Section 504 prohibitions in its March 12 letter. After being advised of the DOL's reference of the Fonti matter to Assistant U.S. Attorney Jonathan Romankow ("Romankow"), legal counsel for the Union asked Romankow to advise the Union as to how it "should properly respond concerning Ms.

Fonti's claims that the Union is violating her rights." Romankow advised Region 22 that he does not intend to answer the Union's request for clarification.

After becoming aware of Fonti's apparent involvement in advising Union members on workplace grievances, however, Romankow sent a letter to Fonti's attorney characterizing Fonti's "providing consultation and advice to members about various union matters, such as contract administration and negotiations" as violative of the terms of her plea agreement.³ Further, though acknowledging Fonti's right to participate in the affairs of the union similar to any union member, Romankow warned that her actions went "well beyond that of a rank and file member and into the realm of agent, consultant and adviser," and that if she is found to again "proactively assert[] herself, in any fashion, into the operation of the [Union]," his office would revoke her plea agreement and charge her with felony offenses.

ACTION

We conclude that the Union did not violate the Act via the letter distributed to its membership because the statements contained therein cannot reasonably be construed as threats and do not constitute "restraint or coercion" under Section 8(b)(1)(A) of the Act.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their Section 7 rights.⁴ By enacting Section 8(b)(1)(A), Congress sought to ensure that strikes and other employee organizational activities were conducted by peaceable persuasion and not by physical force, threats of force, or economic reprisal.⁵ As the

³ Subsequent to the distribution of the Union's March 12 letter, Fonti appears to have directly advised at least one employee on multiple occasions related to a Union grievance contesting that employee's disciplinary suspension. Fonti allegedly engaged that employee in several telephone conversations and sent multiple emails offering her information and advice related to the grievance, despite the employee's communicated objections to speaking with Fonti about Union-related matters.

⁴ In re UAW Local 233 (B.F. Goodrich Co.), 339 NLRB 105, 113 (2003).

⁵ NLRB v. Drivers, Chauffeurs, Local 639 (Curtis Bros.), 362 U.S. 274, 291 (1960), citing Perry Norvell Co., 80 NLRB 225, 239 (1948).

Supreme Court has explained, "Section 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof" ⁶ Thus, the Board has read Section 8(b)(1)(A) narrowly to require a showing of actual restraint or coercion of employee rights. ⁷

Moreover, the Board has recognized that Section 8(c) of the Act protects union and employer speech "[u]nless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats." ⁸ The Board has also held that a party does not violate the Act by simply misstating the law, so long as it cannot reasonably be interpreted, in context, as a threat. ⁹ When determining whether a statement is a threat, the Board

⁶ NLRB v. Drivers, 362 U.S. at 290. In Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Construction Trades Council, 485 U.S. 568, 581 n.5 (1988), the Supreme Court reaffirmed its holding in NLRB v. Drivers that the restrain and coerce language of Section 8(b)(1)(A) "reache[s] only violent conduct and [does] not even include peaceful picketing."

⁷ See, e.g., National Maritime Union (Texas Co.), 78 NLRB 971, 983-86 (1948), enfd. 175 F.2d 686 (2nd Cir. 1949); NLRB v. Drivers, 362 U.S. at 290.

⁸ Bay Cities Metal Trades Council, 306 NLRB 983, 983 n.1, 986 (1992), enfd. 15 F.3d 1088 (9th Cir. 1993) (in adopting ALJ's finding that the union unlawfully threatened employees with the loss of health, welfare, and pension benefits if they resigned from union membership, the Board stressed that the statements there were made in the context of two other unlawful threats of reprisal against employees who crossed the picket line). See also Gelita USA, Inc., 352 NLRB 406, 409 (2008), citing Eagle Comtronics, Inc., 263 NLRB 515 (1982).

