

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

DATE: December 21, 2017

TO: Dennis P. Walsh, Regional Director  
Region 4

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Pennsylvania Democratic Party 240-0150-0000  
Case 04-CA-190869 260-6735-0000  
260-0150-0000  
280-8650-0000  
280-9100-0000  
506-6085-0000  
512-5009-0100

This case was submitted for advice as to whether the Pennsylvania Democratic Party is an employer under the jurisdiction of the Act, and if so, whether its federal court motion that the Charging Party cease and desist soliciting former coworkers to join [REDACTED] lawsuit against the Party violated the Act. We conclude that regardless of whether the Pennsylvania Democratic Party is an employer under the jurisdiction of the Act, it would not effectuate the policies and purposes of the NLRA to issue complaint in this case. The Region should therefore dismiss the charge, absent withdrawal.

**FACTS**

The Pennsylvania Democratic Party (“Employer”) can trace its origins to the Democratic-Republican Party of the 1790s, and has existed in one form or another ever since. Currently, it is headquartered in Harrisburg, Pennsylvania with satellite offices in various counties, depending on the election cycle. It is a commonwealth-wide political party regulated both by the state and federal governments. For federal tax purposes, the Employer is a nonprofit political organization under Section 527. The Employer’s out-of-state expenditures for services and items purchased in 2016 were over one million dollars, and its operating budget is well over a million dollars a year.

Traditionally, the Employer enlarges its staff during election season, reducing numbers after the election is held. In 2016 the Employer hired seven [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] including the Charging Party, to primarily work on the Hillary Clinton for President campaign. The Charging Party worked from [REDACTED] to [REDACTED] 2016 at the Clifton Heights, Pennsylvania office, which is now closed and only opens during peak

election seasons. The Charging Party's duties included calling prospective voters, soliciting new voter registrations, and entering information into a database.

After the campaign concluded and the Charging Party's job ended, (b) (6), (b) filed a lawsuit in the U.S. District Court for the Eastern District of Pennsylvania alleging the Employer violated the Fair Labor Standards Act and Pennsylvania state wage laws. Soon after the lawsuit was filed, an article appeared in the *Philadelphia Inquirer* describing the suit, and listing the Charging Party's name and (b) (6), (b) attorney's firm. The Charging Party shared the article on (b) (6), (b) personal Facebook page, commenting "All former (b) (6), (b) (7)(C) for the Democratic Party, you should read this." Concurrently, the Charging Party's attorney set up a website with information related to the lawsuit, and a link for other former (b) (6), (b) (7)(C) for the Democratic Party to complete a form to petition the court to join the lawsuit. The Charging Party also called all (b) (6), (b) former coworkers to solicit them to join (b) (6), (b) lawsuit, and at least two did so. (b) (6), (b) (7)(C) from other offices and then other states also filed consent forms to join the lawsuit, bringing the number up to about fifty claimants at the present time.

On December 22, 2016, the Employer filed a motion in court entitled "Motion to Strike the Consent Forms filed by Plaintiff and to Order Plaintiff's Counsel to Cease and Desist further unauthorized solicitation efforts and filing of additional purported consent forms." The Employer argued that the website and consent forms created by the Charging Party's attorney misstated the nature of the case, that the consent forms were therefore invalid, and that it was improper for the Charging Party to unilaterally solicit people to join the lawsuit since the lawsuit was at a preliminary stage and the eventual class notice had to be overseen by the court. The Employer therefore requested that the filed consent forms be stricken, and that the court order that "Plaintiff and Plaintiff's counsel must **CEASE AND DESIST** from further solicitation efforts and filing any additional Consent Forms in this action unless specifically authorized by the Court."

Charging Party's counsel argued that such an order would violate the Charging Party's First Amendment rights and would also forbid the Charging Party's protected concerted solicitation of former coworkers. The Employer in its reply brief claimed that it was not attempting to block the Charging Party's protected concerted communications, but that (b) (6), (b) and especially (b) (6), (b) attorney's solicitations were "misleading" and "improper and unauthorized." The Employer did not alter or retract its motion in any way.

Consequently, on advice of counsel, the Charging Party ceased discussing the suit with former coworkers while the motion was pending. The Charging Party also filed the instant charge.

On September 28, 2017, the district court ruled on the Employer's motion. Citing mostly First Amendment concerns, the court declined to order the Charging Party or [REDACTED] counsel to cease and desist soliciting consent forms from former coworkers. However, the court did order the Charging Party's attorney to revise some language on the website, submit the final product to the court for approval, notify all plaintiffs who had previously signed the consent forms of the changes with an explanation of how to retract their consent if they so chose, and to work collaboratively with Employer's counsel on the webpage contents.

### ACTION

We conclude that even if the Employer is under the jurisdiction of the Act, it would not effectuate the policies and purposes of the NLRA to issue complaint in this case.

The Supreme Court has "consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."<sup>1</sup> The language of Section 2(2) of the Act "vests jurisdiction in the Board over any 'employer' doing business in this country save those Congress excepted with careful particularity."<sup>2</sup> The Employer argues, however, that it is not engaged in interstate commerce as its activities are political rather than commercial. The Employer also contends that asserting jurisdiction would implicate significant constitutional concerns under the First Amendment. The Board has never addressed jurisdiction over political parties, though there are cases asserting jurisdiction over other political organizations.<sup>3</sup>

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<sup>1</sup> *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (emphasis omitted).

