

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

DATE: October 31, 2017

TO: Leonard J. Perez, Regional Director
Region 14

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

SUBJECT: The Washington University 512-5006-5067
d/b/a Washington University in Saint Louis 512-5006-8300
Case 14-CA-202172 512-5006-8333

This case was submitted for advice as to whether the Employer's statements during a graduate student employee organizing campaign regarding the effect of any future strike on foreign student visa holders constituted unlawful threats in violation of the Act. We conclude that the Employer violated Section 8(a)(1) of the Act by threatening that, in the event of a strike, "all foreign students will lose their visas and have to leave the country." The Employer's other statements were lawful, however, as they either set forth the exact language of the applicable Federal regulations or merely conveyed the actual possibility that a strike "could" lead to the loss of student visas.

FACTS

The Washington University d/b/a Washington University in Saint Louis (the Employer or the University) is a private university in Saint Louis, Missouri. Service Employees International Union, Local 1 (the Union) is engaged in an organizing campaign among graduate student employees of the Employer. Many of these graduate student employees are international students and hold "F-1" student visas.

On ^{(b) (6), (b) (7)(C)} 2017,¹ the ^{(b) (6), (b) (7)(C)} in the Employer's ^{(b) (6), (b) (7)(C)} department (the ^{(b) (6), (b) (7)(C)}), sent an e-mail to all graduate student employees in the department regarding a graduate student employee unionization forum to be held the next day. Among the questions the ^{(b) (6), (b) (7)(C)} encouraged the graduate student employees to bring up at the meeting included:

Foreign students...I have been told that if a graduate student union is formed, and this union goes on strike...all foreign students will lose

¹ All dates hereinafter are in 2017, unless otherwise noted.

their visas and have to leave the country. In my opinion, this would be terrible for our students and our program.

At the forum, a Union organizer indicated that unionization could have no possible effect on the graduate student employees' visa status, and that there was no possibility of them being deported, while the Union's attorney acknowledged a potential impact on foreign students' visa status. The graduate student employees found this confusing, and again asked the (b) (6), (b) (7)(C) to obtain more definitive information for them. The (b) (6), (b) (7)(C) contacted various sources for information, both within the University and without, including the Region, the U.S. Department of Homeland Security (DHS), and officials at the University of Oregon, at which there recently had been a graduate student employee strike.

In (b) (6), (b) (7)(C) at least one graduate student employee again asked the (b) (6), (b) (7)(C) for a meeting to talk about the contradictory information (b) (6), (b) (7)(C) was receiving about the possible effects of unionization. The (b) (6), (b) (7)(C) agreed to set up a meeting, to which (b) (6), (b) (7)(C) invited all (b) (6), (b) (7)(C) graduate student employees. At the (b) (6), (b) (7)(C) meeting, the (b) (6), (b) (7)(C) told the graduate student employees that (b) (6), (b) (7)(C) did not know what would happen, but the information provided to (b) (6), (b) (7)(C) by the University and DHS indicated that if the Union were to strike, student-visa holders "could lose their status and be asked to leave the country."

On (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) emailed three of the students who had been at the meeting:

The strike at Oregon some folks are talking about only lasted 8 days. According to the director of graduate studies there, they did have to turn over a list of students who were on visas when they went on strike. Nothing probably happened, because the gov't did not respond in the 8 days of the strike. It does not mean they couldn't have responded.

On (b) (6), (b) (7)(C), in response to another student's question, the (b) (6), (b) (7)(C) e-mailed:

I just received this from our Office for International Students and Scholars in my response to wanting more in writing.

Here is the section of the regulations relating to a strike:

(14) Effect of strike or other labor dispute. Any employment authorization, whether or not part of an academic program, is

automatically suspended upon certification by the Secretary of Labor or the Secretary's designee to the Commissioner of the Immigration and Naturalization Service or the Commissioner's designee, that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place of employment. As used in this paragraph, "place of employment" means the facility or facilities where a labor dispute exists. The employer is prohibited from transferring F-1 students working at other facilities to the facility where the work stoppage is occurring.

This is in addition to the academic issues involved with not fulfilling the requirements of each academic program. In the end, any of these things would cause them to not maintain their F-1 status.

On (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) again contacted DHS, emailing the Student and Exchange Visitor Program (SEVP) of US Immigration and Customs Enforcement, which responded:

1. If you dismiss a student from their program for no longer being in good academic standings, the Sevis record will need to be Terminated. Before the record is Terminated, the student may apply for a change of status to another visa type. Please be aware that the Change of Status process can take a while to process and the student needs to maintain their F-1 status while the Change of Status application is pending. If the student's record is Terminated, they will need to leave the U.S. as soon as possible. 2. If the student has topped [sic] taking courses or stopped performing research and that is what is required for their program, the student's record should be Terminated immediately and they will have to leave the U.S. as soon as possible.

On (b) (6), (b) (7)(C) the University emailed all graduate student employees a FAQ document regarding graduate student employee union organizing, which it also posted online. The last question included a lengthy response addressing the F-1 visa issue:

Could a strike potentially have an impact on my F-1 visa status?

