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

Advice Memorandum

DATE: August 15, 2016

TO: Mori P. Rubin, Regional Director
Region 31

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

SUBJECT: Farmworker Institute of Education & Leadership Development (FIELD)
Case 31-CA-165457

512-5009-1500
512-5009-6767
512-5024-0100
512-5024-7300
512-5030-8000
512-5030-8050
512-5030-8075

The Region submitted this case for advice as to whether the Employer's "Evidence Preservation Notice" issued to a former employee violated Section 8(a)(1).[1] We conclude that the evidence preservation notice, in conjunction with the Employer's overall cease and desist notice, constitutes an unlawful threat to sue violative of Section 8(a)(1) because, to date, no lawsuit has been filed.

FACTS

The Farmworker Institute of Education & Leadership Development ("the Employer" or "FIELD") is a non-profit charter educational institution and employs education staff who teach non-traditional students who live primarily in farmworker communities. A union organizing drive began in early November 2015[2] by an

---

[1] The evidence preservation notice is part of the Employer's larger "Cease and Desist Notice" that threatened legal action against the employee. The Region has already determined, and we agree, that the remaining portions of the cease and desist notice are unlawful and the Region seeks advice only as to the evidence preservation notice. Additionally, we also agree with the Region that the employee's activities, which gave rise to the Employer's notices, were protected.

[2] All dates hereinafter are in 2015 unless otherwise stated.

employee who was soon after discharged due to budget issues that predated (b) (6), (b) (7 organizing activities.[3]

In early December, the Employer served the former employee with a "Cease and Desist Notice" that described allegedly tortious contact between (b) (6), (b) (FIELD students, and current employees, wherein the former employee allegedly contacted current students and persuaded them to drop out of the Employer's program.[4] The notice threatened the employee with legal action for damages if (b) (6), (b) (engaged in further contact with FIELD students or employees. The cease and desist notice includes an evidence preservation notice stating that litigation is reasonably anticipated and that the employee is under a legal duty to preserve and protect documents and data relevant to the Employer's claims. The notice states that the employee's failure to retain evidence relevant to the Employer's potential lawsuit against (b) (6), (b) (7 would constitute spoliation of evidence that would subject (b) (6), (b) (7 to legal claims for damages or evidentiary and monetary sanctions.

The evidence preservation notice includes the following language:

> For purposes of this notice, electronic data or electronic evidence shall include, but not be limited to, e-mails, texts and/or phone records with [the Employer's] students and/or employees, all text files (including word processing documents), presentation files (such as PowerPoint presentations), financial data, spread sheets, e-mail files and information concerning e-mail files (including logs of e-mail history and usage, header information, and deleted files), internet history files and preferences, graphical files in any format, databases, calendar and scheduling information, task lists, voicemail, instant messaging, and other electronic communications, telephone logs, contact managers, computer system activity logs, all file fragments, internet usage files, offline storage, information stored on

---

[3] The original charge in this case was filed by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO ("the Union"). The employee, though not employed by the Union, headed the Union's organizing drive at the Employer's location. The Region dismissed a separate charge by the Union alleging that the employee's discharge was unlawful.

[4] Specifically, the notice asserts that the employee's actions, under California law, give rise to claims for intentional interference with contractual relations and negligent interference with prospective relations. The Employer bases these claims on its state contracts, which tie student attendance to state funding for the Employer's programs.

> removable media or storage media, information contained on laptops or other portable devices such as tablets or smart phones, network access information, and backup files containing electronic data or electronic evidence.

The former employee denies that (b) (6), (b) (7 contacted students to persuade them to drop out of the Employer's program and instead remained in contact with (b) (6), (b) (7 former students to help them get their grades. To date, the Employer has not filed any lawsuit against the employee.

ACTION

We conclude that the "Evidence Preservation Notice," issued in response to the employee's protected concerted activity, was not a proper discovery instrument where no lawsuit has been filed and, instead, violates Section 8(a)(1) as a threat to sue that tends to interfere with and coerce employees in the exercise of their protected rights.[5]

It is well settled that threats to sue an employee for engaging in protected concerted activity violate the Act.[6] For example, in *DHL Express*, the ALJ, as affirmed by the Board, found that the employer's threat to sue an employee for defamation, based on his pro-union article, interfered with and coerced employees in the exercise of their protected rights.[7] Indeed, the employer's threat in *DHL Express* actually chilled employees' Section 7 activity where the employee, following the

---

[5] As a threshold matter, we note that although the employee was discharged prior to the events at issue here, (b) (6), (b) (7 remained a Section 2(3) employee. *See, e.g.*, *Schlegel Oklahoma, Inc.*, 250 NLRB 20, 24 (1980) (discharged former employee was still employee for purposes of Section 2(3) and employer violated 8(a)(1) when it threatened former employee with arrest for hand billing), *enforced* 644 F.2d 842 (10th Cir. 1981). Further, because the Employer's evidence preservation notice is part of an unlawful threat to sue and is not a formal discovery instrument filed in an active lawsuit, we do not rely on *Guess?, Inc.* 339 NLRB 432, 434 (2003) (setting out the Board's three-part test to determine if employer's discovery questions are unlawful: (1) questions must be relevant; (2) if relevant, questions must not have an illegal objective; and (3) if relevant and no illegal objective, employer's interest in obtaining information must outweigh employees' Section 7 confidentiality interests).

