

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

DATE: February 16, 2016

TO: Peter Sung Ohr, Regional Director
Region 13

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

SUBJECT: Personnel Staffing Group, LLC
d/b/a Most Valuable Personnel
Case 13-CA-155513

Bill Johnson's Chron
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This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by filing and maintaining a lawsuit against a former employee based on a claim that (b) (6), (b) (7)(C) posted defamatory statements on Facebook. We conclude that the Employer violated the Act because (1) the lawsuit is baseless and retaliatory; (2) the lawsuit is preempted; and (3) the Employer's discovery requests are unlawful under *Guess?, Inc.*¹ because employees' Section 7 confidentiality interests outweigh the Employer's need for the information.

Initially, we agree with the Region that the Charging Party was a statutory employee when (b) (6), (b) (7)(C) made (b) (6), (b) (7)(C) Facebook posts, notwithstanding that (b) (6), (b) (7)(C) was no longer working for the Employer at that time by choice, and was not a statutory supervisor at the time (b) (6), (b) (7)(C) employment with the Employer ended. We also agree that the Charging Party engaged in protected concerted activity through (b) (6), (b) (7)(C) Facebook posts. In addition to the reasons articulated by the Region, we conclude that the Charging Party's Facebook posts—asking employees who are interested in “ending the [Employer's] injustices” to “share” their experiences regarding sexual harassment and unpaid wages—were a continuation of earlier group actions aimed at improving terms and conditions of employment. In this regard, before (b) (6), (b) (7)(C) posted the messages on Facebook, the Charging Party filed charges with the EEOC alleging that the Employer discriminated against (b) (6), (b) (7)(C) and other employees on the basis of sex. And the Charging Party cooperated with DOL and Illinois DOL investigations of alleged wage and hour violations by the Employer that affected (b) (6), (b) (7)(C) and other employees. Therefore, the Charging Party's posts were a continuation of group efforts to remedy

¹ 339 NLRB 432, 434, 435 (2003).

the Employer's alleged discriminatory and unlawful payment practices, as well as a call to take further group action regarding those issues.² We also agree that the Charging Party's posts were not "so disloyal, reckless, or maliciously untrue" as to lose the Act's protection.³

Next, we agree with the Region that the Employer's lawsuit is unlawful under *Bill Johnson's* because the defamation claim is baseless and was brought with a retaliatory motive.⁴ Under *Linn v. Plant Guard Workers*, a court can only award damages for defamatory statements made during the course of a labor dispute if the plaintiff pleads and proves that the statements were made with malice and injured the plaintiff.⁵ In order to prove malice, the plaintiff must show that the statements were made with knowledge of falsity or with reckless disregard of whether the statements were true or false.⁶ Where, as here, a plaintiff alleges harm to its reputation, the plaintiff must show evidence of actual loss due to reputational harm.⁷ In sum, regardless of the requirements under state law, the Board will at a minimum

² See, e.g., *Five Star Transportation, Inc.*, 349 NLRB 42, 43-44, 59 (2007) (drivers' letters to school committee raising individual concerns over a change in bus contractors were a logical outgrowth of concerns expressed at a group meeting), *enforced*, 522 F.3d 46 (1st Cir. 2008); *Every Woman's Place*, 282 NLRB 413, 413 (1986) (employee's telephone inquiry to federal agency regarding holiday pay after complaining to employer found to be logical outgrowth of prior group complaints and discussions), *enforced mem.*, 833 F.2d 1012 (6th Cir. 1987).

³ *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 5 (Aug. 22, 2014), *enforced*, __ F. App'x __, 2015 WL 6161477 (2d Cir. 2015).

⁴ *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 743-44 (1983); see also *BE&K Construction Co.*, 351 NLRB 451, 456-58 (2007).