Many graduate students have posed this question to the University. To obtain an answer, the University contacted an outside immigration attorney and U.S. Immigration and Customs Enforcement (Department of Homeland Security). The information

provided to the University is set out below. Students also may wish to consult with an immigration attorney for personalized legal advice.

Foreign national students in F-1 status are required to participate in a “full course of study” in order to maintain their F-1 status. 8 CFR §214.2(f)(5)(i). For Ph.D. programs, what constitutes a “full course of study” is set by the educational institution for the particular academic program. 8 CFR §214.2(f)(6)(i)(A). The regulations further provide: “[o]n-campus employment pursuant to the terms of a scholarship, fellowship, or assistantship is deemed to be part of the academic program of a student otherwise taking a full course of study.” 8 CFR §214.2(f)(6)(iii). If graduate students are required as part of their academic program to “work” as graduate assistants teaching classes or conducting research, then continuing to serve in that capacity is required in order for the student to maintain a “full course of study” and thus to maintain their F-1 status. (The regulations permit an educational institution to allow an F-1 student to engage in less than a full course of study only for specific reasons enumerated in the regulations, none of which include that the student is unable to continue working due to a strike. 8 CFR §214.2(f)(6)(iii).)

Any individual on an F-1 visa automatically has their work authorization suspended if a work stoppage occurs in their classification at their location of employment. As 8 CFR §214.2(f)(14), entitled “Effect of strike or other labor dispute,” states:

Any employment authorization, whether or not part of an academic program, is automatically suspended upon certification by the Secretary of Labor or the Secretary’s designee to the Commissioner of the Immigration and Naturalization Service or the Commissioner’s designee, that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place of employment. As used in this paragraph, “place of employment” means the facility or facilities where a labor dispute exists. The employer is prohibited from transferring F-1 students working at other facilities to the facility where the work stoppage is occurring.

Therefore, if the union were to engage in a strike, F-1 visa students engaged in graduate teaching and research experiences could be legally prohibited from continuing to “work” in that capacity.

Under such circumstances, F-1 visa students could be subject to deportation whether they continued to “work” or not. If students honored the strike and caused the suspension of their work status under 8 CFR §214.2(f)(14), they could be deemed out of status for having failed to maintain a “full course of study.” 8 CFR §214.2(f)(5)(i); §214.2(f)(6)(iii). And if, despite the automatic suspension of their work authorization, students disregarded the strike and continued to perform their teaching or research responsibilities, they would be out of status. 8 CFR §214.1(e) (a nonimmigrant “may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status ...”). An F-1 student who has failed to maintain status is subject to deportation. 8 U.S.C. §1227(a)(1)(C)(i) (“Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . ., or to comply with the conditions of any such status, is deportable.”); see also 8 CFR §214.2(f)(5)(iv) (“an F-1 student who fails to maintain a full course of study without the approval of the DSO or otherwise fails to maintain status is not eligible for an additional period for departure”).

Furthermore, universities are legally required to report to U.S. Immigration and Customs Enforcement (Department of Homeland Security) if a student fails to maintain status. 8 CFR §214.3(g)(2)(ii)(A); see also SEVIS Reporting Requirements for Designated School Officials (www.ice.gov/sevis/dso-requirements).

U.S. Immigration and Customs Enforcement has confirmed this understanding in writing to the University, stating: “If the student has stopped taking courses or stopped performing research and that is what is required for their program, the student’s record should be terminated immediately and they will have to leave the U.S. as soon as possible.”

Around (b) (6), (b) (7)(C) the University updated the FAQ webpage and added the following line to the end of the above FAQ section: “The University would not report a student’s change in status to the government unless it is determined that, under the particular circumstances, it must do so in order to be legally compliant.”

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by threatening that, in the event of a strike, “all foreign students will lose their visas and have to leave the country.” The Employer’s other statements were lawful, however, as they either set forth the exact language of the applicable Federal regulations or merely accurately conveyed the possibility that a strike “could” lead to the loss of student visas.

It is well established that an employer violates the Act by threatening employees with job loss during a union organizing campaign.² In particular, “employer threats touching on employees’ immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees.”³ For this reason, the Board has emphasized that it “must continue to fine tune its institutional “ear” in order to protect vulnerable workers from immigration-related threats and manipulation that violate the Act.”⁴

While threats of job loss are unlawful, Section 8(c) of the Act states that: “[t]he expressing of any views, argument, or opinion . . . shall not constitute an unfair labor

² See, e.g., *Unifirst Corp.*, 335 NLRB 706, 706-08 (2001) (employer violated Section 8(a)(1) of the Act by making an unlawful threat of job loss, and conveying the inevitability of a strike and the futility of bringing in a union); *Connecticut Humane Society*, 358 NLRB 187, 220 (2012) (“where an employer’s statements about permanent replacements make specific references to job loss, such statements are generally deemed to be unlawful since they convey to employees the message that their employment will be terminated”).

³ *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 (2014). See also, e.g., *Viracon, Inc.*, 256 NLRB 245, 246-247 (1981).

