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

Advice Memorandum

DATE: February 3, 2010

TO : Rhonda P. Ley, Regional Director
Region 3

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

SUBJECT: Birds Eye Foods 506-4033-3000
Case 3-CA-26833 512-5072-2400
625-5598-0000

This case was submitted for advice as to whether a make-whole remedy is appropriate where an Employee's discipline was based, at least in part, on misconduct that might not have occurred had the Employer granted the Employee's Weingarten request.[1] We conclude that a make-whole remedy of reinstatement and back pay is appropriate.

FACTS

The Employer, Birds Eye Foods, and the Union, UNITE HERE Local 1882, have a long-standing collective bargaining relationship. Several years ago, the Employer installed security cameras at its worksite at the behest of the Department of Homeland Security. The Union was aware of the cameras' presence and understood that the Employer did not intend to use them to surveil its employees. Prior to the incident in question, the Employer had never used the surveillance cameras for disciplinary purposes.

On July 28, 2008,[2] a supervisor found traces of spilled liquid on the walls and floor of his office. This prompted the Employer to review the footage from a nearby surveillance camera. The video from the previous evening showed an employee throwing a cup of coffee through a window air conditioning unit and into the supervisor's office. The surveillance video then showed him entering the office with a mop, presumably to clean up the spilled coffee. From the tape, the Employer was able to identify the Charging Party, a 31-year employee, as the perpetrator.

On July 29, the Employer summoned the Union president and vice-president to a meeting with the Employer's human resources manager and production manager. The Employer's representatives told the Union officers the Charging Party had destroyed company property by throwing a cup of coffee.

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[1] NLRB v. Weingarten, 420 U.S. 251 (1975).

[2] All dates are in 2008 unless otherwise noted.

They revealed that the incident had been captured by the surveillance camera.

The Employer's production manager then brought the Charging Party into the meeting. The Union's president requested an opportunity to speak privately with the Charging Party prior to the interview; the Employer's human resources manager refused, saying that she wanted to hear what the Charging Party had to say. Under questioning, the Charging Party initially denied throwing the coffee and then offered several hedging explanations of what had happened. After the Employer informed him that the incident had been captured by the surveillance video, he finally confessed to throwing a small amount of coffee.

The Employer suspended the Charging Party without pay pending further investigation. According to the Employer, the suspension was based on the underlying incident as well as on the Charging Party's equivocations during the interview.[3] After completing its investigation, the Employer determined that the Charging Party had intentionally thrown the coffee and had lied during the interview. The Employer decided to terminate the Charging Party because of his violations of its rules prohibiting the willful destruction of company property and its Code of Ethics, which requires that employees act with honesty at all times. The Union officers and Employer representatives met several times between July 29 and August 28 to confer over the Charging Party's discipline. Although they reached a tentative agreement to reduce his termination to a suspension and temporary disqualification from his leadership position, the parties could not agree on final terms and the Employer reverted to its decision to terminate. The Employer terminated the Charging Party by telephone on August 26.

The Region has concluded that a complaint should issue alleging that the Employer violated Sections 8(a)(1) and (5) of the Act by utilizing the security camera footage for disciplinary purposes without prior notice or bargaining and violated Section 8(a)(1) by its refusal to allow the Charging Party an opportunity to confer with a Union representative prior to a disciplinary interview. The issue submitted to Advice is whether the Charging Party is entitled to reinstatement and back pay.

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[3] The Employer's human resources manager also cited the Charging Party's "entire record" as a justification for the discipline; however, it appears that he had no record of formal discipline prior to the incident in question.

ACTION

We conclude that the Employer terminated the Charging Party at least in part for conduct that directly flowed from its own unfair labor practice. The Region should seek a make-whole remedy of reinstatement and back pay unless the Employer can demonstrate that it would have terminated the Charging Party regardless of his dishonesty during the unlawful interview, based solely on his underlying misconduct.

The Supreme Court in Weingarten held that employees have a Section 7 right to have a union representative present at disciplinary or investigatory interviews.[4] This Weingarten right includes the right to consult with a union representative prior to the interview.[5] The request for pre-interview consultation may come from either the employee or the union representative.[6]

A violation of the Weingarten right does not ordinarily entitle a disciplined or discharged employee to a make-whole remedy.[7] Instead, the standard remedy for such a violation is a cease and desist order, because Section 10(c) of the Act prohibits the Board from ordering reinstatement or back pay for any individual who was suspended or discharged "for cause."[8] The Board later expanded this principle in Anheuser-Busch, Inc. by denying make-whole relief to a group of employees whose wrongful conduct was discovered when their employer installed hidden surveillance cameras without notifying their union, in violation of Section 8(a)(5).[9]

Those cases demonstrate that the Board will not issue an order for reinstatement and/or back pay merely because an employer learns of an employee's misconduct through means which violate the Act. Where the affected employees were disciplined for unprotected misconduct, and there was no correlation between the Employer's unfair labor practice and the employee misconduct that caused the discipline, a make-whole remedy was not appropriate.

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[4] NLRB v. Weingarten, 420 U.S. at 256.

[5] See Postal Service, 303 NLRB 463 (1991); Climax Molybdenum Co., 227 NLRB 1189, 1190 (1977).

[6] Climax Molybdenum Co., 227 NLRB at 1190.

[7] See Taracorp Inc., 273 NLRB 221 (1984).