[6] *See, e.g.*, *DHL Express, Inc.*, 355 NLRB 694, 706 (2010) (threats to sue employees for engaging in protected concerted activities violate the Act because they reasonably tend to interfere with, restrain, or coerce employees in the exercise of Section 7 activities).

[7] *Id.* at 694, 706.

threat, lessened (b) (6), (b) (7 previous outspoken opinions on union issues "because (b) (6), (b) started thinking about 'what I should [or] should not say.'"[8]

Similarly, here, the Employer's evidence preservation notice, as part of the larger cease and desist notice, threatened the employee with legal action and demanded (b) (6), (b) (7 retain a vast array of personal records in anticipation of litigation if (b) (6), (b) (7 continued to engage in protected activity by contacting FIELD's students and employees to discuss terms and conditions of employment.[9] Like in *DHL Express*, the Employer's threat to sue and accompanying evidence preservation notice tended to interfere with, restrain and coerce the employee from speaking with other FIELD employees and students, and accordingly violated Section 8(a)(1). Indeed, the Employer has not filed any lawsuit to date and, thus, the threat violated Section 8(a)(1) regardless of whether a lawsuit would have been unlawful had it been filed.[10] Further, the fact that the

---

[8] *Id.* at 707. *See also Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1, 22 (Aug. 22, 2014) (Board affirmed ALJ's finding that employer's threat to sue for defamation based on employee's social media post violated 8(a)(1) and threat actually chilled Section 7 activity where employee removed social media post following threat and another employee returned to the post to "unlike" it), *aff'd sub nom.*, *Three D, LLC v. NLRB*, 629 Fed.Appx. 33 (2d Cir. 2015).

[9] Because the Employer believes the employee engaged in protected concerted activities and issued its cease and desist and evidence preservation notices in direct response, it is immaterial whether the employee actually engaged in any of the alleged activities. *See United States Service Industries*, 314 NLRB 30, 30-31 (1994) (employer violated 8(a)(1) where it terminated employee because it believed employee was stirring up other employees about their terms and conditions; immaterial whether employee actually engaged in protected concerted activities), *enforced* 80 F.3d 558 (D.C. Cir. 1996).

[10] The Board, on several occasions, has discussed, but never affirmatively decided, whether to apply the principles of *BE & K Construction Co.*, 351 NLRB 451 (2007), to threats to initiate litigation where those threats are "incidental" to the actual filing of a lawsuit. Rather, in each instance, the Board has assumed *arguendo* that *BE&K* principles may apply to such threats, but found that the threats were not incidental to a lawsuit because no lawsuits were ultimately filed in those cases. *See Triple Play*, 361 NLRB No. 31, slip op. at 1 n.3 (threats were not incidental to lawsuit where employer's counsel did not contact employee and no legal action taken against employee); *DHL Express*, 355 NLRB at 694 n.3 (threats to sue not incidental to lawsuit where employer discussed possibility of lawsuit with more than one attorney but never filed suit); *Network Dynamics Cabling*, 351 NLRB 1423, 1427 n.14 (2007) (employer's threats to sue not incidental to lawsuit where employer never pressed charges and employee did not have items he was accused of taking); *Postal Service*, 350 NLRB 125, 125-26 (2007) (employer's statements that employee should get good

employee has ceased contacting current FIELD students or employees indicates that [redacted] has been chilled by the Employer's threats.

Further, the notices currently serve no purpose other than as an overbroad intimidation tactic. The Employer was not required to issue such notices to file a lawsuit.[11] Indeed, FIELD does not cite any legal duty or obligation it was under that would require it to issue the evidence preservation notice. Instead, the Employer's preservation notice is simply the Employer's attempt to usurp the role of the court by threatening sanctions it is unable to levy.[12] Finally, the preservation notice cites information that is facially irrelevant given its expansive commands to preserve extraneous information such as "financial data," "network access information," "PowerPoint presentations," and "all electronic data in any format," that have no relation to the Employer's assertions that the employee tortuously interfered with the Employer's business by contacting FIELD students and employees. Therefore, the evidence preservation notice served only to further intimidate and coerce the employee and others in exercising their Section 7 rights.

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that FIELD's evidence preservation notice violates Section 8(a)(1).

/s/
B.J.K.

H: ADV.31-CA-165457.Response.FIELD.[redacted].doc

---

attorney because employer was going to sue were not threats incidental to lawsuit where employer never actually filed lawsuit), *enforced* 526 F.3d 729 (11th Cir. 2008). As in those cases, here, the Employer's threats encompassed in the cease and desist notice and the evidence preservation notice were not threats incidental to a lawsuit because, to date, no lawsuit has been filed.

[11] *See generally* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); CAL. CIV. PROC. CODE § 350 (West 2016) ("An action is commenced, within the meaning of this Title, when the complaint is filed.").

[12] *See, e.g., New Albertsons, Inc. v. Superior Court*, 168 Cal.App.4th 1403, 1422 (Cal. Ct. App. 2008) (evidentiary sanctions limited to those provided under California Code of Civil Procedure); CAL. CIV. PROC. CODE § 2031.310 (i) (court may impose evidentiary sanction for party's failure to obey court order compelling discovery response); CAL. CIV. PROC. CODE § 2031.320 (c) (same).