

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

DATE: November 9, 2016

TO: David E. Leach III, Regional Director
Region 22

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

SUBJECT: MHA, LLC d/b/a Meadowlands Hospital
Medical Center
Case 22-CA-176267

Bill Johnson's Chron
111-500
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512-5072-2800

This case was submitted for advice as to whether an employer unlawfully retaliated against a union with which it has a very contentious bargaining relationship by covertly funding a lawsuit brought against the union by an ex-union official and, if so, whether the employer has a valid *Bill Johnson's* defense.¹ We initially conclude that the Employer has a First Amendment right to finance this lawsuit and therefore *Bill Johnson's* is applicable. We further conclude that the Employer's actions were likely retaliatory and that the portions of the lawsuit directed at the Union and its president are at least arguably baseless. However, the Region should hold the case in abeyance until the district court has issued its decisions on the pending motions for summary judgment.

FACTS

Background: Union and Employer

The Employer, MHA, LLC d/b/a Meadowlands Hospital Medical Center, operates an acute-care medical center in Secaucus, New Jersey. The Union, Health Professionals and Allied Employees, represents the Employer's registered nurses as well as its technical and service employees. This representation predates the Employer's current ownership, which began when the Employer purchased the assets of the hospital from the predecessor employer in 2010. Although the Employer quickly recognized the Union and signed new collective-bargaining agreements with the

¹ *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

Union, the bargaining relationship was antagonistic almost from the start. In Case 22-CA-086823, an ALJ found that the Employer committed numerous violations of Section 8(a)(1) and (5) including, *inter alia*, threats to close a portion of the facility in retaliation for protected concerted activity and the failure to maintain terms and conditions of the collective-bargaining agreement.

Much of the Employer's hostility toward the Union appears to have stemmed from the Union's lawful publicity and political campaign against the Employer. Beginning sometime after the Employer assumed control of the hospital, the Union engaged in a public campaign in the form of press releases, collaborations with members of the press, public sharing of articles critical of the Employer, and critical statements before governmental agencies. In September 2012, shortly after the Union had released a "white paper" detailing what it viewed as the shortcomings of the Employer's management and immediately before the Union held a press conference to announce the white paper, a member of the Employer's board of directors threatened to close a portion of the facility if the Union did not cease its press campaign against the Employer. The ALJ concluded that this threat violated Section 8(a)(1). The ALJ also found that the Employer conditioned its reaching agreement with the Union on the Union ceasing its publicity campaign, although the ALJ concluded that this was not a violation of the Act because no employees were present to hear this statement.

Background: Union and Plaintiff

The plaintiff in the litigation at issue here, KF, is a former member and former president of a local Union affiliate, although she was employed by and belonged to a bargaining unit at a different hospital. In 2009, KF pled guilty to receiving an illegal loan from the local Union treasury in violation of Section 503 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).² KF resigned her Union presidency in approximately May 2009 pursuant to the terms of her plea agreement with the Department of Labor, which prohibited her from holding Union office or employment or serving in certain other capacities for a period of three years.

KF subsequently resigned her Union membership in approximately June 2009, then sought reinstatement in approximately December 2009. The Union denied her request and informed her that she would be welcome to resume her membership after the completion of her three-year probationary period. In August 2010, KF filed a charge alleging that the Union had violated Section 8(b)(1)(A) by, *inter alia*, distributing a letter to its members instructing them that KF was prohibited from

² 29 U.S.C. § 503(a) ("No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of \$2,000.").

giving advice on Union matters and denying her request to resume her Union membership. This charge was submitted to Advice on the question of whether the Union's letter had violated the Act. Advice concluded that the letter did not constitute restraint or coercion under Section 8(b)(1)(A).³ The Region subsequently dismissed the charge.

