

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

Advice Memorandum

DATE: July 9, 2018

TO: Peter Sung Ohr, Regional Director
Region 13

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

SUBJECT: Berger Realty Group, LLC, and Robert Berger, 512-5009-0100
An Individual 512-5009-6700
Case 13-CA-210885 512-5009-6733
 512-5009-6767

The Region submitted this case for advice as to whether a lawsuit filed by Robert Berger (“Berger”), as an individual, against SEIU Local 1 (“the Union”) in the Circuit Court of Cook County, Illinois violated Section 8(a)(1) of the Act because it lacked a reasonable basis and was commenced with a retaliatory motive. We initially conclude that the state court lawsuit, although filed by Berger as an individual, was attributable to the Employer, and that both Berger and the Employer should be named as respondents. We further conclude that, under the principles established in *Bill Johnson’s Restaurants v. NLRB*,¹ each count of the lawsuit lacked a reasonable basis and Berger, on behalf of the Employer, initiated the lawsuit to retaliate against employee Section 7 activities. Therefore, the lawsuit violated Section 8(a)(1), and the Region should issue complaint, absent settlement. However, concerns under Section 10(b) affect how the Region should plead the violation in the complaint and the extent of the available remedy.

FACTS

Berger Realty Group, LLC (“the Employer”) is an Illinois company engaged in the business of real estate management and related services. Berger is the Employer’s sole owner. In July 2014, the Employer’s four maintenance employees requested that the Employer voluntarily recognize the Union as their exclusive collective-bargaining representative. In September 2014, the Union filed an unfair labor practice charge against the Employer and two affiliated entities, alleging that they were joint employers who had violated the Act by, among other things, laying off the maintenance employees and subcontracting their work. The charge alleged that Berger personally committed some of the unfair labor practices, including soliciting

¹ 461 U.S. 731, 748-49 (1983).

grievances from employees and promising to remedy them, telling employees that the Employer would not sign any Union contract, and promising the employees benefits in exchange for withdrawing support from the Union.

From September through early November 2014, the Union picketed at the Employer's buildings in Chicago while displaying a giant, inflatable rat and distributing leaflets. The leaflets referred to Berger as "Bob" and stated, "Bob is a lawbreaker! Berger Realty Group is currently Under Investigation with the NLRB for: Intimidation, Retaliation, and many other laws protected under the National Labor Relations Act." The leaflets asked the buildings' tenants to contact Berger and tell him that his actions were disrupting the tenants' quality of living. On October 17, Union representatives handed Berger a copy of the leaflet outside one of his buildings.

On about March 5, 2015, the Region found merit to numerous allegations in the Union's September 2014 charge. The parties then entered into a non-board settlement agreement in which the Employer voluntarily recognized the Union as the maintenance employees' exclusive bargaining representative. Berger then agreed to and executed a collective-bargaining agreement with the Union.

On November 2, 2015, Berger, as an individual, filed a complaint against the Union in the Circuit Court of Cook County, Illinois, alleging four counts: defamation per se, false light, intentional infliction of emotional distress, and trespass. The complaint pled facts concerning the Union's organizing, picketing, and leafleting activities. On March 17, 2016, the parties agreed to dismiss the trespass count. On August 10, 2016, Berger filed an amended complaint on the first three counts in which he alleged that the Union had made defamatory statements in the leaflet with actual malice and requested compensatory and punitive damages.

On September 16, 2016, the Union filed a motion to compel compliance with discovery asking the state court to require Berger to respond to a written discovery request and substantiate the damages pled in the amended complaint. On February 17, 2017, Berger filed an opposition to the motion to compel that contained certain stipulations that became part of the record, including Berger's reliance on presumed damages for the counts of defamation per se and false light, and that Berger would not be relying on any medical bills or any documents showing lost rental revenue to establish specific damages.

On November 1, 2017, the state court granted the Union's motion for summary judgment and dismissed all three counts of Berger's lawsuit with prejudice. Regarding the defamation per se and false light claims, the state court held that they were untimely because the statute of limitations for those claims is one year, and Berger admitted to having received the Union's leaflet on October 17, 2014, which

was over a year before he filed the lawsuit on November 2, 2015. The state court dismissed the intentional infliction of emotional distress claim on the merits, finding that the Union's conduct, including displaying a giant, inflatable rat and distributing leaflets, was not "extreme and outrageous" conduct. The state court also noted in dismissing this claim that the statements on the Union's leaflets were true, specifically, that the Board had been investigating whether Berger violated the Act. Berger did not appeal the court's decision.

