

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

DATE: November 30, 2016

TO: John J. Walsh, Jr., Regional Director
Region 1

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

SUBJECT: Oznemoc, Inc. d/b/a Centerfolds
Case 01-CA-177092

506-0100
506-0170
512-5024-5300-0000
512-5024-6300-0000
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The Region submitted this case for advice about whether the Employer unlawfully sought to obtain through discovery the identities of all of the individuals with whom the plaintiff, its former employee, communicated about their civil class action lawsuit against the Employer. We conclude that the discovery requests were unlawfully overbroad and the Region should issue complaint, absent settlement, alleging that the Employer's submission and pursuit of the discovery requests violated Section 8(a)(1).

FACTS

Centerfolds (the "Employer") operates an exotic dancing/adult entertainment business in downtown Boston. The exotic dancing community in Boston is small. Because there is a social stigma associated with exotic dancing, performers use stage names to protect their identities.

On July 28, 2015, the Employer's then-employee (the "Named Plaintiff") filed a class action lawsuit in Massachusetts Superior Court alleging violations of Massachusetts wage and tipping law. In the course of that lawsuit, the Employer filed civil discovery requests, including seeking the identity of any individual, including any co-worker, the Named Plaintiff had spoken to about the subject matter of the lawsuit, and a detailed description of what was said. The Named Plaintiff objected to this discovery request, *inter alia*, on the basis that it violated Section 7 of the Act.

Without waiving this objection, the Named Plaintiff disclosed to the Employer the substance of [REDACTED] text message exchanges with co-workers discussing the

Employer's alleged wage and tipping violations, redacting the names of (b) (6), (b) (7)(C) co-workers. On June 13,¹ the court denied the Employer's motion to compel the Named Plaintiff to disclose (b) (6), (b) (7)(C) co-workers' identities, explaining that "[t]here is no showing of a need to know the names of employees, whose privacy interests therefore prevail unless they be witnesses."² The Employer continues to maintain that it needs the identities of all of the employees who texted so that it can know which potential witnesses to meet with to gather more information useful to build its case, including to impeach the Named Plaintiff's credibility. The Employer offered to settle the discovery dispute by having the Named Plaintiff show the identities to the Employer's attorney through an "attorneys' eyes only" provision. The Named Plaintiff refused.

ACTION

We conclude that the Employer violated Section 8(a)(1) by submitting and pursuing unlawfully overbroad discovery requests seeking the identities of employees with whom the Named Plaintiff communicated about their civil class action lawsuit against the Employer.

The Act protects employees' filing of class action lawsuits against their employer.³ It also protects the right of employees to keep communications about their working conditions confidential, including communications undertaken as part of a class action lawsuit, because the willingness of employees to engage in protected concerted activities would be undermined if an employer could easily obtain such information.⁴ These protections extend to text messages about employees' terms and conditions of employment.⁵

¹ All dates referred to in this memo are in 2016.

² On June 27, the Named Plaintiff amended the complaint to add a second named plaintiff to the class action lawsuit. In response, on August 4, the Employer issued interrogatories seeking the same discovery information from the second named plaintiff as it had sought from the Named Plaintiff.

³ See *Tarlton & Son Inc.*, 363 NLRB No. 175, slip op. at 2 (April 29, 2016) (filing of a class action lawsuit is "clearly protected concerted activity") (citations omitted); *Beyoglu*, 362 NLRB No. 152, slip op. at 2 (July 29, 2015) ("we hold that the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7").

⁴ See *Guess?, Inc.*, 339 NLRB 432, 434-35 & n.8 ("employees are guaranteed a certain degree of assurance that their Section 7 activities will be kept confidential, if they so

This protection is not without limits. In *Guess*, 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.⁶ Specifically, it held that in order to be lawful: (1) an employer's request must be relevant, (2) an employer's request must not have an "illegal objective," and (3) the employer's need for the information must outweigh the employees' Section 7 confidentiality interests.⁷

Applying that framework, the *Guess* Board found that the employer violated the Act when, during a deposition concerning an employee's workers' compensation claim, it asked the employee for the names of co-workers who had attended meetings at a union hall.⁸ The employer had argued that the question was necessary for it to identify potential witnesses to whether the employee had sustained (b) (6), (b) (7) injuries while performing activities on behalf of the union or had engaged in physical activities at the union hall that were inconsistent with (b) (6), (b) (7) injuries.⁹ The Board, in rejecting that defense, assumed that the question was relevant and had a lawful objective; nonetheless, it found that the need for the information "was only marginal," and was outweighed by the employee's significant Section 7 interests, because the question was

desire") *petition for review dismissed*, 2003 WL 22705744, Case Nos. 03-1214, 03-1248 (D.C. Cir. Nov. 13, 2003); *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1, n.1 (March 19, 2015) (finding employer subpoena—seeking communications between employees and their union, authorization and membership cards and communications relating to card distribution and solicitation—unlawful because it would "subject employees' Section 7 activities to unwarranted investigation and interrogation").