⁵ 383 U.S. 53, 64-65 (1966); see also *Letter Carriers v. Austin*, 418 U.S. 264, 278-79 (1974) (in state libel actions where federal policies' interest in "uninhibited, robust, and wide-open debate" in labor disputes are implicated, the standard articulated in *Linn* applies).

⁶ *Linn*, 383 U.S. at 65.

⁷ See *id.*; *Intercity Maint. Co. v. Local 254, SEIU*, 241 F.3d 82, 89-90 (1st Cir. 2001) (despite evidence of malice, plaintiff alleging defamation in labor dispute "could not rest on the common law presumption of damages" and failed to show "evidence of actual loss due to reputational harm and consequent lost profits").

require that the *Linn* standards—malice and actual harm—are met or a defamation claim will be considered baseless.⁸

Here, the Employer’s lawsuit is baseless because the Employer has presented no evidence that the Charging Party made maliciously false statements of fact, and it could not have reasonably believed it would acquire such evidence through discovery.⁹ Indeed, the trial court concluded that neither of the Facebook posts were even statements of fact.¹⁰ Rather, they were merely opinion and rhetorical hyperbole, which the Board and courts have recognized are incapable of being proved true or false in any objective sense.¹¹

In any event, even if the Employer were to make a colorable argument that the posts were false statements of fact, the Employer has not provided evidence that the Charging Party knew the statements were untrue or that it reasonably believed it could acquire such evidence during discovery.¹² On the contrary, there is ample evidence that the Charging Party believed that: (1) (b) (6), (b) (7)(C) and other (b) (6), (b) (7)(C) employees

⁸ See, e.g., *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 962-63 (2000) (applying requirements of *Linn* to examine whether employer’s defamation claim brought in state court was baseless under *Bill Johnson’s*).

⁹ See *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. at 6-7 (Dec. 30, 2011) (when considering reasonableness of a party’s defamation claim, “the question [for the Board] is whether a plaintiff, with the factual information in its possession...[plus any evidence it could reasonably expect to acquire through discovery], could reasonably have believed it had a cause of action upon which relief could eventually be granted”); see also *Beverly Health & Rehabilitation Services*, 331 NLRB at 963 (Board examines whether defamation suit raises a genuine issue of material fact under *Bill Johnson’s* and whether plaintiff’s pleadings are adequate under *Linn*).

¹⁰ The court dismissed the claim on those grounds. The Employer has appealed this dismissal, and the appeal is currently pending before an Illinois appeals court.

¹¹ See, e.g., *Letter Carriers v. Austin*, 418 U.S. at 285-86; *Steam Press Holdings v. Hawaii Teamsters & Allied Workers Union, Local 696*, 302 F.3d 998, 1005-07 (9th Cir. 2002) (citing various cases).

¹² See, e.g., *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 5 (Nov. 26, 2014) (concluding on-going defamation suit baseless where General Counsel showed an absence of evidence to support a necessary element of employer’s claim, i.e., no evidence that former employee actually published the allegedly defamatory anonymous statement).

were sexually harassed at work and that the Employer's response was inadequate, based on (b) (6), (b) (7)(C) own experiences and (b) (6), (b) (7)(C) discussions with (b) (6), (b) (7)(C) coworkers who had experienced similar problems; (2) the Employer failed to properly pay employees because the Charging Party's job duties as "on-site supervisor" required (b) (6), (b) (7)(C) to process complaints from temporary employees that they were not properly paid; and (3) the Employer had failed to properly pay the Charging Party and other "on-site supervisors" because (b) (6), (b) (7)(C) did not receive overtime when (b) (6), (b) (7)(C) worked more than forty hours in a week. And, even though (b) (6), (b) (7)(C) Facebook posts may have been based, in part, on the accounts of others, the Charging Party's failure to investigate those accounts does not establish a reckless disregard for the truth.¹³ The Employer has not presented evidence to the contrary; in fact, as of December 2015, a month before it filed the defamation lawsuit, the Employer knew that DOL had concluded that the Employer had failed to pay a proper minimum wage to two employees, and the Employer agreed to comply and pay the wages owed. Given these facts, as well as the other evidence underlying the Facebook posts that already is in the Employer's possession, e.g., the Charging Party's processing employees' complaints of improper payment and the multiple government investigations into alleged (b) (6), (b) (7)(C) discrimination and wage and hour violations, the Employer could not reasonably have believed that it could acquire evidence to establish malice during discovery. In sum, the Employer has failed to demonstrate in its court filings or during the Region's investigation that it can carry its burden to prove that the Facebook posts were maliciously false statements of fact.¹⁴