On December 1, 2017, the Union filed the instant charge against Berger and the Employer alleging that they had violated Section 8(a)(1) by filing a state lawsuit against it that lacked a reasonable basis and retaliated against the employees' Section 7 activities. The Region served the charge on December 4, 2017.

ACTION

We initially conclude that the state court lawsuit, although filed by Berger as an individual, is attributable to the Employer, and that both Berger and the Employer should be named as respondents. We further conclude that Berger and the Employer violated Section 8(a)(1) by maintaining the state lawsuit against the Union because each count of the lawsuit lacked a reasonable basis and the lawsuit retaliated against employee Section 7 activities. However, concerns under Section 10(b) affect how the Region should plead the violation in the complaint and the extent of the available remedy.

I. Berger's Lawsuit is Attributable to the Employer, and Both Parties Should be Named as Respondents

As an initial matter, we conclude that the lawsuit can be attributed to the Employer even though Berger filed it as an individual. To determine whether an individual's lawsuit is attributable to an employer, the Board looks to traditional agency principles.² The Board considers the following factors: whether the employer held out the individual as authorized to speak and act on its behalf, whether the

² *Braun Electric Co.*, 324 NLRB 1, 2 (1997) (attributing a lawsuit to the employer because the individual who filed it was acting as an agent of the employer when he wrote a demand letter as part of that lawsuit on company letterhead, signed the letter with his title "President," and the lawsuit directly concerned employment that took place on company property).

lawsuit directly relates to an employment matter and took place on company property, and whether the individual committed other unfair labor practices.³

Each of the preceding factors is satisfied here. Berger is the Employer's sole owner and, as such, had authority to speak and act on its behalf, which is evidenced by his negotiating and executing a collective-bargaining agreement with the Union. The lawsuit also directly relates to the labor dispute between the Union and the Employer, particularly the picketing and leafleting that occurred at the Employer's facilities as part of the maintenance employees' protest of the Employer's unfair labor practices and support for the Union. During that underlying labor dispute, Berger himself is alleged to have committed some of the unfair labor practices covered by the Union's September 2014 charge. These facts provide strong support for the conclusion that Berger filed the state court lawsuit in his capacity as an agent of the Employer.

In addition to Berger's lawsuit properly being attributed to the Employer, both the Employer and Berger, as an individual, are appropriately named as Charged Parties. In *Manno Electric*, the Board considered a state court lawsuit filed by the employer and its owner-president against the union that sought to organize the employer's workforce.⁴ The Board explicitly agreed with the ALJ that it was appropriate to include the owner-president as an individual respondent "in order to avoid frustrating the remedial purposes of the Act."⁵ In so finding, the Board affirmed the ALJ's conclusion that if the owner-president "were permitted to bring the state lawsuit, without prejudice, he would be obtaining for [the employer] indirectly what [the employer] could not obtain directly, the pressing of an alleged illegal state lawsuit against the [u]nion for which [the employer] would benefit. Nothing in the Act

³ See *Atelier Condominium & Cooper Square Realty*, 361 NLRB 966, 968 n.13, 999-1001 (2014) (finding the lawsuit filed by two individual supervisors attributable to their joint employers because the supervisors were acting as agents of the employers as demonstrated by their authorization to speak and act for the employers, including representing the employers in contract negotiations, their involvement in the day-to-day operations of the employers, their engagement in conduct that otherwise violated Section 8(a)(1) and (3), and the fact that the sole basis for filing the lawsuit against the plaintiff was by virtue of the plaintiff's employment relationship with the employers), *enfd.* 653 Fed. Appx. 62 (2d Cir. 2016); *Braun Electric Co.*, 324 NLRB at 2-3.

⁴ 321 NLRB 278 (1996), *enfd. mem.* 127 F.3d 34 (5th Cir. 1997).

⁵ *Id.*, 321 NLRB at 278, n.3.

gives ‘the [c]ompany’s principal that privilege.’”⁶ To similarly prevent skirting of the Act in the current case, the complaint here also should include both the Employer and Berger as respondents, and the Region need not allege that they are alter egos or joint employers.

