

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

DATE: January 6, 2017

TO: Paula S. Sawyer, Regional Director  
Region 27

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

SUBJECT: CF&I Steel, L.P.  
d/b/a Evraz Rocky Mountain Steel Mills  
Case 27-CA-181096

*Bill Johnson's Chron*  
512-5009-3300  
512-5009-6700  
512-5009-6733  
524-3350-8500

This case was submitted for advice as to whether the Employer violated the Act by filing a lawsuit against an unlawfully terminated employee who had used (b) (6), (b) (7)(C) cell phone to record grievance meetings and a management caucus.

We conclude that the Employer violated the Act by filing the three state law counts of its lawsuit, as it lacked a reasonable basis in law and fact and the lawsuit was filed with a retaliatory motive. We further conclude that the Employer did not violate the Act by filing the Federal law count of the lawsuit, as the Employer reasonably believed that it would be able to show that the terminated employee unlawfully recorded the management caucus.

**FACTS**

Since at least May 2015, the (b) (6), (b) (7)(C) (the Union), who was also employed as a (b) (6), (b) (7)(C) by CF&I Steel, L.P. d/b/a Evraz Rocky Mountain Steel Mills (the Employer), has openly and consistently used (b) (6), (b) (7)(C) cell phone to record labor-management grievance meetings in which (b) (6), (b) (7)(C) was a participant. Since at least early 2016,<sup>1</sup> (b) (6), (b) (7)(C) has discussed (b) (6), (b) (7)(C) recording of such meetings with Employer officials, telling them they can assume (b) (6), (b) (7)(C) is always recording when (b) (6), (b) (7)(C) is in attendance at such meetings. While some Employer officials expressed their displeasure at the (b) (6), (b) (7)(C) cell phone recording, none ever told (b) (6), (b) (7)(C) to stop such recording, and they accepted (b) (6), (b) (7)(C) doing so, apparently

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<sup>1</sup> All dates hereinafter are in 2016, unless otherwise noted.

because they believed (b) (6), (b) (7)(C) had a right under Colorado law to record any conversation in which (b) (6), (b) (7)(C) was a participant.

On April 27, the (b) (6), (b) (7)(C) and other Union representatives were meeting with Employer representatives to discuss grievances. As was (b) (6), (b) (7)(C) regular practice, the (b) (6), (b) (7)(C) recorded the meeting, leaving (b) (6), (b) (7)(C) cell phone on the table in plain view. The parties separated during this meeting for one or two management caucuses,<sup>2</sup> during which time the Union representatives left the room so that the management team could speak privately. While the (b) (6), (b) (7)(C) left the room, (b) (6), (b) (7)(C) left (b) (6), (b) (7)(C) cell phone on the meeting table, continuing to record. After being out of the room for a short time, the (b) (6), (b) (7)(C) returned to the meeting room while the management team was still caucusing. (b) (6), (b) (7)(C) opened the door, and claims (b) (6), (b) (7)(C) pointed at (b) (6), (b) (7)(C) cell phone. An Employer official, who apparently did not see or understand the (b) (6), (b) (7)(C) gesture, told the (b) (6), (b) (7)(C) to “give us a minute,” and the (b) (6), (b) (7)(C) again left the room, while (b) (6), (b) (7)(C) cell phone continued to record. When the meeting reconvened a few minutes later, the Employer official asked the (b) (6), (b) (7)(C) whether (b) (6), (b) (7)(C) had left (b) (6), (b) (7)(C) phone recording when (b) (6), (b) (7)(C) was not in the room. The (b) (6), (b) (7)(C) responded that (b) (6), (b) (7)(C) had and that it was a mistake. (b) (6), (b) (7)(C) offered to delete the recording, and immediately did so. The Employer official told the (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) understood it was a mistake, but that if the (b) (6), (b) (7)(C) did it again there would be legal consequences.