⁴ *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2. While *Labriola Baking Co.* itself was a representation case, the Board made it clear that it applies similar considerations in unfair labor practice cases. *Id.* (“it is both objectionable and (where alleged) unlawful for an employer to threaten immigration-related problems for employees because they engage in union or other protected, concerted activity”); *Id.*, slip op. at 8 (Members Miscimarra and Johnson dissenting) (“it is highly objectionable and unlawful for an employer to threaten or cause immigration-related problems for employees because they engage in union or other protected concerted activity”).

practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” This has been interpreted by the Board to mean that an employer does not violate the Act by merely stating an accurate understanding of the law. Thus, for example, an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike, even it does so without fully detailing the protections employees have pursuant to *Laidlaw*,⁵ as long as the employer does not threaten that employees will be deprived of their rights in a manner inconsistent with *Laidlaw*.⁶

In the instant case, when the Employer stated on (b) (6), (b) (7)(C) that “all foreign students will lose their visas and have to leave the country” in the event of a strike, it clearly restrained and coerced employees in the exercise of their Section 7 right to strike, and this was not an accurate statement of the law because a strike would not necessarily lead to the loss of their student visa and the immediate end of their lawful right to remain in the United States. While a strike could potentially lead to such consequences for at least some graduate student employees, the Employer’s statement overstated the requirements of the applicable regulations and the potential effects of those regulations on the affected graduate student employees. In many strike situations, graduate student employees in fact would not lose their visas, given the time that it takes the Secretary of Labor to certify the strike after being notified by the relevant school officials. The Employer’s own statements illustrate this point -- on (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) noted that a graduate student employee strike at another university did not result in a DOL certification causing the loss of their visa status. Moreover, even where the Secretary of Labor does certify a graduate student employee strike, and foreign graduate student employees do lose their student visas, individual graduate student employees may well have some basis other than their student status for lawfully remaining in the United States, despite the Employer’s blanket statement that they all would “have to leave the country.” And, it is also possible that the Employer, which is responsible for determining the “course of study” requirements underlying F-1 visa status, could alter those requirements so as to permit the continuation of student visa status notwithstanding the revocation of work authorization.⁷ Therefore, the Employer’s (b) (6), (b) (7)(C) statement constituted an

⁵ *The Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

⁶ *See, e.g., Stahl Specialty Co.*, 364 NLRB No. 56, slip op. at 18 (2016); *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982).

⁷ In this regard, we note that it is well established that an employer’s statements about the consequences of unionization must be “carefully phrased on the basis of

unlawful threat in violation of Section 8(a)(1) of the Act.⁸

In contrast, the Employer's later statements were more measured, and either set forth the exact language of the applicable regulations or more accurately conveyed the actual possibility that a strike "could" lead to the loss of student visas. Indeed, as noted above, on one occasion the Employer actually informed graduate student employees of a graduate student employee strike that did not have any effect on student visas. All of the Employer's statements after (b) (6), (b) (7)(C) involved a reasonable reading of the possible consequences of the applicable regulations, often with the relevant sections of those regulations included or attached to the statements. In the absence of any unlawful threats in the Employer's statements after the (b) (6), (b) (7)(C) statement, we conclude that the Employer did not violate the Act by making these statements.⁹

objective fact to convey an employer's belief as to demonstrably probable consequences *beyond his control.*" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (emphasis added). *See also, e.g., Quamco, Inc.*, 325 NLRB 222, 223 fn. 6 (1996) (when employer "implies a prediction that the employer's plant will also close if the employees choose union representation, the employer must, as noted above, articulate an objective basis for the prediction").

⁸ The Region should not, however, rely on any asserted inconsistency between the Employer's statements as to student visas and its statement regarding the Deferred Action for Childhood Arrivals (DACA) policy, i.e., that it "will not release information about a student's immigration or citizenship status to third parties unless required to do so by law or directive from a court." While the Charging Party argues that these statements are inconsistent and demonstrate the Employer's unlawful motivation, we note that: (1) the Employer has similarly stated that it would not report a graduate student employee's change in status to the government unless it is determined that, under the particular circumstances, it must do so by law; (2) the Employer appears to be required by law to report any graduate student employee who fails to maintain a full course of study; and (3) in any case, the alleged violation of Section 8(a)(1) of the Act does not require a showing of an unlawful motivation.

⁹ We recognize that there may be some tension between the regulations at issue in the instant case and the Section 7 protections afforded to graduate student employees, similar to the conflict discussed by the district court that invalidated a regulation regarding H-1 visas because it ran counter to the policies of the Act. *WJA Realty Ltd. Partnership v Nelson*, 708 F. Supp. 1268 (1989). We note that, following the District Court's decision, the invalid regulation was replaced with language that does not

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by threatening on (b) (6), (b) (7)(C) that, in the event of a strike, “all foreign students will lose their visas and have to leave the country.” The Region should dismiss the allegations concerning the Employer’s later statements, absent withdrawal, as the later statements either set forth the exact language of the applicable regulations or accurately conveyed the actual possibility that a strike “could” lead to the loss of student visas.

/s/
J.L.S.

ADV.14-CA-202172.Response.WashU.(b) (6), (b) (7)

conflict with the Act. The Immigration Unit in the Division of Operations-
Management is addressing this issue with the appropriate authorities at DHS.