<sup>2</sup> *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986). We agree with the Region that the Employer is not a political subdivision under *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

<sup>3</sup> See *Kansas AFL-CIO*, 341 NLRB 1015, 1017–18 (2004) (exercising jurisdiction over the Kansas AFL-CIO despite its status as a nonprofit political and lobbying organization). See also *Ohio Public Interest Campaign (OPIC)* 284 NLRB 281, 281 (1987) (declining jurisdiction over a political organization due to its minimal effect on interstate commerce, but specifically rejecting argument that political organizations were outside NLRA jurisdiction); *Ohio State Legal Services Assn.*, 239 NLRB 594 (1978) (asserting jurisdiction over an organization that, among other things, engaged in lobbying). While the Board in *Kansas AFL-CIO* and the Supreme Court in

We conclude that it is unnecessary to resolve the difficult jurisdictional question because even if the Board has jurisdiction here, issuing complaint would not effectuate the policies and purposes of the Act.

Under the Supreme Court's decisions in *Bill Johnson's Restaurants, Inc. v. NLRB*<sup>4</sup> and *BE & K Construction Co. v. NLRB*,<sup>5</sup> a party violates Section 8(a)(1) by filing a lawsuit that directly seeks to prohibit Section 7 activity and therefore has "an objective that is illegal under federal law."<sup>6</sup> Here, while it was lawful to seek an order requiring the Charging Party to cease filing new consent forms and requiring that forms already filed be stricken, the Employer's motion that the Charging Party cease and desist from "all solicitation efforts" in regards to the lawsuit may have had an unlawful object under the Act.<sup>7</sup> However, the district court rejected this part of the

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*Associated Press v. NLRB*, 301 U.S. 103 (1937), found that the First Amendment posed no obstacle to asserting jurisdiction over political organizations or newspapers, respectively, the constitutional issues raised by the prospect of asserting jurisdiction over a political *party* are arguably greater.

<sup>4</sup> 461 U.S. 731, 737 n.5 (1983).

<sup>5</sup> 536 U.S. 516, 531–32 (2002).

<sup>6</sup> See *Dilling Mechanical Contractors*, 357 NLRB 544, 546 (2011) (holding that the Supreme Court's decision in *BE & K* "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice"). See also *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010) (noting that *BE&K* left undisturbed the *Bill Johnson's* holding that a lawsuit with an illegal objective constitutionally may be enjoined).

<sup>7</sup> It is well-established that employees engage in protected concerted activity when they solicit fellow employees to join in employment-related lawsuits against their employer, and the Employer's motion would directly bar the Charging Party from engaging in that protected concerted activity. See, e.g., *United Parcel Service, Inc.*, 252 NLRB 1015, 1018 (1980) (employee engaged in protected concerted activity when he filed a class action state lawsuit against his employer, petitioned his coworkers to join the lawsuit, and solicited funds from coworkers to pay the lawyer's retainer), *enforced*, 677 F.2d 421 (6th Cir. 1982). See also *Tarlton & Sons, Inc.*, 363 NLRB No. 175, slip op. at 4–5 (Apr. 29. 2016) (Member Miscimarra in dissent nonetheless agreeing that employees who engaged in concerted activity to press a claim under a statute other than the NLRA are protected). See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (holding that a broad range of concerted activities that bear a relationship to

Employer's motion, and the court's order contained no restrictions that are repugnant to the Act.<sup>8</sup> Thus, there is no ongoing improper interference with the Charging Party's Section 7 activity.

Furthermore, although the Employer would ordinarily be liable for reimbursement of legal fees incurred by the Charging Party prior to the court's decision, only those fees incurred in defending the unlawful portion of the Employer's motion would be recoverable, and it would be difficult to argue that there were any such segregable fees where the lawful aspects of the Employer's motion were so closely intertwined with its unlawful aspects. Finally, other than the temporary effect on the Charging Party, there is no evidence that the Employer's motion had or is continuing to have any chilling effect on employee solicitation to join together to pursue legal remedies or other protected concerted activity. Consequently, issuing complaint would serve little purpose, and would not meaningfully effectuate the policies and purposes of the Act.

Accordingly, the Region should dismiss the complaint, absent withdrawal.

/s/  
J.L.S.

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employees' interests are protected under the "mutual aid and protection" clause of the Act).

<sup>8</sup> In *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (1989), the Supreme Court noted that in FLSA class actions, questions of notice to the prospective class, proper discovery, and the validity of consent forms were intertwined, since an inaccurate notice of what the lawsuit was about could render consent forms invalid. Thus, the Court held that it was entirely proper for a district court to manage how the prospective class in such a lawsuit was notified. *Id.* at 171–73. However, the Court has also found a blanket order banning communication between plaintiffs and the prospective class to be an abuse of discretion. *Gulf Oil Co. v. Bernard* 452 U.S. 89, 101–02, 101 n.15 (1981) (finding any limitation on communications must be carefully tailored to address specific abuses, and further noting that it was not reaching the obvious First Amendment concerns also raised by a blanket cease and desist order).