Later in the meeting, the parties again discussed the (b) (6), (b) (7)(C) recording. Many of the Employer officials present again expressed their displeasure at the (b) (6), (b) (7)(C) cell phone recording of the parties’ bilateral meetings, but they all stated that they believed (b) (6), (b) (7)(C) had a right under Colorado law to record any conversation in which (b) (6), (b) (7)(C) was a participant. Indeed, an Employer representative expressly said that they were “okay with it.” Turning to the recording of management caucuses, the Employer officials made it clear that the (b) (6), (b) (7)(C) had no right to record any discussions in which (b) (6), (b) (7)(C) was not a participant and that they did not consent to (b) (6), (b) (7)(C) recording them. An Employer official stated that (b) (6), (b) (7)(C) believed that the (b) (6), (b) (7)(C) had recorded such private caucuses “a number of times” before, repeating “a number of times” for emphasis. The (b) (6), (b) (7)(C) denied this, saying, “No. Not true.”<sup>3</sup> However, several of the participants in the meeting,

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<sup>2</sup> The Employer has asserted that the (b) (6), (b) (7)(C) recorded two private management caucuses on April 27, although the (b) (6), (b) (7)(C) has said that (b) (6), (b) (7)(C) was in the room during the first caucus.

<sup>3</sup> The parties’ conversation was recorded by the (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C) denial is clear in the recording. We note, however, that the Employer has never received a copy of this recording. It sought a copy of the recording as part of its discovery in the

including both Employer and Union representatives, mistakenly thought the (b) (6), (b) (7)(C) had actually said “a few,” thereby admitting that (b) (6) had recorded private management caucuses in the past.<sup>4</sup>

Thereafter, on May 10, the Employer terminated the (b) (6), (b) (7)(C), ostensibly for recording management caucuses, after previous disciplinary actions. In its provisional discharge notice, and in the termination meeting, the Employer noted that the (b) (6), (b) (7)(C) had admitted to recording management caucuses in the past, apparently without contradiction from the Union. In the termination meeting, the Employer stated that the (b) (6), (b) (7)(C) was being terminated for eavesdropping illegally under Federal and state law, because (b) (6) was recording without a consenting party in the room, and possibly bad faith bargaining under the NLRA. A day or two after the termination meeting, the Employer’s human resources manager told a Union representative, “if this thing goes to a Board charge or anything else, which [the (b) (6), (b) (7)(C)] has every right to do, we’re throwing the kitchen sink at it, and it’ll include the International.” The human resources manager also said that the Employer would “react” to any Board charges.

On May 16, the Union filed a charge (Case 27-CA-176261), alleging that the (b) (6), (b) (7)(C) s termination violated Section 8(a)(1), (3), and (4) of the Act.<sup>5</sup> The Region found merit to these allegations, and has not submitted Case 27-CA-176261 for advice.

On June 9, the Employer filed a lawsuit in Colorado state court against the (b) (6), (b) (7)(C), as an individual, over the alleged unlawful recording made in the April 27 grievance meeting. The lawsuit, which seeks, among other things, at least \$100,000 in damages, includes three counts based on Colorado law and one count based on federal law. The state claims are: (1) “Misappropriation of trade secrets” under the Colorado Uniform Trade Secrets Act;<sup>6</sup> (2) “Negligence *per se*,” also citing the Colorado Uniform Trade Secrets Act; and (3) “Intentional concealment,” again

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lawsuit, but the lawsuit was dismissed before the recording was provided to the Employer.

<sup>4</sup> Prior to the termination of the (b) (6), (b) (7)(C) and the filing of the lawsuit at issue here, the Employer gathered statements from both management and Union participants in the April 27 meeting confirming their belief that the (b) (6), (b) (7)(C) had admitted that (b) (6) had recorded management caucuses in the past.

<sup>5</sup> The charge in Case 27-CA-176261 was amended on August 31.

<sup>6</sup> COLO. REV. STAT. § 7-74-101, et seq.

citing the Colorado Uniform Trade Secrets Act. The Federal claim is “Interception and disclosure of oral communications,” under the Federal Wiretapping Act.<sup>7</sup>

On July 28, the Union filed the charge in the instant case, alleging that the lawsuit violates Section 8(a)(1), (3), and (4) of the Act, as it was unlawfully motivated, retaliatory, and preempted by Federal law. On September 26, the Region issued a Consolidated Complaint in Cases 27-CA-176261 and 27-CA-181096,<sup>8</sup> and sent the Employer a *Loehmann’s Plaza*<sup>9</sup> letter, informing the Employer that state court jurisdiction in the lawsuit was preempted by the issuance of the Consolidated Complaint. The same day, the Employer filed with the state court a motion to dismiss the lawsuit without prejudice.<sup>10</sup> On October 21, the state court dismissed the lawsuit without prejudice, and awarded attorney fees to the (b) (6), (b) (7)(C)

### ACTION

We conclude that the Employer violated the Act by filing the three state law counts of its lawsuit, as it lacked a reasonable basis in law and fact and the lawsuit was filed with a retaliatory motive. We further conclude that the Employer did not violate the Act by filing the Federal law count of the lawsuit, as the Employer reasonably believed that it would be able to show that the (b) (6), (b) (7)(C) unlawfully recorded the management caucus.