Likewise, the Employer has presented no evidence that the Facebook posts caused it harm, and it could not reasonably believe that it could acquire such evidence through discovery or other means. In its complaint, the Employer claims actual and compensatory damages of \$50,000 but has failed to articulate how the Charging Party's statements caused those alleged damages or how it determined the amount of damages.¹⁵ The Employer broadly asserts that its reputation was harmed because it

¹³ See, e.g., *NLRB v. New York Univ. Med. Ctr.*, 702 F.2d 284, 286-87, 291-92 (2d Cir. 1983) (statements contained in employees' leaflets alleging that employer's guards unlawfully targeted minorities were not knowingly false or made with reckless disregard for the truth where employees relied on accounts of others and did not engage in further investigation), *judgement affirmed mem.*, 751 F.2d 370 (1984).

¹⁴ See *Bill Johnson's*, 461 U.S. at 746 n.12 (burden rests on the plaintiff to present the Board with evidence showing genuine issues of material fact and prima facie evidence for each cause of action alleged).

¹⁵ See *Milum Textile*, 357 NLRB No. 169, slip op. at 7 (under *Linn*, plaintiff must plead and prove actual damages, in contrast to those jurisdictions where damages are presumed under state defamation law).

runs a temporary employment agency and the Facebook posts were directed “at the workforce [the Employer] relies on for its business.” However, in order to prove actual harm, as required under *Linn*, the Employer must show, for example, that individuals did not apply for work specifically because of the Facebook posts. It would not even be sufficient to show that fewer individuals applied for work (something the Employer hasn’t shown) where there were other possible reasons for a decline in applications, e.g., the many other public communications about the Employer’s alleged unlawful practices.¹⁶ Moreover, although the Employer has stated that it intends to use discovery to obtain evidence of harm, a reasonable plaintiff would be in possession of evidence of at least *some* damages before filing a lawsuit alleging compensable defamation rather than using discovery as a fishing expedition.¹⁷ Because the Employer has not shown that it possesses or reasonably believes it can obtain evidence to support essential elements of its cause of action—that the Charging Party’s statements were maliciously false and that the Employer experienced actual harm as a result of the Facebook statements—the Employer’s lawsuit is baseless under *Bill Johnson’s*.¹⁸

Next, we agree with the Region that the Employer’s lawsuit was retaliatory under *Bill Johnson’s* because it was directed at protected activity and the lawsuit is baseless.¹⁹ We also conclude that the Employer’s retaliatory motive may be inferred from the Employer’s animus towards protected activity. In particular, based on the Charging Party’s affidavit in support of the (b)(6), (b)(7)(C) discrimination lawsuit, the

¹⁶ Cf. *Intercity Maint. Co.*, 241 F.3d at 86, 90 (although plaintiff presented evidence of pecuniary loss from losing clients, plaintiff failed to show how the loss actually resulted from the union’s maliciously false statements).

¹⁷ See *Milum Textile*, 357 NLRB No. 169, slip op. at 7 (recognizing that, although resolution of the malice inquiry typically requires discovery, “a reasonable plaintiff would be in possession of evidence of actual damages” prior to filing a claim of defamation).