II. The Employer and Berger Violated Section 8(a)(1) by Maintaining a State Court Lawsuit Against the Union that Lacked a Reasonable Basis and Retaliated Against Section 7 Activities

In *Bill Johnson’s Restaurants v. NLRB*, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a state court lawsuit only when the lawsuit: (1) lacks a reasonable basis in law or fact; and (2) was commenced with a retaliatory motive.⁷ In *BE & K Construction Co.*, the Board clarified that a baseless lawsuit, whether ongoing or completed, violates the Act if the motive for initiating the lawsuit was to retaliate against Section 7 rights, but that a reasonably based lawsuit does not violate the Act, regardless of the motive for bringing it.⁸

A lawsuit is objectively baseless when its factual or legal claims are such that “no reasonable litigant could realistically expect success on the merits.”⁹ The analysis requires “[an examination of] the plaintiff’s evidence to determine whether it raises any material questions of fact.”¹⁰ In conducting that analysis, 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.¹¹

Applying these principles here, we conclude that each count of the state court lawsuit lacked a reasonable basis. We also conclude that Berger, on behalf of the

⁶ *Id.* at 295.

⁷ 461 U.S. at 748-49.

⁸ 351 NLRB 451 (2007).

⁹ *Id.* at 457.

¹⁰ *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997). *See also Bill Johnson’s*, 461 U.S. at 745-47.

¹¹ *Id.* at 744-46.

Employer, filed the lawsuit to retaliate against the maintenance employees' Section 7 activities.

A. Each count of the lawsuit dismissed by the state court lacked a reasonable basis

We agree with the Region that the three counts of the lawsuit dismissed by the state court lacked a reasonable basis.¹² Initially, regarding the claims of defamation per se and false light, those claims lacked a reasonable basis because Berger filed them after the applicable statute of limitations had expired. Specifically, the state court noted that Berger had knowledge of the alleged defamatory statements on the Union's leaflets as of October 17, 2014, when the Union handed him a leaflet outside one of his buildings, but he did not file his lawsuit until November 2, 2015, more than two weeks beyond the one-year statute of limitations for the defamation per se and false light claims.¹³ Thus, neither of those claims could ever have been meritorious as of the date Berger filed them.

Moreover, each count of the state lawsuit lacked a reasonable basis under substantive law. First, regarding the defamation per se claim, under Illinois law, a statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him.¹⁴ Truth is an absolute defense to a claim of defamation and only "substantial truth" is required to establish this defense.¹⁵ Additionally, to successfully prosecute a state defamation lawsuit that is connected to a labor dispute, Illinois courts acknowledge that under *Linn* a plaintiff must also

¹² It is unnecessary to analyze the fourth count, i.e., the trespass claim, because the parties agreed to dismiss that count in March 2016, which was well outside of the Section 10(b) period for the current charge.

¹³ 735 Ill. Comp. Stat. 5/13-201 (2018) ("Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.")

¹⁴ *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201, 206 (Ill. 1992).

¹⁵ See, e.g., *Seitz-Partridge v. Loyola University of Chicago*, 987 N.E.2d 34, 41 (Ill. App. Ct. 2013) ("While substantial truth is normally a question for the jury, where no reasonable jury could find that substantial truth had not been established, the question is one of law.").

demonstrate that the allegedly defamatory remarks were made with actual malice and caused the plaintiff damage.¹⁶

Here, the statements on the Union's leaflets were substantially true – the Employer was under investigation by the Board for numerous alleged unfair labor practices, including several that Berger allegedly committed himself. Indeed, the state court, albeit in the context of analyzing the intentional infliction of emotional distress claim, concluded that the leaflet contained true statements. The leaflet's substantial truth is an absolute defense to the defamation claim. That defense also means that Berger and the Employer could not have established actual malice, i.e., that the Union distributed the leaflet knowing it contained false statements or with reckless disregard for the truth or falsity of its statements, a required element under *Linn* that is recognized by Illinois courts when the challenged statements occurred during a labor dispute. Finally, Berger and the Employer also failed to establish the required element of actual damages because Berger stipulated in opposing the Union's motion to compel compliance with discovery that he was relying on presumed damages and did not have medical records or records of lost rents to establish actual damages.¹⁷ In sum, Berger and the Employer could not satisfy several elements of the defamation per se claim.