⁵ See, e.g., *Laguna College of Art and Design*, 362 NLRB No. 112, slip op. at 1, n.1 (June 15, 2015) (upholding hearing officer's determination to quash a subpoena seeking pro-union supervisor's personal emails and text messages with the union organizing committee and union officials involving organizing strategy because the "considerable interests" of the workers "in keeping their Section 7 activity confidential" outweighed the employer's need for the subpoenaed information).

⁶ *Guess?, Inc.*, 339 NLRB at 434, 435 n.8.

⁷ *Id.* at 434.

⁸ *Id.* at 432.

⁹ *Id.*

overbroad.¹⁰ The *Guess* Board relied in part on *National Telephone Directory Corp.*, in which it determined that employee confidentiality interests trump an employer's need to obtain employee identities for cross-examination and credibility impeachment purposes, at least where the employer is not prejudiced by this limitation.¹¹

We conclude that under *Guess*, the Employer acted unlawfully by submitting its overbroad discovery requests seeking the identities of employees with whom the Named Plaintiff communicated about their civil class action lawsuit against the Employer. As the Board did in *Guess*, we assume *arguendo* that the employee identities subject to the Employer's discovery requests are sufficiently relevant to the issues in the lawsuit, such that, absent countervailing employee rights, the discovery requests would be appropriate. We also assume that the Employer did not have an illegal objective in submitting the discovery requests. Nonetheless, the Employer's discovery requests violated Section 8(a)(1) because the *Guess* balancing test favors protecting the employees' Section 7 confidentiality interests in this case.

The employees' interest in maintaining the confidentiality of their identities is strong. The text messages constitute private communications among employees regarding their working conditions with their class action lawsuit representative. Without the protection afforded by Section 7, the employees in this case would likely be hesitant to share their experiences and concerns for fear that the Employer could retaliate against them, for instance, by terminating them, refusing to rehire them, or even blacklisting them from the small local exotic dancing industry. These confidentiality concerns are heightened in this case by the social stigma associated with the exotic dancing industry, evinced by the common practice of dancers using stage names to maintain their anonymity.

In contrast, the Employer's need for the employees' identities is weak. Significantly, the court denied the Employer's motion to compel discovery, including the Employer's request to learn the names of the employees who communicated with the Named Plaintiff by text, ruling that the disclosure of the substance of the texts was sufficient to protect the Employer's interests at this stage of litigation.¹²

¹⁰ *Id.* at 434-35.

¹¹ *Id.* at 434, citing *National Telephone Directory Corp.*, 319 NLRB 420, 421-22 (1995).

¹² This case is distinguishable from *Cintas Corp.*, Case 29-CA-27153, pp. 7-8 & n.17, Advice Memorandum dated May 24, 2006. In *Cintas*, we determined that the employer lawfully sought union housecall sheets through discovery, where the employer had agreed to accept the housecall sheets with the employee names redacted. Here, the Named Plaintiff provided the substance of the requested communications with the names redacted, and the Employer continued to seek the

Moreover, the Employer's argument that it needs the names of those employees now in order to gather more information to impeach the Named Plaintiff is not compelling where the Named Plaintiff will call witnesses with relevant information and the Employer will then have the opportunity to cross examine them.¹³ Finally, the Employer has access to its own employees and can question them in accordance with *Johnnie's Poultry* safeguards.¹⁴

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by submitting and pursuing overbroad discovery requests seeking to obtain the identities of the employees with whom the Named Plaintiff communicated about their civil class action lawsuit against the Employer.

/s/
B.J.K.

ADV.01-CA-177092.Response.Centerfolds. (b) (6), (b)

communicants' identities. *See also Durham School Services, L.P.*, Case 15-CA-163098, Advice Memorandum dated January 13, 2016 at p. 8 (concluding that the employer unlawfully sought the identities of employees who completed union safety surveys where the substance of the surveys had been disclosed to the employer, and finding that the state court protective order for an "attorneys eyes only" viewing of the employee names to be "insufficient to safeguard employees' confidentiality interests").

¹³ *See National Telephone*, 319 NLRB at 421.

¹⁴ *See Johnnie's Poultry Co.*, 146 NLRB 770, 774-75 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).