

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

Advice Memorandum

DATE: August 24, 2016

TO: Paula S. Sawyer, Regional Director
Region 27

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

SUBJECT: United States Postal Service
Case 27-CA-170744

506-4033-3900
506-4067-8700
506-6090-1600
512-5006-5052
512-5030-4090
512-5072-2700
512-5072-4000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by requiring a Union steward, under threat of discipline, to provide a written statement for its investigation regarding an employee's sexual harassment allegations made during a *Weingarten* interview. We conclude that: (1) the Employer violated Section 8(a)(1) by threatening the steward with discipline and coercing (b) (6), (b) (7) to provide a statement that was in conflict with (b) (6), (b) (7) representational duties; and (2) in the alternative, the Employer violated Section 8(a)(1) by failing to narrowly tailor the scope of the required statement to the facts surrounding the alleged sexual harassment.

FACTS

The American Postal Workers Union Local #132 ("the Union") represents a unit of workers for the United States Postal Service ("the Employer") in Billings, Montana. On (b) (6), (b) (7)(C) 2016, a Union steward was asked to be a *Weingarten* representative during a meeting between a supervisor and an employee ("Employee A") who was accused of verbally harassing another employee ("Employee B") earlier that day. During the meeting, Employee A claimed, unrelated to the events at issue in the meeting, that Employee B had been sexually harassing (b) (6), (b) (7) for years and that (b) (6), (b) (7) had been keeping a notebook cataloguing the sexual harassment. Employee A initially stated (b) (6), (b) (7) was saving the notebook for the right time to use it, but then modified (b) (6), (b) (7) statement, saying (b) (6), (b) (7) meant that (b) (6), (b) (7) did not think the sexual harassment by Employee B had been so bad in th st that (b) (6), (b) (7) felt the need to report it. The steward and the supervisor explained to Employee A that any sexual harassment should have been immediately reported. When the interview ended and Employee A

left, the supervisor told the steward to prepare a written statement about what had transpired in the meeting and that [REDACTED] was required to cooperate in the Employer's investigations or the steward could be subject to discipline.

The steward wrote a statement immediately following the meeting and chronicled everything that was discussed, including Employee A's admission that [REDACTED] had recorded instances of alleged sexual harassment without reporting them to the Employer. After receiving the Union steward's statement, the supervisor did not follow up with [REDACTED] further, and the steward was not contacted at any point during the Employer's formal sexual harassment investigation of Employee B that followed. It does not appear that the Employer initiated a separate investigation of Employee A for any misconduct related to [REDACTED] failure to report sexual harassment claims over a number of years.

The Employer's Employee and Labor Relations Manual ("ELM"), at Section 665.3, states that "Employees must cooperate in any [Employer] investigations, including Office of the Inspector General investigations."¹ That section of the ELM is silent as to whether Union representatives are also required to cooperate in investigations. The Employer's Publication 552, "Manager's Guide to Understanding, Investigating, and Preventing Harassment," outlines, in detail, how the Employer's managers are to approach allegations of sexual harassment. In the section titled "Initial Management Inquiry Process," the document instructs managers to interview the accuser, the alleged harasser, and any witnesses to the harassment. That section also outlines a series of specific questions to ask each individual to obtain the details of the alleged harassment.

The Employer's investigation ultimately determined that Employee A's sexual harassment charges were unfounded. The Union did not file a grievance over the Employer's demand that the steward provide a statement under threat of discipline.

ACTION

We conclude that the Employer violated Section 8(a)(1) by threatening the steward with discipline and coercing [REDACTED] to provide a statement that was in conflict with [REDACTED] representational duties; and, in the alternative, the Employer violated Section 8(a)(1) by failing to narrowly tailor the scope of the required statement to the facts surrounding the alleged sexual harassment.

¹ The Employer cites ELM Section 665.41 as the policy source for employee cooperation with investigations. However, this appears to be a typographical error, as Section 665.41 speaks to "Requirement of Regular Attendance."

