

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

Advice Memorandum

DATE: May 31, 2007

TO : James J. McDermott, Regional Director
Region 31

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

SUBJECT: Ampersand Publishing, LLC, 512-5036-6720-6300
d/b/a Santa Barbara New-Press 512-5036-6720-6900
Cases 31-CA-28154 & 31-CA-28157 512-5082-3000-0000
524-5073-4000-0000
601-5050-9100-0000
712-5042-6767-0000

These cases were submitted for advice as to whether (1) the Employer violated Section 8(a)(1) when it discharged a supervisor after he refused to issue a written reprimand to a discriminatorily discharged union supporter; and (2) a statement made by one of the Employer's attorneys, and quoted in a local newspaper, can be attributed to the Employer as an unlawful threat of discharge. The Region also submitted this and related cases for consideration of Section 10(j) relief.¹

We conclude that the Employer unlawfully discharged the supervisor for refusing to further the Employer's discharge of the union supporter where the supervisor refused to issue the reprimand in the reasonable belief that it was in furtherance of that discriminatory discharge, and the Employer's asserted reason for the supervisor's discharge was pretextual. We also conclude that the attorney's statement was not attributable to the Employer because the statement was outside the scope of the attorney's authority.

I. The Discharge of Supervisor Bob Guiliano

FACTS

The Santa Barbara News-Press (Employer/News-Press) is the largest daily newspaper based in Santa Barbara, California. Wendy McCaw is the owner and co-publisher of the newspaper. Scott Steepleton is the associate editor and the highest-ranking supervisor in the newsroom.

Assistant city editor Bob Guiliano started working for the News-Press in October 2006. Guiliano has over thirty

¹ The Injunction Litigation Branch will address the need for 10(j) relief in a separate memorandum.

years experience in the newspaper business, working in a variety of capacities including reporter, news editor, sports editor, assistant managing editor and copy editor for about seven different newspapers. As assistant city editor, Guiliano supervised a team of eight to nine news reporters on the city desk and edited their work.

Near the end of each year, the News-Press distributes employee performance evaluations which include ratings in eight categories on a five-point scale. A rating of 1.0 indicates that the employee does not meet standards and improvement is required while a rating of 5.0 indicates that the employee always excels and exceeds standards. Employees who receive an overall rating of 3.0 or above receive performance bonuses.

In mid-December 2006, Steepleton prepared and issued performance evaluations for newsroom employees, including the reporters that Guiliano directly supervised. Steepleton did not solicit Guiliano's feedback before preparing the evaluations. Steepleton was leaving for vacation and instructed the employees to return their performance evaluations and written responses to Guiliano.

Reporter Anna Davison and three other reporters supervised by Guiliano all received overall ratings below 3.0, which were substantially lower than the ratings any had received the previous year. Although Davison received one of the lowest performance scores, Davison was one of the best reporters at the city desk in Guiliano's view. All four of these reporters were open and known union supporters. Guiliano himself had observed them wearing black shirts and Teamsters shirts on Fridays.² Guiliano also specifically knew that Davison was one of the 25 reporters who signed an August 24, 2006, letter to McCaw asking her not to retaliate against them because they sought Union representation. In related case 31-CA-28161, the Region concluded that the lowered evaluations and lack of performance bonuses in 2006 for Davison and the others all violated Section 8(a)(3).

Another reporter on Guiliano's team, Leanna Orsua, received a 3.0 on her evaluation. Orsua was not an open union supporter. During the time that Guiliano supervised Orsua, he had several serious problems with her work including plagiarized quotes. Guiliano had brought these problems to Steepleton's attention prior to Orsua's evaluation.

² Davison also participated in several other open Union activities prior to her evaluation.

Guiliano covered Steepleton's position when Steepleton went on vacation in mid-December. During that time, Guiliano spoke with Davison and other reporters about their performance evaluations. Davison asked Guiliano how she could save her job. Guiliano suggested that he give Davison written goals every week and a report card at the end of each week so she could have written proof that she was doing a good job.³ In a telephone conversation with Steepleton who was still on vacation, Guiliano outlined his performance improvement plan for Davison. Steepleton responded negatively, stating that Guiliano should not be telling employees they were doing a good job when Steepleton was telling them they were doing a poor one.