Litigation regarding the retiree medical trust

In May 2013, KF filed a complaint in New Jersey state court against the Union's retiree medical trust and the trust administrator. The lawsuit sought clarification of benefits under the trust plan and alleged breach of fiduciary duty under the Employer Retirement Income Security Act of 1974 (ERISA). Specifically, she alleged that: the trust failed to provide a summary plan description prior to the union members' vote on whether to adopt the trust; the value of the trust's benefit was less than the time value of the money that employees contributed to the trust; and the board of trustees did not contain an equal number of management and Union representatives as indicated in "various literature." She was represented by a solo practitioner to whom she was referred by the Employer's in-house counsel.

On June 3, 2013, shortly after initiating her lawsuit, KF forwarded to the Employer several internal Union emails regarding the Union's political activity and advocacy as well as a copy of the Union's conflict of interest policy. A member of the Employer's board of directors forwarded the emails to the rest of the board members and two Employer public relations consultants. In response, one of the public relations consultants wrote:

This is part of what [board member] wants to talk about If what they found constitutes TEAL⁴ pursuant conflict, then have the lawyers file the complaint!! The infractions have to meet that test, not the journalistic threshold of interest.

Two days later, KF amended her complaint to allege a claim for breach of fiduciary duty against the Union, the Union president, and a Union staffer who served as a trustee for the retiree medical trust. The new count was based on a "common law fraud" theory. In July 2013, the defendants removed the lawsuit to the federal District Court of New Jersey.

³ *Health Professional and Allied Employees, Local 5030 (Palisade Medical Center)*, Case 22-CB-011155, Advice Memorandum dated January 6, 2011.

⁴ In its investigation, the Region was unable to determine what "TEAL" stands for. The Union has indicated that it is unfamiliar with the term.

A few months later, in December 2013, KF met with the Employer's in-house counsel, board chairman, and a member of the board of directors to discuss her ongoing lawsuit. In response to her concerns that her attorney was ill-suited to handle the federal litigation, the Employer's attorney recommended that she retain the law firm that serves as the Employer's primary counsel. On January 28, 2014, the Employer wrote a \$25,000 check to the recommended law firm to satisfy KF's initial retainer fee. She entered into a retainer agreement with the firm on February 11, 2014. The agreement inaccurately stated that KF, rather than the Employer, had paid the retainer and specified that she was responsible for all future charges for legal services. Despite this stipulation in the retainer agreement, KF had not paid any of her outstanding legal fees—which during discovery were revealed to total more than \$256,000—as of the time of the Region's submission to Advice. At that time, the only additional payment on her account was a second check for \$25,000 provided by the Employer on October 1, 2015.

On February 19, 2014, approximately one week after KF signed the retainer agreement with the Employer's law firm, she filed a motion to amend her complaint for a second time, which the magistrate granted on July 11, 2014. The Union appealed the magistrate's order, but it was upheld by a district court judge on April 2, 2015.

KF filed her second amended complaint on July 14, 2014. That complaint added four Union members as co-plaintiffs, named two additional trustees of the retiree medical trust as defendants, and added an additional count against the Union president for breach of fiduciary duty under the LMRDA.⁵ According to the complaint, the Union president had long been romantically involved with an attorney who was a shareholder in the law firm the Union used for much of its legal work and lived in a home owned by this attorney. The complaint asserted that this constituted a potential for personal enrichment and created a conflict of interest that should have been disclosed to the Union.

KF and the Union have each filed motions for summary judgment, which are still pending as of this date. In August 2016, several of the defendants were dismissed with prejudice by joint stipulation, including two of the three trustees, the trust administrator, and the trust itself. At this time, the only remaining defendants are the Union, the Union president, and one of the trustees.

ACTION

We initially conclude that the Employer has a First Amendment right to finance the litigation at issue here and therefore *Bill Johnson's* is applicable. We further conclude that the Employer's actions in funding KF's litigation were likely retaliatory

⁵ 29 U.S.C. § 501.

and that the portions of the lawsuit directed at the Union and Union president are at least arguably baseless. However, because the issues in the lawsuit turn on questions of federal law outside the Board's particular expertise, the Region should hold the case in abeyance until the district court has issued its decisions on the pending motions for summary judgment.