¹⁸ Cf. *Personnel Staffing Group, LLC*, Case 13-CA-149591, Advice Memorandum dated November 23, 2015, at 15 (concluding question of baselessness should be held in abeyance where employer’s lawsuit claiming defamation and other tortious acts by worker’s organization was at early stage—before parties had engaged in discovery or filed dispositive motions—with limited development of underlying facts both in the litigation and the Region’s investigation).

¹⁹ See, e.g., *Allied Mechanical Services*, 357 NLRB No. 101, slip op. at 10-11 (Oct. 25, 2011), *enforcement denied*, 734 F.3d 486 (6th Cir. 2013).

Employer was well aware that the Charging Party was affiliated with the CWC. And, as demonstrated by the numerous lawsuits filed by the Employer in response to CWC's activities on behalf of the Employer's employees, there is a considerable record that demonstrates the Employer's animus towards protected activities.²⁰ Finally, the Employer's request for punitive damages against the Charging Party also evidences retaliatory motive.²¹

We also agree with the Region that the Employer's lawsuit is preempted. The Board has held that *Linn* governs whether a defamation claim is preempted and, therefore, the Board examines whether the plaintiff pleads and proves malice and actual damages.²² As discussed above, the posts constitute opinion and rhetorical hyperbole, rather than statements of fact. And, even assuming that the posts were statements of fact, the Employer has produced no evidence that the posts were knowingly or recklessly false or that they caused actual harm to the Employer. Since the Employer has failed to satisfy these elements of the *Linn* framework, the defamation claim is preempted and violates Section 8(a)(1).²³

²⁰ Cf. *Summitville Tiles*, 300 NLRB 64, 65-66 (1990) (finding retaliatory motive based on evidence that employer filed lawsuit against former employees because of their affiliation with union and filing of lawsuits against the employer; employer's claim of civil conspiracy alleged that defendants and union were jointly responsible for instituting litigation in order to harass the employer).

²¹ See, e.g., *Atelier Condominium*, 361 NLRB No. 111, slip op. at 6 (employer's request for punitive damages was further evidence of retaliatory motive behind lawsuit against former employee, particularly where employer made no attempt to justify the amount of damages alleged).

²² See *Beverly Health & Rehabilitation Services*, 331 NLRB at 963 (concluding defamation lawsuits are governed by *Linn* and holding in abeyance allegation that employer had unlawfully maintained a preempted lawsuit where, in early stage of litigation, the employer had satisfied the *Linn* framework by pleading malice and damages and established genuine issues of material fact and law).

²³ Cf. *Beverly Health & Rehabilitation Services*, 336 NLRB 332, 332-34 (2001) (where Board had previously found that the employer's defamation suit was reasonably based, Board concluded that defamation claim was not preempted at time General Counsel issued complaint); *Personnel Staffing Group, LLC*, Case 13-CA-149591, Advice Memorandum dated November 23, 2015, at 12-13 (concluding defamation claim not preempted where Employer adequately pled actual malice and damages and, given early stage of litigation, there was no record to show that the Employer could not ultimately prove defamation as the lawsuit proceeded). Note that here, where the Employer's lawsuit targets allegedly defamatory statements, the

Finally, we agree with the Region that the Employer's discovery requests violated Section 8(a)(1) of the Act. The Employer requested, among other things, that the Charging Party provide the names of all individuals that the Charging Party had "tagged"²⁴ in the allegedly defamatory Facebook posts and any communications [REDACTED] had with any person—including coworkers—regarding the Employer, the Employer's clients, or the staffing industry in general.

In *Guess?, Inc.*, the Board announced a framework for assessing the lawfulness of an employer's demand for information concerning employees' confidential Section 7 activities in the course of a legal proceeding.²⁵ Specifically, it held that, in order to be lawful: (1) an employer's request must be relevant, (2) the request must not have an "illegal objective," and (3) the employer's need for the information must outweigh the employees' Section 7 confidentiality interests.