When Steepleton returned from vacation in early January 2007,⁴ he told Guiliano that he had done a great job. Copy desk chief, Charles Bucher, also told Guiliano that he had done a great job of keeping stories flowing during this time. Around January 9, Steepleton had Guiliano put Davison on the city hall beat. Davison had previously worked the science and environmental beat. Davison told Guiliano at this time that she felt she was being set up.

On Friday, January 12, Davison submitted an article titled "Walk This Way." No editor identified any bias problem in the article. On Monday, January 15, while Steepleton was out of the office, Guiliano edited and ran the article. The article concerned sidewalk renovations which had required the city to remove 51 trees. Guiliano considered the article to be a puff piece or light harmless news.

That afternoon McCaw called Guiliano into her office; co-publisher Arthur von Wiesenberger was also present. McCaw stated that the article written by Davison was biased because it did not contain negative statements about the tree removal and also went against the paper's editorials. McCaw said that Davison quoted Mayor Blum too many times and McCaw did not want that many Blum quotes in her paper. McCaw told Guiliano to give Davison a written reprimand.

Guiliano did not issue any reprimand to Davison. Guiliano instead directed her to try to locate someone to

³ In December 2006, the News-Press conducted management training which Guiliano attended. One of the management guidelines stressed at this training was that management should provide clear expectations to employees.

⁴ All dates hereafter 2007 unless otherwise noted.

comment against the tree removals so the News-Press could run a second story. Davison worked for about a week trying to obtain quotes from sources who might have protested the removal of the trees. Davison was unsuccessful and instead received an e-mail from a past member of the City Street Trees Advisory Committee who stated that the tree issue had been the subject of two years of public hearing and asked why the News-Press was trying to create a controversy now.

On January 22, Guiliano gave McCaw a memorandum that initially conceded that Davison's story had been weak in telling both sides. The memorandum outlined the steps Davison had taken to find sources opposed to the removal of the trees, included a copy of the e-mail Davison had received, and asked McCaw and von Wiesenberger to let Guiliano know what they thought. The memorandum did not mention the written reprimand that McCaw had instructed Guiliano to give to Davison. Three days later, on January 25, Steepleton terminated Davison because of her biased reporting in the article titled "Walk this Way" and also because of issues raised in her 2006 performance evaluation. In related case 31-CA-28131, the Region concluded that Davison's discharge violated Section 8(a)(3).

The next day, January 26, Steepleton terminated Guiliano allegedly based on his performance. Guiliano asked Steepleton how he could terminate Guiliano for performance when Guiliano had ran the newsroom for three weeks and Steepleton had told him he had done a great job. Steepleton did not respond.

The Employer's stated reason for Guiliano's discharge was that he engaged in conduct unbecoming of an editor of a major newspaper on three occasions. In particular, Guiliano had berated an employee in front of other employees, had falsely accused an employee of plagiarism, and had loudly congratulated Steepleton in front of Newsroom employees for the "good job" Steepleton had done testifying for the Employer at the hearing on the Employer's objections to the NLRB election. Guiliano concedes he engaged in some conduct apparently alluded to by the Employer.⁵

⁵ Guiliano acknowledges that he complained to other employees about reporter Orsua on one occasion but denies that he berated her, or any other employee, in front of other employees. Guiliano recalls complaining to Orsua several times about her taking quotes from other sources without attributing the quotes, but is not aware of any incident where he falsely accused anyone of plagiarism. Guiliano admits that after the NLRB hearing, he yelled to Steepleton across the newsroom something to the effect that

ACTION

We conclude that the Employer unlawfully discharged Guiliano for refusing to issue the reprimand to Davison because Guiliano refused to issue the reprimand in the reasonable belief that it was in furtherance of Davison's unlawful discharge, and the Employer's asserted reason for discharging Guiliano was pretextual.