It is well-settled that employers have a legitimate prerogative to investigate employee misconduct and may compel employees to submit to questions about an incident where it is still in the investigatory stage.² In cases of employee misconduct, the Board has recognized the tension between the Section 7 right of employees to make common cause with their co-workers and an employer's need to maintain the orderly conduct of its business.³ The Board has struck the balance in favor of the employer's interest where the employer's questioning takes place in an investigatory context prior to disciplinary action.⁴ However, the Board has struck the balance in favor of employees' Section 7 interests where an employer seeks to question employees to "vindicate its disciplinary decision" prior to grievance arbitration because, at that stage, the employer's interests move away from the legitimate concern of maintaining orderly business operations.⁵

The D.C. Circuit denied enforcement of the Board's decision in *Cook I* that an employee was unlawfully questioned prior to arbitration, but remanded the case to the Board to reconsider whether the other employee who was ordered to participate in questioning was entitled to additional protection due to his role as steward, because "[t]here are fundamental differences between an interview of an employee and an interview of a union steward."⁶ In *Cook II*, the Board on remand, accepting the court's decision as law of the case, found that the employer's interview of the steward was an unwarranted infringement of the steward's protected union activity, emphasizing that the steward's involvement in the underlying issue arose solely as a result of his status as a steward and that he was not an eyewitness to the events the employer was interested in.⁷

² See *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279 (1992) (employer has "legitimate prerogative to investigate employee misconduct in its facilities without interference from union officials").

³ *Cook Paint & Varnish Co. (Cook I)*, 246 NLRB 646, 646 (1979), *enforcement denied and remanded*, 648 F.2d 712 (D.C. Cir. 1981).

⁴ *Id.*

⁵ *Id.* (finding that employer unlawfully compelled two employee witnesses to submit to questioning concerning coworker's misconduct after disciplinary action had been taken and related grievance proceeding was scheduled for arbitration).

⁶ *Cook*, 648 F.2d at 724. The D.C. Circuit rejected what it considered to be a "per se rule" that employers may never use a threat of discipline to compel employees to respond to questions relating to a grievance proceeding that has been scheduled for arbitration. 648 F.2d at 719-20.

⁷ *Cook Paint & Varnish Co. (Cook II)*, 258 NLRB 1230, 1231 (1982).

Similarly, in *Hospital Linen Service*,⁸ the Board affirmed the ALJ's finding that the employer violated Section 8(a)(1) when it threatened a union steward with discharge if she did not provide a written account of an employee's conduct, which she witnessed while performing her steward duties.⁹ In that case, the union steward accompanied a unit employee to a discharge meeting during which the employee tore up the envelope containing his discharge notice and threw it at the general manager's face.¹⁰ Following the meeting, in the hallway outside the manager's office, the employee cursed at and threatened the manager with bodily harm.¹¹ The manager then told the steward that she was required to provide a statement of what she witnessed; otherwise, she would be terminated.¹² The ALJ found that the employer's purpose for requiring the statement was to supplement the testimony of employer representatives, who also had witnessed the employee's misconduct, during arbitration if the union filed a grievance in the matter.¹³ The ALJ determined that the steward was functioning in her representational role during the discharge meeting and afterward in the hallway and that the employer unlawfully infringed on her protected representational activity. Specifically, the employer put her "in a sharp conflict of interest by pitting her interest in representing [the] bargaining unit employee to the fullest extent, against her interest in protecting her own job by complying with the [employer's] demand."¹⁴

Here, like in *Hospital Linen*, the Employer unlawfully put the steward in a "sharp conflict of interest" by requiring ██████████^{(b)(6), (b)(7)(C)} to give a statement about what was discussed during the *Weingarten* meeting.¹⁵ Given the seriousness of the sexual harassment allegations that were revealed at that meeting, we recognize the

⁸ 316 NLRB 1151 (1995).

⁹ *Id.* at 1151, 1153.

¹⁰ *Id.* at 1152.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1153.

¹⁴ *Id.*

¹⁵ See generally *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 252 (1975) (employees have right to a union representative present at investigatory interview where discipline is reasonably anticipated).