Here, because the requests were relevant to the subject matter of the complaint and could arguably lead to the discovery of admissible evidence, we assume, as the Board did in *Guess*, that the Employer's requests did not have an illegal objective and were relevant.²⁶ However, because the requests were extremely broad, we find that the Employer's need for the information does not justify the requests' significant impingement on employees' Section 7 confidentiality interests.

The Employer's interrogatories and requests for production of documents were broad enough to include information related to protected Section 7 communications that the Charging Party and other employees have an interest in keeping confidential. The Act protects the right of employees to keep communications about their working conditions confidential because the willingness of employees to engage in protected concerted activities "would be severely compromised" if an employer

requirements of *Loehmann's Plaza*, 305 NLRB 663, 671 n.56 (1991), *supplemented by* 316 NLRB 109 (1995), *aff'd sub nom. UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), do not apply and the Region may proceed to argue that the lawsuit is preempted under *Linn* and violates Section 8(a)(1) on that basis.

²⁴ On the Facebook posting, the Charging Party "tagged [one named individual] and 28 others" whose names did not appear on the page. By tagging others, the Charging Party's post would appear on those individuals' Facebook pages, as long as their standard privacy settings had not been adjusted to prevent this.

²⁵ 339 NLRB at 434-35.

²⁶ *Id.* at 434.

could easily obtain information about those activities.²⁷ Here, where the Employer has already issued subpoenas to those individuals who responded by name to the Charging Party's posts and has filed multiple lawsuits aimed at protected activity, employees would reasonably be chilled from engaging in protected concerted activity if their identities were shared with the Employer.²⁸

In contrast, the Employer's legitimate need for the information is marginal. It is highly unlikely that discovery would yield evidence demonstrating that the Charging Party's statements were maliciously false. In all likelihood, the Employer already possesses whatever evidence is relevant to its claim. Indeed, one of the Charging Party's job duties with the Employer involved reporting employees' complaints that they were improperly paid, and the Employer has been the target of government investigations of alleged (b) (6), (b) (7)(C) discrimination and wage and hour violations.²⁹ The discovery requests are also so broad that they encompass, for example, any communications that the Charging Party ever had with (b) (6), (b) (7)(C) coworkers about the Employer, not just communications that would be arguably relevant to the defamation claim. And, given that the Employer has failed to articulate or demonstrate how it intends to prove actual harm, its discovery requests in that regard are an improper fishing expedition.³⁰ Therefore, we find that the Employer's

²⁷ See *Guess*, 339 NLRB at 434-35 & n.8 (“[E]mployees are guaranteed a certain degree of assurance that their Section 7 activities will be kept confidential, if they so desire.”); *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1 (Mar. 19, 2015) (finding employer subpoena unlawful because it would “subject employee Section 7 activities to unwarranted investigation and interrogation”); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (“The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing.”), *enforced*, 200 F.3d 1162 (8th Cir. 2000).

²⁸ Cf. *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 3 (Aug. 19, 2011) (employer's record of intimidating employees through surveillance, interrogations, and other means supported finding that discovery request seeking to identify employees who joined the union had an illegal objective).

²⁹ Cf. *Guess*, 339 NLRB at 432, 435 (finding employer's demand for names of coworkers who attended union meetings during deposition related to worker's compensation case, where employer sought to discover whether employee sustained her injuries while performing union activities, was overbroad and only of marginal relevance to employer's defense).

³⁰ *Milum Textile*, 357 NLRB No. 169, slip op. at 7.

need for the information is outweighed by employees' confidentiality interests, and the Employer's discovery requests are unlawfully overbroad under Section 8(a)(1).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act because its defamation lawsuit is baseless and retaliatory, the lawsuit is preempted, and the Employer's discovery requests are overbroad and unlawful. Further, the Region should seek all legal and other expenses incurred by the Charging Party in defense of the lawsuit.³¹

/s/
B.J.K.

ADV.13-CA-155513.Response.Personnel Staffing. (b) (6), (b)

³¹ See, e.g., *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1379 (7th Cir. 1997).