An employer may not discharge a supervisor for refusing to commit an unfair labor practice⁶ or for refusing to take actions in furtherance of the employer's unfair labor practices.⁷

In Country Boy Markets, the Board found that the employer unlawfully discharged a supervisor for refusing to fill out termination slips which would have supported the pretextual reasons for the unlawful termination of five employees. The supervisor had already unlawfully discharged the employees, per the employer's instruction, because they had signed union authorization cards. The Board found a violation because in "declining to go along with [the employer's] repeated requests for the termination slips, [the supervisor] was refusing to take part any further in the Respondent's unfair labor practices."⁸

In the instant case, the Union alleges that the News-Press discharged Guiliano because he refused to issue a written reprimand to Davison, when Guiliano reasonably believed that the reprimand would have been in furtherance of the Employer's unlawful termination of Davison. We agree that the evidence supports the Union's claim.

First, given that the Employer's termination of Davison, assertedly for biased reporting, was pretextual,⁹ Guiliano's reprimand of Davison for biased reporting would

Steepleton had not cracked on the stand when he testified at the objections hearing.

⁶ Country Boy Markets, 283 NLRB 122, 122 (1987).

⁷ Country Boy Markets, 283 NLRB 122, 122 (1987).

⁸ Id. at note 2

⁹ The employer also asserted that Davison was discharged for issues raised in her 2006 performance evaluation. In related Case 31-CA-28131, the Region concluded that this reason was also pretextual.

have been in furtherance of her unlawful termination. Even assuming Davison's article was biased, the Region's investigation revealed that the Employer did not address problems of biased reporting through its disciplinary proceeding. The Employer presented no evidence that any reporter in the past had received a written warning or had been discharged for biased reporting. Rather, biased reporting was addressed in conversations between editors and reporters, or as part of the reporters' performance review. The Region's investigation revealed that Steepleton addressed the biased writing of other reporters in their 2006 evaluations.¹⁰ In contrast, Steepleton made no comments in Davison's 2006 evaluation regarding biased reporting. Thus, the Employer accorded Davison clear disparate treatment when it ordered Guiliano to issue her a written warning for alleged biased reporting and then summarily discharged her for the same conduct.

In light of this evidence of disparate treatment, the Region concluded that the Employer relied on Davison's biased reporting as a mere pretext to unlawfully discharge her for union activities. McCaw's order to reprimand Davison for biased reporting clearly was a part of this pretext to strengthen her grounds for the unlawful discharge. Thus here as in Country Boy Markets, Guiliano's refusal to issue Davison a reprimand supporting a pretextual discharge also constituted a refusal "to take part any further" in an unlawful discharge.¹¹

The Employer disputes that the reason Guiliano refused to issue the reprimand was to avoid furthering an alleged unlawful discharge of Davison. It notes that McCaw never mentioned Davison's union activities when she ordered Guiliano to issue the reprimand and thus Guiliano did not reasonably believe that warning Davison would further any unfair labor practice.¹² However, the evidence shows to the

¹⁰ At least two reporters, Hobbs and McManigal, had comments addressing bias writing in their 2006 evaluations by Steepleton.

¹¹ Country Boy Markets, 283 NLRB at 122, note 2.

¹² See, Pioneer Hotel, 182 F.3d 939, 947 (D.C. Cir. 1999) (Board's finding that supervisor had been unlawfully discharged was not supported by substantial evidence where the supervisor was not told to fire employee because of union activities, and there was no evidence that supervisor refused to fire the employee because he thought it would be an unfair labor practice).

contrary that Guiliano did reasonably believe that the New-Press was discriminating against Davison because of her union activities. Guiliano knew of Davison's union activity and also knew that Steepleton had given all of the Union supporters on his team unprecedented low evaluations. Guiliano also knew that Steepleton had highly rated Orsua who was not an open union supporter and who had problems in Guiliano's view. Guiliano also was aware of Steepleton's negative response to his improvement plan for Davison even though Guiliano's plan was warranted under the News-Press's recent training guidelines. Guiliano also thought that Davison's article was not biased and did not merit a warning. Finally, Davison had expressly told Guiliano that she feared that she was being set up. In these circumstances, where Guiliano clearly knew of Davison's overt union activity, the Employer's disparate treatment of her and the Employer's union animus, we conclude that Guiliano reasonably believed that the Employer was discriminating against Davison and that his written reprimand of her would be in furtherance of her unlawful discharge.