It is well established that the Board may find the filing and prosecution of a lawsuit to be an unfair labor practice only when the lawsuit: (1) lacks a reasonable basis in law or fact; and (2) was commenced with the motive of retaliating against the exercise of Section 7 protected activities.<sup>11</sup> A lawsuit will be deemed objectively

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<sup>7</sup> 18 U.S.C. 2510, et seq.

<sup>8</sup> The Region has since withdrawn the Consolidated Complaint and submitted the instant case for advice as to the lawfulness of the Employer’s lawsuit.

<sup>9</sup> See *Loehmann’s Plaza*, 305 NLRB 663, 699-71 (1991), *supplemented by* 316 NLRB 109 (1995), *aff’d sub nom. UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), *cert. denied sub nom. Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

<sup>10</sup> The Employer stated in its motion that it intended to file complaint in Federal court alleging that the (b) (6), (b) (7)(C) violated the Federal Wiretapping Act, but no Federal court lawsuit has been filed as yet.

<sup>11</sup> *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 743-44 (1983); *BE & K Construction Co.*, 351 NLRB 451, 456-58 (2007).

baseless when its factual or legal claims are such that “no reasonable litigant could realistically expect success on the merits.”<sup>12</sup> Where a charge alleges as baseless a lawsuit that has not been fully litigated, the General Counsel’s burden is to prove that the respondent, when it filed its complaint or during the pendency of the lawsuit, “did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action.”<sup>13</sup> The Board, in assessing whether the respondent could satisfy the essential elements of its causes of action, must evaluate the evidence the General Counsel offered to satisfy his burden of proof while also considering the respondent’s evidence to the contrary.<sup>14</sup>

In making its determination, the Board cannot make credibility resolutions or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.<sup>15</sup> At the same time, the Board’s inquiry need not be limited to the bare pleadings.<sup>16</sup> Where a respondent fails to present the Board with any evidence demonstrating a reasonable belief that it could acquire the necessary factual support for its claim through discovery or other means, a lawsuit may be enjoined as an unfair labor practice prior to completion.<sup>17</sup>

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<sup>12</sup> *BE&K Construction Co.*, 351 NLRB at 457.

<sup>13</sup> *Milum Textile Services Co.*, 357 NLRB 2047, 2053 (2011). By contrast, where a lawsuit or a major part of a lawsuit has been litigated to completion, the Board will evaluate the actual arguments and evidence presented by the respondent to determine whether it had reasonable grounds for seeking relief. *Id.* at 2052.

<sup>14</sup> *Id.*

<sup>15</sup> *Bill Johnson’s*, 461 U.S. at 744-46; *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 & n.20 (Nov. 26, 2014) (quoting *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 962 n.6 (2000)), *enforced*, 653 F. App’x 62 (2d Cir. 2016).

<sup>16</sup> *Bill Johnson’s*, 461 U.S. at 744-46.

<sup>17</sup> *Id.* at 746; *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 4 & n.25.

All of the Employer's allegations regarding the (b) (6), (b) (7)(C) recording of the parties' *bilateral* meetings were not reasonably based.

In the instant case, we initially conclude that all of the Employer's allegations regarding the recording of the parties' bilateral meetings, which it included in each count of its lawsuit, were not reasonably based because the Employer had consented to such recording. The Federal Wiretapping Act makes it unlawful to intentionally intercept or endeavor to intercept oral communications of another person only where the other person has a reasonable expectation that such communication is not subject to interception.<sup>18</sup> Similarly, the Colorado Uniform Trade Secrets Act, on which all of the Employer's state law claims are based, limits its application to information that is "secret and of value," and as to which the owner of the information "must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes."<sup>19</sup> Thus, both of the statutes relied upon by the Employer would not provide a basis for proceeding against any recordings made with the consent and/or knowledge of the Employer.