In *Bill Johnson's*, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: 1) lacks a reasonable basis in law and fact; and 2) was commenced with the motive of retaliating against the exercise of Section 7 protected activities.⁶ This approach allows the Board to balance competing interests, protecting employees' right to exercise their Section 7 rights free from employer interference or coercion while minimizing harm to an employer's First Amendment right of access to the courts.⁷ Accordingly, the Board is only required to engage in a *Bill Johnson's* analysis in circumstances where the employer has a First Amendment right at stake.⁸

The Employer has a First Amendment right to finance KF's lawsuit.

We conclude that the Employer here has a First Amendment right to finance KF's lawsuit. In *NAACP v. Button*, the Supreme Court held that support of litigation is a form of expression and association protected by the First Amendment.⁹ Courts have been clear that this protection inures not only to the organizations that provide legal representation, but also to those who contribute or affiliate with those organizations.¹⁰ Similarly, the Supreme Court has extended its reasoning in *NAACP*

⁶ 461 U.S. at 748–49; see also, e.g. *Atelier Condominium and Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 (Nov. 26, 2014), *enforced mem.* 653 F. App'x 62 (2d Cir. 2016).

⁷ *Bill Johnson's*, 461 U.S. at 745–46.

⁸ Cf. *Bill Johnson's*, 461 U.S. at 743–44 (noting that the reason the Board is entitled to enjoin baseless and retaliatory litigation is that such suits are not immunized by the First Amendment).

⁹ 371 U.S. 415, 428–29 (1963).

¹⁰ *UAW Local 1093 v. Nat'l Right to Work Legal Def. and Educ. Found.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978); see also, e.g., *Eilers v. Palmer*, 575 F. Supp. 1259, 1261 (D. Minn. 1984) (refusing to compel plaintiff to reveal identity of individuals or organizations funding his lawsuit on grounds that it would interfere with their First Amendment right to support litigation). *Accord Citizens United v. Fed. Election*

v. Button to hold that unions have a First Amendment right to hire attorneys to assist their members in the assertion of their legal rights.¹¹ Accordingly, we conclude that the Employer has a First Amendment right to provide funding and support for KF's litigation.

The lawsuit is arguably baseless and retaliatory

Because the Employer has a First Amendment right to finance the lawsuit at issue here, we must determine whether the litigation has a reasonable basis in law and fact and whether it is retaliatory in nature.¹² A lawsuit will be deemed objectively baseless “if the plaintiff’s position is plainly foreclosed as a matter of law or is otherwise frivolous” or if it rests on “plainly unsupportable [factual] inferences” or “patently erroneous submissions with respect to mixed questions of fact and law.”¹³ When evaluating whether the lawsuit—or, as in this case, the support thereof—violated the Act, the Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.¹⁴ At the same time, the Board’s inquiry need not be limited to the bare pleadings.¹⁵

Here, the first two counts of KF’s lawsuit alleging violations of ERISA do not apply to the Union or its president and the third, which does apply to the Union and

Comm’n, 558 U.S. 310 (2010) (holding that the First Amendment protects independent political contributions by a nonprofit corporation).

¹¹ *United Mine Workers, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 221–22 (1967). See also, e.g., *Stericycle, Inc.*, 357 NLRB 582, 583 (2011) (confirming that unions have a constitutional right to provide legal assistance to both member and non-member unit employees).

¹² See, e.g., *Atelier Condominium and Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3, 5 (employer violated Section 8(a)(1) in bringing baseless and retaliatory libel suit against an employee because of his union activity); *Milum Textile Services Co.*, 357 NLRB 2047, 2049 (2011) (employer violated Act by filing motion for temporary restraining order against union’s protected public communications).