Second, regarding the false light claim, Illinois law requires a plaintiff to show that he or she was placed in a "false light" before the public as a result of the defendant's actions, that the false light would be highly offensive to a reasonable person, and that the defendant acted with actual malice.¹⁸ Substantial truth of the

¹⁶ See *Von Solbrig Memorial Hospital v. Licata*, 305 N.E.2d 252, 255-57 (Ill. App. Ct. 1973) (recognizing the federal overlay of actual malice and damages mandated by *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 64-66 (1966), for a defamation claim in a labor dispute).

¹⁷ Inasmuch as it dealt with the standard for finding an ongoing lawsuit to be baseless, the Region should not rely on *Milum Textile Services Co.*, 357 NLRB 2047 (2011), in support of finding this completed lawsuit to be an unfair labor practice. The General Counsel does not necessarily agree with the standard for enjoining ongoing lawsuits articulated in *Milum Textile Services*.

¹⁸ *Kolegas v. Heflet Broadcasting Corp.*, 607 N.E.2d at 209-10.

challenged statements is also a defense to a claim of false light.¹⁹ Thus, as with the defamation per se claim, the false light claim was baseless because the statements on the Union's leaflets were substantially true. That meant Berger and the Employer also could not establish the required element of actual malice. And again, based on his stipulation, Berger also could not establish the required element of actual damages for this claim.

Finally, regarding the intentional infliction of emotional distress claim, Illinois law requires a plaintiff to establish 1) that the defendant's conduct was extreme and outrageous, 2) that the defendant knew that there was a high probability that his or her conduct would cause severe emotional distress, and 3) that the conduct in fact caused severe emotional distress.²⁰ The standard for what qualifies as "extreme and outrageous" is high, and under no circumstances do "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" qualify.²¹ Instead, the conduct must be so extreme as to "go beyond all possible bounds of decency" and be regarded as intolerable in a civilized community.²² Here, the state court, in granting the Union's motion for summary judgment, concluded that the Union's picketing and distribution of a truthful leaflet could not constitute extreme or outrageous conduct. The court also concluded that the added presence of a giant, inflatable rat did "not rise to shocking the conscience or being beyond the pale of what one would find acceptable in a civilized society." In dismissing this claim with prejudice, the court noted that it was not possible for Berger to replead the claim to satisfy the extreme and outrageous standard.

Although the state court did not reach the issue, Berger also could not have satisfied the third element of the intentional infliction claim, i.e., that the conduct in fact caused severe emotional distress. Despite pleading in the complaint that he had

¹⁹ *Wynne v. Loyola University of Chicago*, 741 N.E.2d 669, 677 (Ill. App. Ct. 2000) (plaintiff could not prevail on her false light claim because the assertions "were substantially true").

²⁰ *Kolegas v. Heflet Broadcasting Corp.*, 607 N.E.2d at 211.

²¹ *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988).

²² *Public Finance Corp. v. Davis*, 360 N.E.2d 765, 767 (Ill. 1976) (plaintiff did not establish a claim for intentional infliction of emotional distress by the company seeking to collect money owed to it because the company did not use outrageous methods when repeatedly calling and visiting the plaintiff at home and in the hospital in an attempt to collect on the promissory note).

suffered “medically significant and diagnosable distress,” Berger then stipulated in opposing the Union’s motion to compel that he had no medical records to support his claim of damages and relied solely on presumed damages. Berger did not produce or identify any evidence during either the state court litigation or the Region’s investigation to substantiate his claim.

Since all three claims in the lawsuit were objectively baseless, the lawsuit can be found to violate the Act under the standard in *BE & K Construction*, as long as it was also filed with a retaliatory motive.