[8] Id. at 221—22.

[9] 351 NLRB 644 (2007).

On the other hand, the Board will order make-whole relief if it finds a substantial nexus between the employer's unfair labor practice and the misconduct that caused the discipline. For example, in Supershuttle of Orange County, the Board ordered reinstatement and back pay for an employee who was terminated for making false statements in incident reports that were prepared during a discriminatorily-motivated investigation.[10] The Board granted make-whole relief in that case because "the discharge here was not based on misconduct *uncovered* by the investigation, but rather on misconduct that was triggered by and elicited during the investigation."[11] Using a similar analysis, an ALJ in Exxon Mobil Corp. ordered reinstatement and back pay for an employee who was terminated for lying about his protected activity during an unlawful interrogation.[12]

The Board recognized this point in Anheuser-Busch, distinguishing several cases where it had granted make-whole remedies to employees who engaged in arguably wrongful conduct: "These cases are distinguishable because it is not clear whether the employees' actions would have been wrongful . . .—that is, whether the employees' actions would have constituted "cause" for discipline—if the employer had not committed the unfair labor practices."[13] Even after Anheuser-Busch, the Board should grant make-whole relief when "[t]here is a clear and direct connection between the

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[10] 339 NLRB 1 (2003).

[11] Id. at 3 (emphasis in original).

[12] Exxon Mobil Corp., 343 NLRB 1 (2004), revd. by Slusher v. NLRB, 432 F.3d 715 (7th Cir. 2005). Although the Board reversed the ALJ's decision based on credibility findings, the Seventh Circuit held that the Board had no substantial evidence to do so and reinstated the ALJ's decision. Neither the Board nor the Seventh Circuit addressed the remedial provisions of the ALJ's decision.

[13] Anheuser-Busch, Inc., 351 NLRB at 649 & n.18, citing, e.g., Kidde, Inc., 294 NLRB 840 (1989) (ordered reinstatement and back pay for employee who was discharged for conduct that the employer only investigated after the employee began union activities); Kolkka Tables & Finnish-American Saunas, 335 NLRB 844 (2001) (ordered make-whole remedy for employee discharged for conduct that was provoked by the employer's unfair labor practices).

employer's unlawful conduct and the reason for discipline."[14]

The Board has never directly considered whether to grant reinstatement and back pay to an employee discharged for misconduct that occurred during an unlawful Weingarten interview.[15] However, Advice has twice addressed the issue and in both cases authorized a make-whole remedy. In National Rehabilitation Hospital, a hospital employee was terminated for his conduct during a disciplinary meeting, prior to which he had requested and was denied union representation.[16] Advice determined that the employee's agitation during the interview was a direct result of the employer's Weingarten violation and therefore that the Region should seek reinstatement and back pay.[17] In The Lusty Lady, an employee was terminated in part for her conduct during an unlawful Weingarten interview.[18] Advice concluded that the employer would not have discharged the employee absent her conduct in the unlawful interview, and authorized the Region to seek a make-whole remedy.[19]

This case is similar to National Rehabilitation Hospital and The Lusty Lady. Here, the Charging Party was terminated at least in part for misconduct during the interview, which might not have occurred but for the Employer's unfair labor practice. The Union officers were aware that the Charging Party's actions had been captured on video when they requested to meet with him prior to the Employer's interview. They presumably would have shared this

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[14] Supershuttle of Orange County, 339 NLRB at 3.

[15] The Employer relies on Westside Community Mental Health Center, Inc., 327 NLRB 661 (1999). In that case, an employee who was discharged in part for her conduct after an interview where she was denied union counsel was not granted reinstatement and back pay, even though the ALJ acknowledged that her post-interview misconduct may have been avoided but for the Weingarten violation. Id. at 666. However, it appears that the General Counsel did not seek a make-whole remedy in that case, as neither the ALJ nor the Board addressed the question of remedy.

[16] Case 5-CA-24870, Advice Memorandum dated Feb. 28, 1995.

[17] Id. at 6-8.

[18] Case 19-CA-26979, Advice Memorandum dated Sept. 8, 2000.

[19] Id. at 2-3.

information with the Charging Party and counseled him to report honestly on his actions. The Employer unlawfully refused the Union's request and proceeded to question the Charging Party. Without the benefit of Union counsel, the Charging Party was at a disadvantage in responding to the Employer's questioning. The Employer's Weingarten violation was therefore a proximate cause of the Charging Party's misconduct during the interview.

It is evident that the Employer based its decision to terminate in large part upon the Charging Party's conduct in the Weingarten interview. The Employer had ample evidence of the underlying misconduct to render the interview unnecessary, unless it intended to weigh the Charging Party's interview responses in its decision regarding discipline. The Employer's human resources manager reinforced this impression when she explained that she "wanted to hear what [the Charging Party] had to say" as a reason for refusing his pre-interview Union consultation. In addition, during the Region's investigation, the Employer's representatives heavily emphasized the Charging Party's dishonesty as a deciding factor in their decision to terminate him.

Since the Charging Party was terminated in part for conduct that was caused by the Employer's Weingarten violation, the Region should seek a make-whole remedy of reinstatement and back pay.[20]

B.J.K.

[20] A make-whole remedy would not be appropriate if the Employer could demonstrate that it would have terminated the Charging Party regardless of his conduct in the Weingarten interview. The Region should solicit such evidence from the Employer if it has not already done so.