While the Employer lawfully could have required the (b) (6), (b) (7)(C) not to record the parties' grievance and bargaining meetings,<sup>20</sup> it is clear that the Employer knew about, and had in fact given its consent for, the recording of the bilateral meetings. In this regard, the (b) (6), (b) (7)(C) has openly and consistently used (b) (6), (b) (7)(C) cell phone to record labor-management grievance meetings in which (b) (6), (b) (7)(C) was a participant since at least May 2015, and has repeatedly discussed (b) (6), (b) (7)(C) recording of such bilateral meetings with Employer officials. The (b) (6), (b) (7)(C) even told Employer officials that they can assume (b) (6), (b) (7)(C) is always recording when (b) (6), (b) (7)(C) is in attendance at such meetings. While some Employer officials expressed their personal displeasure at such recording, none ever told the (b) (6), (b) (7)(C) to stop such recording, and they clearly accepted (b) (6), (b) (7)(C) doing so. Indeed, even during the April 27 meetings that led to the (b) (6), (b) (7)(C) termination, Employer officials expressly stated that they believed (b) (6), (b) (7)(C) had a right under Colorado law to record any conversation in which (b) (6), (b) (7)(C) was a participant, and that they were "okay with it." Under

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<sup>18</sup> 18 U.S.C. 2510 (2).

<sup>19</sup> COLO. REV. STAT. § 7-74-102(4).

<sup>20</sup> See *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501, 501-502 (1985) (because "[t]he presence of a recording device may have a tendency to inhibit free and open discussions," a party fails to bargain in good faith by insisting to impasse on the use of a recording device during a grievance meeting) (citing *Bartlett-Collins Co.*, 237 NLRB 770 (1978), *enforced*, 639 F.2d 652 (10th Cir. 1981), *cert. denied*, 452 U.S. 961 (1981)).

these circumstances, when the Employer had clear knowledge of, and consented to, the (b) (6), (b) (7)(C) recording of the parties' bilateral meetings, the Employer had no reasonable basis on which to allege that such recording was unlawful in any of the counts of its lawsuit.

Each of the counts of the Employer's lawsuit, however, also alleged as unlawful the (b) (6), (b) (7)(C) recording of the private management caucus, to which the Employer did not consent. Thus, as the Employer could prevail on each count of its lawsuit by showing that this conduct was unlawful, we must examine those allegations as well.

**The state-law misappropriation of trade secrets, negligence *per se*, and intentional concealment causes of action also lacked a reasonable basis even to the extent they concerned recording of the private management caucus.**

**a. Misappropriation of trade secrets**

The Employer alleged in its lawsuit that the (b) (6), (b) (7)(C) recording constituted an unlawful misappropriation of a trade secret under Colorado law. This allegation is based in the Colorado Uniform Trade Secrets Act,<sup>21</sup> which makes unlawful the misappropriation or acquisition of a "trade secret" by improper means, including espionage through electronic or other means. A violation of this statute can occur without any actual use or commercial implementation of the misappropriated trade secret; the act of misappropriation consists of the improper acquisition or disclosure of the trade secret.<sup>22</sup>

The statutory definition of a trade secret includes several types of information: "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value."<sup>23</sup> Colorado courts have stated that "[a]n exact definition of a trade secret may not be possible," but

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<sup>21</sup> COLO. REV. STAT. § 7-74-101, et seq.

<sup>22</sup> See, e.g., *L-3 Commc'ns Corp. v. Jaxon Eng'r & Maint., Inc.*, 125 F. Supp. 3d 1155, 1180-81 (D. Colo. 2015).

<sup>23</sup> See COLO. REV. STAT. § 7-74-102(4).

factors to be considered in recognizing a trade secret are:

(1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, *i.e.*, by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.<sup>24</sup>

Applying these factors, Colorado courts have found a wide variety of business information not to be trade secrets under certain circumstances, including an employer's employee-ranking information<sup>25</sup> and customer or price lists.<sup>26</sup> In doing so, the courts have noted the difference between the precautions taken to protect trade secrets and "normal business precautions,"<sup>27</sup> emphasizing the necessity of showing a much higher level of effort or money expended, and precautions taken, in order to demonstrate a trade secret.

