

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

Advice Memorandum

DATE: January 29, 2002

TO : Rosemary Pye, Regional Director
Ronald Cohen, Regional Attorney
Paul Rickard, Assistant to Regional Director
Region 1

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

SUBJECT: General Maintenance Cleaning
Services, LLC
Case 1-CA-38667

524-5073-1101
524-5073-1114
625-6612-0100
625-7742-3300

The Region submitted this case for advice on whether to issue complaint alleging that the Employer discharged or constructively discharged employees Reina Escobar, Guillermo Escobar, Jose Granados, and Alejandra Guillen in violation of Section 8(a)(3), [FOIA Exemptions 2, 5, 7(E)]¹ [FOIA Exemptions 2, 5, 7(E)

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We conclude that a Section 8(a)(3) complaint should issue, absent settlement, alleging that Jose Granados, Reina Escobar, and Alejandra Guillen were discharged, and that Guillermo Escobar was constructively discharged, based on the Employer's demand for I-9 forms in response to their Union activity. We also conclude that a Gissel bargaining order is not warranted. However, the special Board remedy of notice reading should be sought in addition to the traditional reinstatement and cease and desist remedies.

FACTS

In late 2000, the Employer performed service contractor cleaning services at four downtown Boston locations: 101 Merrimac Street, One Bowdoin Square, 55 Summer Street, and 160 Federal Street. Employees Jose Granados, Reina Escobar, and Alejandra Guillen were employed at 101 Merrimac. Guillermo Escobar was employed at Bowdoin Square.

¹[FOIA Exemptions 2, 5, 7(E).]

². [FOIA Exemptions 2, 5, 7(E)

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On November 28, 2000,³ Union organizer DaSilva met with employees at the Merrimac and Bowdoin Square locations and got authorization cards from 12 of the 17 employees at those two sites.⁴ Granados, Reina and Guillermo Escobar, and Guillen were among the employees who signed cards.

Employer owner Chinwing witnessed DaSilva's visit at both locations and some of the card-signing activity. Later that day, Chinwing and co-owner Chinafat interrogated employees at 101 Merrimac and Bowdoin Square about the card signing and why they wanted a Union. They also made unlawful threatening statements, such as telling employees that those who signed cards should not work there anymore, and told employees that unionizing was futile because the Employer could not afford Union wages.

On December 7, the Union demanded recognition at the Merrimac Street and Bowdoin Square locations based on the 12 authorization cards it had received at those locations. The Employer refused to recognize the Union.

The next day, December 8, the Employer distributed INS "I-9" work-eligibility forms to employees at all of its locations and asked employees to return the forms with the required supporting documentation. The Region has determined that the Employer's request for I-9 forms violated Section 8(a)(1), based on the timing of the request, the anti-Union animus displayed by the Employer's interrogation and threats to employees on November 28, and the fact that before the Union's organizing, the Employer had no consistent policy of requiring I-9 forms from its employees.

When Chinwing distributed the I-9 form at 101 Merrimac, she told Granados that she needed it returned on December 11 and that she was going to send the form to the INS. Reina Escobar and Guillen were present at the time, but they do not understand English and received their information about the forms from Granados.

³ All dates are in 2000 unless otherwise indicated.

⁴ At the time, the Union was unaware of the Employer's two other locations. The Union learned of the other locations after filing a representation petition. The Union has since agreed that the appropriate unit includes all four locations with a total of about 23 employees. Nevertheless, it has never attempted to obtain cards from employees at the other two locations.

At Bowdoin Square, Chinwing told Guillermo Escobar that employees had to return the I-9 form on December 11 and that those who did not could no longer work for the Employer and would have to find another job. Two other employees at Bowdoin Square gave different versions of Chinwing's statement about the forms. Although these two employees' versions are not identical, both testified that Chinwing assured employees that the form was just for her files and that she made no threat of job loss if they didn't provide the form. The Region has determined that these conflicting versions are insufficient to discredit Guillermo Escobar, because Chinwing might have made different statements to the employees as she handed them the forms.