¹³ *Allied Mechanical Services*, 357 NLRB 1223, 1229 (2011) (quoting *Bill Johnson’s*, 461 U.S. 731, *enforcement denied*, 734 F.3d 486 (6th Cir. 2013)).

¹⁴ *Bill Johnson’s*, 461 U.S. at 744–46. See also *Beverly Health and Rehabilitation Services*, 331 NLRB 960, 962 n.6 (2000) (leaving to state court the determination of whether union’s allegedly defamatory statements were made with actual malice).

¹⁵ *Bill Johnson’s*, 461 U.S. at 744–46.

its president, is arguably baseless. The final count, brought only against the Union president, appears to be foreclosed by a provision in the LMRDA prohibiting lawsuits by union members that are financed by “interested employers.”

The first three counts of the lawsuit allege breach of fiduciary duty under ERISA. Counts I and II do not apply to the Union or the Union president, but specifically allege that the trust administrator and the plan trustees breached their fiduciary duties to union member trust plan participants by failing to disclose critical information prior to the adoption of the trust.

The third count, which does apply to both the Union and the Union president, is arguably baseless as a matter of law. It alleges a common law breach of fiduciary duty by the Union, the Union president, and the plan trustees in allegedly making false representations and/or failing to disclose critical information prior to the members’ vote in favor of establishing the trust. Although the third count fails to specify the source of the alleged fiduciary duty, it seeks a statutory penalty under ERISA, 29 U.S.C. § 1132(c) and attorneys’ fees and costs under ERISA, 29 U.S.C. § 1132(g). But it appears that neither the Union nor the Union president owes a fiduciary duty with regard to the medical trust. According to ERISA, a person is a fiduciary with respect to a plan:

to the extent [] he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan.¹⁶

Thus, while the trust administrator and trustees of a plan are necessarily fiduciaries, the union and/or employer sponsoring a plan ordinarily are not.¹⁷ As the Supreme Court has noted, “ERISA vests the exclusive authority and discretion to manage and control the assets of the plan in the trustees alone, and not the employer or the union.”¹⁸ And the Department of Labor has issued regulations in the form of an interpretive guide that lists “purely ministerial functions” as nonfiduciary in nature,

¹⁶ 29 U.S.C. § 1002(21)(A).

¹⁷ See, e.g., *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (plan sponsors do not act as fiduciaries when they adopt, modify, or terminate welfare benefit plans).

¹⁸ *NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981) (internal citation omitted) (holding that employer-selected trustees of employee benefit plan were not employer representatives within the meaning of Section 8(b)(1)(B)).

including: “[p]reparation of employee communications material”; “[o]rientation of new participants and advising participants of their rights and options under the plan”; and “[p]reparation of reports concerning participants’ benefits.”¹⁹ Moreover, the fiduciary duties under ERISA apply only to established plans; “[d]ecisions as to whether or when to establish a plan, or how to design a plan, are not subject to any ERISA fiduciary obligation. Nor does any fiduciary obligation arise during the negotiation or execution of an agreement regarding future pension benefits.”²⁰ Accordingly, it is extremely unlikely that either the Union or the Union president are fiduciaries of the retiree medical trust, nor were they acting in a fiduciary capacity when they carried out the allegedly false or incomplete communications regarding the proposed plan prior to its creation.

The fourth and final count of KF’s lawsuit, while reasonably grounded in fact, appears to be foreclosed as a matter of law. The fourth count alleges a breach of fiduciary duty under Section 501(a) of the LMRDA²¹ by the Union president for her failure to disclose her personal relationship with an attorney whose firm handled much of the Union’s legal work. However, the second proviso to Section 101(a)(4) of the LMRDA provides that “no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any [] action, proceeding, appearance, or petition [brought by a union member].”²² With this proviso, “Congress wanted to deny employers the power to cause harassing suits or otherwise to create divisions in the unions with which they had relationships.”²³ In particular, an interested employer is one that “stands to gain from any divisiveness within the union which could weaken it at the bargaining table.”²⁴ Given the

¹⁹ 29 C.F.R. § 2509.75-8, D-2.