Here, even if the **(b) (6), (b) (7)(C)** recording constituted a "misappropriation," the Employer has offered no evidence or argument that would support a finding that the management caucus discussed any trade secret.<sup>28</sup> Thus, the caucus was called solely for the purpose of discussing the particular grievances at issue between the parties, and did not involve any larger confidential business issues. By all indications, the only subjects discussed in the caucus were, at most, the *ad hoc* determinations of the management team as to particular disciplinary actions or the

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<sup>24</sup> *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1341 (Colo. Ct. App. 1984) (quoting *Sw. Bell Tel. Co. v. State Corp. Comm'n*, 6 Kan. App. 2d 444, 448, 629 P.2d 1174, 1178 (Kan. Ct. App. 1981)).

<sup>25</sup> *See Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 795-96 (Colo. Ct. App. 2001).

<sup>26</sup> *See, e.g., Colorado Supply Co., Inc. v. Stewart*, 797 P.2d 1303, 1305-07 (Colo. Ct. App. 1990).

<sup>27</sup> *Id.* at 1306.

<sup>28</sup> We note that the only statutory definition of trade secret relied upon by the Employer in its lawsuit is "confidential business or financial information that is secret and of value."

application of particular Employer policies. Such discussions would not involve information “of value” vis-à-vis competitors, or information that the Employer had invested great expense in developing or taken great precautions in guarding, so as to constitute a trade secret under Colorado law. Indeed, the results of these discussions would likely be made known to the Union immediately or soon after the caucus concluded. In any case, the Employer has offered no evidence or argument that might demonstrate that the Employer had a reasonable belief that the management caucus discussed a trade secret. Therefore, in the absence of any indication that the management team was discussing a trade secret when it was recorded by the (b) (6), (b) (7)(C) we conclude that the Employer had no reasonable basis in law or fact for alleging a violation of the Colorado Uniform Trade Secrets Act.<sup>29</sup>

**b. Negligence *per se***

In addition, the Employer alleged that the (b) (6), (b) (7)(C) recording also constituted “negligence *per se*” under Colorado law. “To state a prima facie case of negligence, a plaintiff must establish that the defendant owed plaintiff a duty which was breached and the breach of that duty proximately caused the plaintiff’s injury.”<sup>30</sup> Significantly, the duty asserted by the Employer is the same duty to refrain from misappropriating a trade secret set forth in the Colorado Uniform Trade Secrets Act, discussed above. Therefore, as we have concluded that the Employer had no reasonable basis for alleging that any trade secret was at issue here, and such a finding would also be necessary to sustain the Employer’s negligence *per se* cause of action, we further conclude that the Employer also had no reasonable basis for its negligence allegation.

**c. Intentional concealment**

Similarly, to establish its allegation of intentional concealment (or fraudulent concealment, as it is more generally known), the Employer would have to establish that the (b) (6), (b) (7)(C) had a legal duty to disclose a “material fact,”<sup>31</sup> i.e., that

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<sup>29</sup> If the Employer submits evidence demonstrating that the April 27 management caucus actually discussed *bona fide* trade secrets as defined by the Colorado Uniform Trade Secrets Act, despite its failure to do so as yet, the Region should contact the Division of Advice.

<sup>30</sup> *Lyons v. Nasby*, 770 P.2d 1250, 1254 (Colo. 1989) (quoting *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986)).

<sup>31</sup> See, e.g., *Burman v. Richmond Homes Ltd.*, 821 P.2d 913, 918 (Colo. App. Ct. 1991) (“to establish a claim for fraudulent concealment or nondisclosure, plaintiff must

(b) (6) was recording a management caucus that involved a trade secret. Therefore, as we have concluded that the Employer had no reasonable basis for alleging that any trade secret was at issue here, and such a finding would also be necessary to sustain the Employer's intentional concealment cause of action, we further conclude that the Employer had no reasonable basis for its intentional concealment allegation as well.