Granados, Guillen, and the Escobars did not provide the I-9 forms when they returned to work on December 11 because all four are undocumented immigrants. When Chinwing asked Granados, Guillen, and Reina Escobar for the forms at 101 Merrimac that day, Granados told her that they did not have the forms. Chinwing then told Granados that if they did not bring the forms, they couldn't work there anymore and had to go home. Granados asked if his wife (Guillen) would get paid for unused vacation and Chinwing replied that she would. Granados then asked Chinwing if they had to leave right away and couldn't work there anymore because they didn't have the forms. Chinwing said yes, although she asked Granados to work his shift that night so that the day's work would be completed. Guillen and Reina Escobar left work immediately; Granados left at the end of his shift.

That evening, Chinwing also asked employees at Bowdoin Square for their I-9 forms. Most employees had not brought the form that day and she gave them another day to produce it. To Guillermo Escobar, she repeated the threat she had made earlier that those who did not produce the form the following day would have to look for another job.⁵ Knowing that he could not produce the required documentation, Guillermo Escobar performed only part of his work that night, walked out of his job, and never returned.

On December 21, shortly after the Employer required employees to produce I-9 forms, Union Organizer DaSilva attempted to solicit cards from two employees at 101 Merrimac. Neither employee signed a card.

⁵ The two other witnesses employed at Bowdoin Square give different versions of Chinwing's statements that night, testifying that Chinwing gave them more time than another day to produce the form and did not make any threat of job loss.

On December 30, the Employer granted a 25-cents-per-hour wage increase to employees at all four locations. The Region has determined that the wage increase was unlawful based on the timing, the Employer's history of never granting a general wage increase before, and the lack of any persuasive legitimate explanation for the increase.

Meanwhile, the Union made no other organizing efforts at the Employer's locations until early February 2001. At around that time, DaSilva returned to 101 Merrimac and spoke with a few employees. None appeared receptive to Union representation and one employee stated that employees no longer wanted a Union contract because "everything was OK now." Also around that time, DaSilva contacted an employee who had signed a Union card in December. This employee refused to cooperate in the Board's investigation of the charge and told DaSilva that employees were happy with the wage increase.

ACTION

We conclude that the Employer unlawfully discharged employees Granados, Guillen, and Reina Escobar after they failed to produce the unlawfully-requested I-9 form, in violation of Section 8(a)(3). We also conclude that the Employer constructively discharged Guillermo Escobar in violation of Section 8(a)(3) when it required him to produce the I-9 form under threat of job loss. [FOIA Exemptions 2, 5, 7(E)]

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1. The complaint should allege that the Employer unlawfully discharged and constructively discharged employees in violation of Section 8(a)(3) after unlawfully requiring them to complete INS work-eligibility forms

Chinwing's and Chinafat's actions on November 28, when they witnessed Union organizer DaSilva's visit to 101 Merrimac and Bowdoin Square, interrogated employees, and made unlawful comments about the Union organizing, establish the Employer's knowledge of its employees' Union activity, as well as its Union animus. The Employer intensified its anti-Union conduct after the Union's demand for recognition, by suddenly requesting that its mostly Hispanic immigrant

workforce provide INS work-eligibility forms, even though the Employer had never before requested these forms from the majority of its employees.⁶

When Granados, Guillen, and Reina Escobar failed to produce the forms on December 11, Chinwing terminated their employment. Although she did not formally issue these employees any discharge notices, her responses to Granados' questions about whether they had to leave immediately and whether they would get earned vacation pay clearly conveyed the message that they were being discharged.⁷ The Employer cannot show that it would have discharged these employees for not providing I-9 forms in the absence of Union activity because, prior to the Union organizing, the Employer did not maintain I-9 forms in its files for the majority of its employees. By terminating their employment based on their failure to comply with the unlawful request for I-9 forms, the Employer discharged Granados, Guillen, and Reina Escobar in violation of Section 8(a)(3).⁸

While Chinwing did not similarly send Guillermo Escobar home on December 11, the Employer nevertheless coerced him into leaving his job. Thus, Chinwing told Escobar that he had to bring the I-9 form the next day or lose his job. Escobar abandoned his job on December 11, knowing that he was unable to present work-eligibility documents the

⁶ See Regal Recycling, Inc., 329 NLRB 355, 356 (1999); Victor's Café 52, 321 NLRB 504, 514 (1996) (discriminatorily requiring employees to produce immigration papers).