⁹ Woodbridge Foam Fabricating, Inc., 329 NLRB 841, 841-42 (1999) (finding misstatements to the union about the nature of employer's bargaining obligation not a threat when considered in context and in the absence of evidence of employer deception); Air La Carte, Inc., 284 NLRB 471, 473-74 (1987), citing Midland National Life Insurance Co., 263 NLRB 127 (1982) (union statement predicting employer's refusal to honor the applicable labor agreement if the union was voted out in a representational election was not a threat but, at most, a misrepresentation that did not warrant setting aside the election).

will consider whether the person delivering the statement has the power to take the alleged threatening action.¹⁰

In the context of a union's statements predicting a potential third party response to an employee action, the Board examines the context underlying the statements at issue to determine whether the union had a reasonable factual basis for its prediction.¹¹ In so doing, the Board has recognized that "[w]hen a [u]nion has merely objectively informed employees of those consequences of the employees' actions that are beyond the [u]nion's control, no Section 8(b)(1)(A) violation has occurred."¹² In determining whether a union has objectively informed employees of potential external consequences of their actions, the Board considers whether there are objective facts showing that the union was making a truthful prediction or had some reasonable basis for its expressed belief.¹³

In this case, a review of the context of the Union's March 12 letter to the membership shows a reasonable basis for the Union's statements at issue. Not only did the DOL advise the Union to read the DOL letter to its membership and prominently post it with the accompanying fact sheet, but it also advised that the Union "must take steps to prevent the barred individual from serving in a prohibited capacity" and that a "failure . . . to do so if they have

¹⁰ Air La Carte, Inc., 284 NLRB at 473-74 (finding incumbent union statements did not constitute threats because it had no control over employer actions).

¹¹ Bay Cities Metal Trades Council, 306 NLRB at 986 (union unlawfully threatened employees with loss of benefits if they resigned from union where no objective facts showing employees were in danger of the employer taking such action); Air La Carte, 284 NLRB at 473-74 (finding accurate union agent's statement that employees could lose the labor agreement with the employer if the incumbent union did not win the election); Carpenters Local 180 (Condiotti Enterprises), 328 NLRB 947, 949-50 (1999) (no objective facts supporting union statements that an employee's withdrawal from the union would result in a loss of pension and health benefits administered by a third-party trust).

¹² Bay Cities Metal Trades Council, 306 NLRB at 986, n.4, quoting NLRB v. Laborers Local 534, 778 F.2d at 291

¹³ See, e.g., Bay Cities Metal Trades Council, 306 NLRB at 986; Air La Carte, 284 NLRB at 473-74; Carpenters Local 180, 328 NLRB at 949-50.

knowledge of the barred individual's employment disqualification and service in a prohibited capacity is a violation of the LMRDA." Thus, it was objectively reasonable for the Union to take steps to make sure employees understand the nature of the DOL-imposed restrictions. After the Union received requests from members to clarify the meaning of Fonti's prohibitions, it generated and distributed a written explanation of its understanding of the prohibitions imposed upon Fonti by the DOL. Moreover, the Union specifically advised the membership to become familiar with the content of the DOL materials included with the letter because it was in the best interest of everyone to adhere to the DOL restrictions.

Although the Union used somewhat different language from that supplied by the DOL—that it is a violation for Fonti to "give advice to any union member on union matters or issues"—that characterization by the Union was not unreasonable. In fact, it appears that the Union accurately predicted that the DOL would find Fonti's actions in advising employees on Union representational matters violative of the terms of her probation as evidenced by the warning Assistant U.S. Attorney Romankow provided to Fonti.¹⁴ Moreover, and without regard to whether the Union characterization went slightly beyond the terms explicitly set forth under Section 504 of the LMRDA,¹⁵ the Union's statements specifically directed employees to review and become familiar with the actual restrictions set forth in the attached DOL materials. In any event, the Union did not have the power to impose statutory punishment for LMRDA violations, and its statements did not suggest that it would take any action against employees for violating the restrictions. Rather, the Union's letter merely stated that it was a "violation of [Fonti's] probation" to give advice on union matters and that "[a]ccording to the [DOL], it is a punishable offense for any member to cause Ms. Fonti to violate the terms of her probation. . . ." Thus, the Union's advisory statements cannot reasonably be interpreted as threats and therefore did not violate Section 8(b)(1)(A) of the Act.

¹⁴ See discussion *supra* at p. 4.

¹⁵ To the extent that these statements might be characterized as misleading or inaccurate, such misleading or inaccurate statements of law by the Union without more would not violate Section 8(b)(1)(A). See *supra* note 9.

CONCLUSION

The Region should dismiss this allegation of the charge, absent withdrawal, since the Union's statements cannot reasonably be construed as threats and do not constitute "restraint or coercion" under Section 8(b)(1)(A) of the Act.

B.J.K.