**The Employer had a reasonable basis for the Federal law cause of action concerning recording of the private management caucus.**

In contrast to the state law counts of its lawsuit, we conclude that the Employer had a reasonable basis for the Federal cause of action in its lawsuit, "Interception and disclosure of oral communications" under the Federal Wiretapping Act,<sup>32</sup> because the Employer reasonably believed that it would be able to show that the (b) (6), (b) (7)(C) acted unlawfully by intentionally recording the management caucus. The Federal Wiretapping Act makes it unlawful, *inter alia*, for any person to intentionally intercept or endeavor to intercept any oral communication in which other parties had a reasonable expectation of privacy.<sup>33</sup> This statute has been found to apply to placing a cell phone on a table to record a conversation,<sup>34</sup> and specifically to the interception of a cell phone conversation between a union's president and chief negotiator during contract negotiations.<sup>35</sup>

Here, there is no dispute that, by recording the private management caucus, the (b) (6), (b) (7)(C) intercepted oral communications that were part of conversations in which the management team had a reasonable expectation of privacy. We further conclude that the Employer reasonably believed that it would be able to show that the (b) (6), (b) (7)(C) intentionally recorded the management

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show that a defendant had a duty to disclose information"); *Berger v. Sec. Pac. Info. Sys., Inc.*, 795 P.2d 1380, 1383 (Colo. Ct. App. 1990) (same).

<sup>32</sup> 18 U.S.C. 2510, et seq.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., *Aldrich v. Ruano*, 952 F. Supp. 2d 295, 302-03 (D. Mass. 2013).

<sup>35</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 517-18, 530 n.16 (2001) (accepting that "the interception was intentional, and therefore unlawful," and noting that the statute particularly reflects Congress' concerns regarding private surveillance "in domestic relations and industrial espionage situations") (quoting S. Rep. No. 1097, at 225 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2274).

caucus.<sup>36</sup> In this regard, prior to filing the lawsuit, the Employer had gathered statements from both management and Union participants in the April 27 meeting confirming their belief, albeit a mistaken one, that the (b) (6), (b) (7)(C) had admitted that (b) (6), (b) (7)(C) had recorded management caucuses in the past. While the (b) (6), (b) (7)(C) contrary denial is clear in the extant recording of that conversation, neither the Employer nor any of the other witnesses had ever received a copy of this recording. Moreover, on April 27 itself, Employer officials understood the (b) (6), (b) (7)(C) to have recorded another management caucus before the one over which they confronted (b) (6), (b) (7)(C), although the (b) (6), (b) (7)(C) asserts that (b) (6), (b) (7)(C) was in the room at that time. The Employer's reasonable belief that there was a pattern of such conduct, which in turn led it to believe that the conduct was intentional, was never contradicted by the Union—even when the Employer noted in both the provisional discharge notice and the termination meeting its belief that the (b) (6), (b) (7)(C) had admitted to recording prior caucuses, it does not appear that these assertions were contradicted. Under these circumstances, even if the (b) (6), (b) (7)(C) in fact had mistakenly recorded the April 27 management caucus, the Employer had a reasonable basis for believing that it would be able to show that the (b) (6), (b) (7)(C) had acted intentionally, and therefore the Employer did not act unlawfully by filing the Federal count of its lawsuit.<sup>37</sup>

**The Employer filed its lawsuit to retaliate against the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Section 7 activity.**

Relevant factors for discerning a retaliatory motive include whether the lawsuit was filed in response to protected concerted activity;<sup>38</sup> evidence of the respondent's

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<sup>36</sup> As discussed above, the General Counsel's burden here is to prove that the Employer, when it filed its lawsuit, "did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action." *Milum Textile Services Co.*, 357 NLRB at 2053.

<sup>37</sup> Although the Employer had a reasonable belief that it would be able to show that the (b) (6), (b) (7)(C) acted intentionally, this does not affect the Region's conclusion that the (b) (6), (b) (7)(C) conduct was protected under the Act, and (b) (6), (b) (7)(C) termination unlawful, as the full record indicates that the recording was not intentional. Moreover, should the Employer re-file its Federal law cause of action, as it has indicated that it might, a new appraisal would have to be made of the evidence available to the Employer at *that* time to determine if it still has a reasonable basis for proceeding on that claim.