Employer's legitimate interest in investigating them.¹⁶ And, unlike in *Cook Paint & Varnish*, the Employer sought this statement as part of its investigatory process, rather than at the pre-arbitral stage. However, the Employer's requirement that the steward provide a statement appears only to serve its interest in corroborating what the supervisor already knew by virtue of attending the same meeting.¹⁷ Indeed, the steward did not witness any of the alleged sexual harassment; [REDACTED] only witnessed Employee A's claim that [REDACTED] had been sexually harassed by Employee B and had been keeping a record of each occurrence.¹⁸ Moreover, the steward's involvement in the Employer's investigation arose exclusively because of [REDACTED] steward status; but for [REDACTED] representational role and presence at the *Weingarten* meeting, [REDACTED] would not have witnessed anything relating to Employee A's allegation.¹⁹ Thus, the steward's representational status and corollary Section 7 interests in representing employees outweighs the Employer's interest in merely corroborating a statement also witnessed by a supervisor, and the Employer violated the Act by forcing the steward to choose between [REDACTED] representational interests and protecting [REDACTED] job.

In the alternative, if it is found that the Employer's requiring a statement from the steward did serve the Employer's legitimate interests in preventing misconduct, the requirement still violated Section 8(a)(1) because the Employer's demand was not narrowly tailored to the issue it was investigating—the sexual harassment claim. In *St. Francis Regional Medical Center*, the Board agreed with the ALJ that the Employer violated Section 8(a)(1) when it questioned a union steward and threatened her with discipline for failing to aid the employer in its investigation of other employees about breaches of confidential patient information.²⁰ The Board noted that employers may question employees under a “lawful investigation into facially valid claims of misconduct,” even if the alleged misconduct took place during the exercise of

¹⁶ See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 8 (Aug. 11, 2014) (recognizing that an employer has a legitimate interest in preventing employee sexual harassment because an employer is responsible for acts of sexual harassment that it knew or should have known of, unless it can show it took immediate and appropriate corrective action).

¹⁷ See *Hospital Linen Service*, 316 NLRB at 1153 (employer's purpose for requiring statement from steward was to supplement testimony manager could give if union took matter to grievance arbitration).

¹⁸ See *id.*

¹⁹ See *Cook II*, 258 NLRB at 1231 (steward involvement arose solely as result of steward status, and he was not eyewitness to events employer sought information on).

²⁰ 363 NLRB No. 69, slip op. at 1 n.2, 18 (Dec. 16, 2015).

Section 7 rights, but employers must avoid impinging on Section 7 rights by, among other things, tailoring questions to address only the narrow facts surrounding the alleged misconduct.²¹

Here, the Employer failed to narrowly tailor its demand for a written statement to include only Employee A's sexual harassment claim and, instead, demanded that the steward, under threat of discipline, provide a statement about what was discussed during the *Weingarten* meeting.²² Even assuming that the Employer did not explicitly tell the steward to include "everything" from the meeting, the instruction was sufficiently vague that the steward reasonably understood it as a demand for an account of the entire meeting. Indeed, the steward's statement provided a narrative of the whole meeting, including the events discussed before Employee A made the sexual harassment claim. We also note that the Employer relies on its Publication 552, "Manager's Guide to Understanding, Investigating, and Preventing Harassment," as its policy on preventing and investigating sexual harassment. That publication's section on investigating claims of sexual harassment includes a suggested form to be used for interviewing witnesses of alleged sexual harassment, and the questions on the witness interview form appear narrowly tailored to obtain information necessary to investigate a sexual harassment claim. The Employer failed to follow its own policies by not using the form and instead demanded a blanket statement from the steward. Thus, the Employer impinged on the steward's Section 7 rights by unlawfully demanding a statement that was not narrowly tailored to the specific facts surrounding Employee A's sexual harassment claims.

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Employer's demand for a statement from the steward concerning the *Weingarten* meeting, under threat of discipline, violated Section 8(a)(1).

/s/
B.J.K.

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²¹ *Id.*, slip op. at 1 n.2. Cf. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528-29 (2007) (no violation where employer's questions were narrowly tailored and did not ask about substance of conversations during protected activities; employer's threat to discipline for employee's failure to cooperate would not reasonably be construed as threat of discipline for union activities).

²² Although the Employer claims it demanded a statement from the steward only as to the sexual harassment claim, the steward asserts that the supervisor demanded a statement about what occurred overall in the meeting.