**B. The lawsuit retaliated against the maintenance employees’
Section 7 activities**

Berger, on behalf of the Employer, filed the lawsuit to retaliate against the maintenance employees’ efforts to protest the Employer’s unfair labor practices and to support the Union. Factors for discerning a retaliatory motive include whether the lawsuit was directed at protected concerted activity, whether the respondent demonstrated prior animus toward protected rights, whether the lawsuit was baseless, and whether the respondent made any claim for punitive damages.²³ Each of these factors is present here.²⁴ First, the lawsuit explicitly targeted the maintenance employees’ Section 7 activity of picketing and distributing leaflets to protest the Employer’s alleged unfair labor practices and support the Union. Second, Berger’s, and the Employer’s, prior animus toward the employees’ protected rights is evidenced by the unfair labor practices alleged in the Union’s September 2014 charge, which the parties settled after the Region made a merit determination. The alleged violations included laying off the maintenance employees, subcontracting their work, soliciting their grievances, promising them benefits, and making statements that Union representation would be futile. Berger also demonstrated Union animus during his deposition for the state lawsuit when he described the Union organizer as a liar, bum, cheat, and “very ambitious ignoramus,” and described the two Union supporters that handed him the Union’s leaflet as “thugs.”

²³ See, e.g., *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 6-7 (Feb. 1, 2018).

²⁴ While the Board in *Allied Mechanical Services*, 357 NLRB 1223, 1232 (2011), *enf. denied* 734 F.3d 486 (6th Cir. 2013), discussed a respondent’s lawsuit as being “retaliatory on its face” if it seeks an award of money damages based on statutorily protected conduct, the General Counsel does not necessarily agree with that conclusion, and the Region should not cite *Allied Mechanical* for that proposition.

Third, the obvious lack of merit to each count of the state lawsuit provides additional support for a retaliatory motive finding. Because Berger filed the defamation per se and false light claims after the applicable statute of limitations had expired, he could never have succeeded on those claims. Those facts strongly support the inference that Berger did not file the lawsuit with the legitimate objective of vindicating his legal rights, but rather to retaliate against his employees' pro-Union activities and impose litigation costs on the Union. Finally, Berger's request for compensatory and punitive damages for unspecified reputational injuries, while stipulating that he could not justify or quantify any amount of actual damages, also evidences a retaliatory motive.²⁵ Because the evidence here firmly establishes that Berger, on behalf of the Employer, filed the state lawsuit in retaliation for the maintenance employees' exercise of their Section 7 rights, the lawsuit violates Section 8(a)(1).

III. The Effect of Section 10(b) on the Complaint and the Remedy

Because of Section 10(b) concerns, the complaint should allege only that the respondents unlawfully *maintained* (but not filed) the baseless and retaliatory lawsuit. Although Berger initiated the state lawsuit against the Union two years earlier, on November 2, 2015, the Union did not file the current charge until December 1, 2017. The Region did not serve the charge on Berger until December 4, 2017. Thus, because the complaint can only address unfair labor practices occurring in the six months before the current charge, it cannot include an allegation that Berger and the Employer violated Section 8(a)(1) by filing the state lawsuit, which occurred well outside the six month period. Moreover, as noted above, for this same reason the trespass claim that Berger originally included in the lawsuit, but which the parties agreed to dismiss in March 2016, is entirely outside the scope of the complaint.

The application of Section 10(b) also limits the available remedy. Rather than recover all legal expenses it incurred defending against a baseless lawsuit over the course of the entire state proceeding, the Union here may only be reimbursed for all reasonable legal fees and expenses incurred during the six months prior to filing and

²⁵ See *Atelier Condominium*, 361 NLRB at 971 (the size of the unsubstantiated claims for each injury, each of which included punitive damages, was evidence of an unlawful motive).

service of the charge.²⁶ Therefore, the Union will only be entitled to reasonable legal fees and expenses incurred since June 4, 2017.

/s/
J.L.S.

ADV.13-CA-210885.Response.BergerRealty. (b) (6), (b) (7)

²⁶ See, e.g., *Cross Island Telephone Services*, 330 NLRB 19, 19 n.2 (1999) (noting that the monetary remedy had to be limited to the 6-month period preceding the charge in a case where the employer had violated Section 8(a)(5) by refusing to sign and follow an agreed-on contract). See also *BE & K Construction*, Case 26-CA-17650, Advice Memorandum dated March 17, 1997 (directing the Region to seek as a remedy only the \$1,500 to \$2,000 in attorneys' fees the charging party-union had incurred during the Section 10(b) period even though the union had incurred a total of \$230,000 in fees defending against the employer's baseless and retaliatory lawsuit).