The Employer contends that it terminated Guiliano because he engaged in conduct unbecoming of an editor. Although Guiliano concedes that he engaged in some of the conduct relied on by the Employer, we nevertheless conclude that the News-Press merely seized on these actions as a pretext for his discharge. The News-Press did not raise these allegations of unbecoming conduct with Guiliano immediately prior to his discharge nor at any prior time.¹³ In contrast, immediately prior to Guiliano's discharge, both Steepleton and copy desk chief Bucher had praised Guiliano for the great job he had done in running the newsroom. Moreover, all of Guiliano's alleged misconduct occurred before McCaw instructed Guiliano to issue Davison the written reprimand. The timing of Guiliano's discharge, which occurred on the day after Davison's discharge and was based on actions occurring much earlier, further indicates it was not the real reason for the discharge.

Thus, we conclude, in agreement with the Region, that there is sufficient evidence to support an inference that the Employer's asserted reasons for Guiliano's discharge are pretextual and that the Employer discharged Guiliano because

¹³ Newlonbro, LLC, 332 NLRB 1559, 1567 (2001) (reasons asserted for discharge found pretextual where employer did not give employee a chance to explain and issued three warnings and discharge slip at one time); See also Lancer Corp., 271 NLRB 1426, 1427 (1984), *enfd.* 759 F.2d 458 (5th Cir. 1985).

he refused to issue a pretextual reprimand to Davison in furtherance of Davison's unlawful discharge.¹⁴

II. The Newspaper Quote by Attorney Barry Cappello

FACTS

On February 2, six staff writers participated in a demonstration on the Anapamu footbridge over the 101 Freeway, which runs through Santa Barbara. Two Union organizers and one former employee, discriminatee Melinda Burns, accompanied the six reporters. The demonstrators held large banners, approximately 8 feet by 4 feet, reading "CANCEL YOUR NEWSPAPER TODAY." The demonstrators also held up hand-printed signs that stated "protect free speech," "stop illegal firings," "bring Anna back," and "bring Melinda back."

On either February 5 or 6, Dugan Kelly, an attorney with attorney Barry Cappello's firm, assisted Steepleton in interrogating these employees about their activities on the bridge. After each employee finished responding, Kelly nodded to Steepleton who then handed each employee a termination letter for having engaged in disloyal conduct.

On the evening of February 6, Cappello attended a Santa Barbara Board of Supervisors Meeting. Kevin Frazier, a reporter for the Santa Barbara Daily Sound, asked Cappello if he cared to comment on the six reporters' discharges. Cappello stated that the News-Press was legally entitled to discharge the employees. Frazier followed up by asking Cappello whether the National Labor Relations Act protected the employees. Cappello responded:

The paper had an absolute legal right to do what they did and would do it again in the face of disloyalty such as that. There are other people who work at that paper that have the right to have their incomes and lives protected. Employees that are out attempting to damage the actual institution that they work for would be terminated by any employer in this town.

The following day the Santa Barbara Daily Sound included the quote in a published article. A current News-Press employee, Kim Favors, read the published quote on the

¹⁴ Country Boy Markets supra; See also Cerro Copper Products Co., Case 14-CA-25144, Advice Memorandum dated September 18, 1998 (employer unlawfully discharged supervisor who refused to sign a false statement in the reasonable belief that it would be used to further the commission of unfair labor practices).

internet and mentioned it twice to groups of News-Press employees. The News-Press provided no evidence that Cappello or the News-Press contacted the Santa Barbara Daily Sound to retract or disavow the quoted remark.