²⁰ *Landry v. Air Line Pilots Ass’n*, 901 F.2d 404, 414–15 (5th Cir. 1990) (opinion modified on denial of rehearing Apr. 27, 1990).

²¹ 29 U.S.C. §501(a).

²² 29 U.S.C. § 411(a)(4).

²³ *UAW Local 1093 v. Nat’l Right to Work Legal Def. and Educ. Found.*, 590 F.2d at 1151. *See also, e.g., Adamszewski v. Local Lodge 1487 IAM*, 496 F.2d 777, 782–84 (7th Cir. 1974) (examining legislative history of LMRDA § 101(a)(4) and concluding that ‘interested’ means “is concerned with it or is liable to be affected by it or has some self-interest in it”); *Local Union No. 38, Sheet Metal Workers v. Pelella*, 350 F.3d 73, 83–84 (2d Cir. 2003) (examining legislative history of § 101(a)(4)).

²⁴ *Adamszewski*, 496 F.2d at 784.

Employer's fraught bargaining relationship with the Union and apparent interest in the litigation despite its lack of legitimate stake in the outcome, there is little question that it is an interested employer under Section 101(a)(4). And while at least one court has concluded that Section 101(a)(4) does not bar a lawsuit financed by an interested employer if brought by a non-member such as KF,²⁵ the four additional plaintiffs introduced with the second amended complaint are all current members of the Union. Accordingly, the fact that the Employer has financed the lawsuit forecloses further litigation under the LMRDA.

Finally, we conclude that the Employer's actions in supporting KF's litigation were retaliatory. A retaliatory motive may be inferred from, among other things, the fact that the plaintiff bore animus toward the union-defendant and particularly toward its protected activity, as well as the lawsuit's baselessness.²⁶ Here, the Employer is not only financing, but apparently also helping to strategize and direct the litigation at issue—litigation that it would not have standing to bring itself and in which it has no legitimate interest. The only benefit the Employer could hope to realize from the ongoing lawsuit is the potential weakening of the Union as it is forced to expend resources defending itself. Moreover, the Employer has an established history of hostility toward the Union's protected activity of publicizing the parties' dispute. Both the timing of the Employer's first documented contact with KF regarding her litigation as well as their discussion of internal Union emails regarding the Union's political activity suggest that the Employer's interest in the lawsuit was motivated by this animus. In light of this particularly contentious relationship between the Union and the Employer, the Employer's support of KF's lawsuit is clearly retaliatory.

The Region should hold the case in abeyance.

Although we conclude that the lawsuit is arguably baseless and that the Employer's motives in financing it were retaliatory, we recognize that this litigation is grounded in ERISA and LMRDA, neither of which is within the Board's particular expertise. Accordingly, the Region should hold this case in abeyance pending the district court's resolution of the outstanding motions for summary judgment. Should the district court grant the Union's motion for summary judgment, the Region is authorized to issue complaint alleging a violation of Section 8(a)(1) as reasoned

²⁵ See *Klemens v. Air Line Pilots Assoc.*, 500 F. Supp. 735, 738 (W.D. Wash. 1980).

²⁶ *Milum Textile Services Co.*, 357 NLRB at 2049.

herein.²⁷ If, however, the district court grants KF's motion for summary judgment, the Region should dismiss the charge, absent withdrawal. If the district court denies both motions for summary judgment and allows the lawsuit to continue, the Region should contact Advice for further instruction.

/s/
B.J.K.

ADV.22-CA-176267.Response.Meadowlands Medical (b) (6), (b)

²⁷ Cf. *BE & K Construction Co.*, 351 NLRB 451, 457-58 (2007) (holding that unsuccessful retaliatory lawsuit may not be prosecuted as an unfair labor practice unless it was unreasonably based).