⁷ See Nortech Waste, 336 NLRB No. 79, slip op. at 3, n. 7 (2001) (discharge based upon employer's informing employees that they had to see the INS and that they could not work in the meantime, citing NLRB v. Hale Mfg. Co., 570 F.2d 705, 708 (8th Cir. 1978) (no formal words necessary to establish discharge; discharge may be inferred from the totality of the employer's language and actions)). As noted, on December 11 Guillen and Reina Escobar left work immediately; Granados left at the end of his shift.

⁸ See, e.g., Regal Recycling, 329 NLRB at 355-57 (discharge of employees who failed to produce work-authorization documents unlawful because request for documents was not a good-faith effort to comply with IRCA obligations, but was motivated by employees' union activity); Victor's Café, 321 NLRB at 514-15 (same). See also, Nortech Waste, 336 NLRB No. 79, slip op. at 2-3 (discharge of employees after investigation into their immigration status unlawful because investigation was motivated by desire to retaliate against employees for union election victory).

following day. The Employer's unlawful request for the I-9 form, accompanied by a threat of job loss if he did not comply, placed Guillermo Escobar, an undocumented immigrant, in a position of facing deportation proceedings or abandoning his job. By coercing Guillermo Escobar to abandon his job in this manner, the Employer constructively discharged him in violation of Section 8(a)(3).⁹

The Employer provides no persuasive defense to these Section 8(a)(3) allegations. The Employer contends that Chinwing did not discharge any employees or threaten them with job loss if they didn't produce the I-9 form. It claims, but refuses to provide supporting affidavit evidence, that the request for I-9 forms was a good-faith effort to update its files and that the discriminatees left their jobs voluntarily because they did not want to provide the documents. However, as mentioned above, the timing of the request, the Employer's Union animus, and its prior disinterest in I-9 documentation belie its assertion that its actions were unrelated to the Union and not intended to coerce employees in any manner.¹⁰ Accordingly, the Employer has not shown that the discriminatees left their jobs voluntarily in the absence of being discharged or coerced.

2. [FOIA Exemptions 2, 5, 7(E)]

[FOIA Exemptions 2, 5, 7(E)

⁹ See Impact Industries, Inc., 285 NLRB 5, 26 (1987), remanded on other grounds, 847 F.2d 379 (7th Cir. 1988) (employer constructively discharged alien employees who abandoned their jobs after the employer, in retaliation for employees' union activity, told alien employees they had to report to the INS and clear their work status). See also La Mousse, Inc., 259 NLRB 37, 45-46 (1981), enf'd mem. 703 F.2d 576 (9th Cir. 1983) (employer constructively discharged employees by arranging for INS raid that led some employees not to show up for work and others to be subject to deportation proceedings); Sure-Tan, Inc., 234 NLRB 1187, 1187 (1978), enf'd in rel. part 672 F.2d 592, 599-602 (7th Cir. 1982), affd. in rel. part 467 U.S. 883, 895-896 and n. 6 (1985) (employer constructively discharged employees when it instigated INS investigation that led to deportation of employees).

¹⁰ See, e.g., NLRB v. Sure-Tan, Inc., 672 F.2d at 602.

2, 5, 7(E) .] ¹¹ [FOIA Exemptions

2, 5, 7(E) .] ¹² [FOIA Exemptions

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[FOIA Exemptions 2, 5, 7(E)

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¹¹ [FOIA Exemptions 2, 5, 7(E)

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¹² [FOIA Exemptions 2, 5, 7(E) .]

¹³ [FOIA Exemptions 2, 5, 7(E) .]

¹⁴ [FOIA Exemptions 2, 5, 7(E)

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¹⁵ [FOIA Exemptions 2, 5, 7(E)

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[FOIA Exemptions 2, 5, 7(E)

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¹⁶ [FOIA Exemptions 2, 5, 7(E)

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¹⁷ [FOIA Exemptions 2, 5, 7(E)

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¹⁸ [FOIA Exemptions 2, 5, 7(E)

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¹⁹ [FOIA Exemptions 2, 5, 7(E)

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²⁰ [FOIA Exemptions 2, 5, 7(E).]

²¹ [FOIA Exemptions 2, 5, 7(E)

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²² [FOIA Exemptions 2, 5, 7(E)

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²³ [FOIA Exemptions 2, 5, 7(E).]

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²⁴ [FOIA Exemptions 2, 5, 7(E)

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²⁵ [FOIA Exemptions 2, 5, 7(E)

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