Other newspaper articles and broadcast news stories have referred to Cappello as the attorney for McCaw and/or the News-Press. Cappello has also identified himself as the attorney for McCaw and/or the News-Press which admits that Cappello has served as its attorney. However, the News-Press asserts that Cappello's reported comment was not within the scope of his agency as the Employer's attorney and that Cappello is not an Employer agent for the purposes of setting human resources policies or speaking about terms and conditions of employment for current News-Press employees.

ACTION

We conclude that Cappello's alleged unlawful statement that the News-Press would discharge other employees for similar disloyal conduct is not attributable to the Employer because the statement was not within the scope of Cappello's authority as the Employer's attorney.

The Board applies the common law principles of agency as set forth in the Restatement (Second).¹⁵ An employer grants apparent authority to an agent when the employer's manifestation to a third party creates a reasonable basis for the third party to believe that the agent has the authority to act for the employer.¹⁶ The manifestation must be intended to cause a third party to believe that the agent is acting for the employer or the employer should realize that its manifestation is likely to cause such belief.¹⁷ Statements from an alleged agent do not constitute evidence of agency status.¹⁸

The News-Press does not deny that Cappello has served as its attorney but argues that Cappello has not served as

¹⁵ See, e.g., Allegany Aggregates, 311 NLRB 1165, 1165 (1993); Dentech Corp., 294 NLRB 924, 925-926 (1989).

¹⁶ See Precipitator Services Group, Inc., 349 NLRB No. 77, Fn. 11.

¹⁷ Service Employee Local 87, 291 NLRB 82, 83 (1988).

¹⁸ Precipitator Services Group, Inc., 349 NLRB slip op. at 7.; Virginia Mfg. Co., 310 NLRB 1261, 1266 (1993) enfd. 27 F.3d 565 (4th Cir. 1994).

its agent for the purpose of setting terms and conditions of employment for New-Press employees and thus his reported statement was outside the scope of his actual or apparent authority. Cappello's statement about future News-Press discharges would be within the scope of his authority if the Employer had manifested some intention to lead News-Press employees to believe that Cappello was authorized to deal with News-Press employee terms and conditions of employment.¹⁹ We conclude that neither Cappello's statement nor its surrounding circumstances provided such Employer manifestation to employees that the New-Press authorized Cappello to discuss or deal with employee terms or conditions of employment.

Cappello made the statement in response to a question arising after a Commission Board meeting where Cappello's presence was unrelated to his role as an attorney for the News-Press. In this context, Cappello's statement appears to be merely his own personal opinion. We recognize that the newspaper that carried the quote, as well as several other newspapers, identified Cappello as the New-Press attorney. However, none of these articles carried an affirmation by the News-Press itself that Cappello is its agent for the purpose of setting terms and condition of employment.

The Region's investigation uncovered letters that Cappello himself wrote as an attorney representing either McCaw or the News-Press. These letters, written by the putative agent, cannot be evidence of any manifestation on the part of the News-Press. Finally, although there is evidence that an associate from Cappello's firm had been involved in the termination of the six employees that Cappello spoke about in his statement, there is no evidence that Cappello himself had any direct involvement in these discharges, nor any evidence that Cappello had any involvement with setting terms and conditions of employment for News-Press employees.

In sum, given the apparent personal nature of Cappello's statement and the lack of any direct, known involvement by Cappello in either the discharges or setting any other employee terms or conditions, the statement was not within the scope of Cappello's agency as the Employer's

¹⁹ Cf. Batavia Nursing and Convalescent Inn, 275 NLRB 886, note 2 (1985) (attorney who not only represented employer in legal matters but also spoke for management on several occasions regarding election possessed agency "akin to that exercised by Respondent's administrators" and not an agency limited solely to legal matters.)

attorney. Accordingly, the Region should dismiss this allegation, absent withdrawal.

B.J.K