<sup>38</sup> See, e.g., *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 6; *Milum Textile Services Co.*, 357 NLRB at 2049.

prior animus toward protected rights;<sup>39</sup> and a request for damages in excess of actual damages.<sup>40</sup> And, although a lawsuit's baselessness alone is insufficient to establish retaliatory motive, the Board will consider it as one factor in its analysis of motive.<sup>41</sup>

Here, the evidence clearly demonstrates that the Employer filed its lawsuit with a retaliatory motive. Thus, the lawsuit was aimed at conduct the Region has already concluded was protected under the Act; there is ample evidence of prior animus, including the Employer's threats to file a lawsuit if the Union filed Board charges; and the lawsuit seeks over \$100,000 in damages, despite there being no evidence of any damages at all. Finally, the state law counts of the lawsuit are clearly baseless, as discussed above. Therefore, we conclude that the Employer violated Section 8(a)(1) of the Act by filing the three counts of the lawsuit based on state law.<sup>42</sup>

**The state law counts of the Employer's lawsuit were preempted by Federal law only after the Region issued its Consolidated Complaint.**

We further conclude that the state law counts of the Employer's lawsuit were preempted by Federal law only after the Region issued its Consolidated Complaint finding the (b) (6), (b) (7)(C)'s conduct to be protected under the Act,<sup>43</sup> and were

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<sup>39</sup> *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 6; *Milum Textile Services Co.*, 357 NLRB at 2052.

<sup>40</sup> See, e.g., *Federal Security, Inc.*, 336 NLRB 703, 708 (2001); *Phoenix Newspapers*, 294 NLRB 47, 49-50 (1989); *H.W. Barss Co.*, 296 NLRB 1286, 1287-88 (1989).

<sup>41</sup> See, e.g., *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 6; *Milum Textile Services Co.*, 357 NLRB at 2052 n.22; *Allied Mechanical Services*, 357 NLRB 1223, 1234 (2011), *enforcement denied*, 734 F.3d 486 (6th Cir. 2013).

<sup>42</sup> The Employer's lawsuit does not violate Section 8(a)(3) or 8(a)(4) of the Act because the lawsuit only seeks monetary damages, and therefore does not seek to "discharge or otherwise discriminate against" the (b) (6), (b) (7)(C) for filing the prior Board charge over (b) (6), (b) (7)(C) termination.

<sup>43</sup> See *Loehmann's Plaza*, 305 NLRB at 699-71. As for the Federal count of the Employer's lawsuit, preemption analysis does not apply, as a federal claim is not subject to preemption by another federal claim. See, e.g., *Lupiani v. Wal-Mart Stores, Inc.*, 435 F.3d 842, 846 (8th Cir. 2006) ("The Supreme Court and our sister circuits have suggested in several instances that *Garmon* preemption is not implicated where the potential conflict is between two federal statutes and not between a federal law and a state law."); *Baker v. IBP, Inc.*, 357 F.3d 685, 688-89 (7th Cir. 2004) (noting

not preempted *ab initio*. Under *Loehmann's Plaza*, when the activity at issue constitutes arguably protected activity, preemption occurs only upon the Board's involvement in the matter, which begins when the General Counsel issues a complaint regarding the same activity that is subject of the state court lawsuit.<sup>44</sup> In the instant case, that means that the Employer's lawsuit became preempted only after the Region issued the Consolidated Complaint. As the Employer filed its motion to dismiss the lawsuit the same day the Region sent the Employer its *Loehmann's Plaza* letter, the Region should not include preemption allegations in any future complaint in this case.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by filing the three Colorado law counts of its lawsuit. The Region should dismiss, absent withdrawal, the allegation regarding the Federal law count of the lawsuit.

/s/

B.J.K.

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(b) (6), (b) (7)

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that “[f]ederal statutes do not ‘preempt’ other federal statutes . . . though one may repeal another implicitly if they are irreconcilable”).

<sup>44</sup> 305 NLRB at 699-71. While the General Counsel at one time argued that a state court lawsuit against arguably protected conduct should be found to be preempted from the date an unfair labor practice *charge* is filed alleging the conduct to be protected (*see Giant Food Stores*, Case 04-CA-16264, Advice Memorandum dated March 23, 1987), such a contention is now clearly foreclosed by the Board's subsequent decision in *Loehmann's Plaza*, which expressly concluded that the operative date for preemption is the General Counsel's issuance of an unfair labor practice *complaint*.