

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

# Advice Memorandum

DATE: November 6, 2017

TO: Sean R. Marshall, Acting Regional Director  
Region 5

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

SUBJECT: Service Employees International Union                   506-2017-5000-0000  
Case 05-CA-187532   506-4067-8000-0000  
   506-6050-0167-5000  
   506-6050-1240-0000  
   512-5036-6720-5600

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) and (3) of the Act by sending home five employees from an Employer-organized convention after an employee-led action on the convention floor resulted in a confrontation and ten-minute interruption of the Employer's president's speech.

We conclude that the employees' action was protected under Section 7, and that the employees did not lose that protection pursuant to the work stoppage principles of *Quietflex Mfg. Co.*<sup>1</sup> We further conclude that the Employer's sending home of employees constituted an adverse employment action. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by removing the employees from work in retaliation for engaging in a protected on-the-job protest.

## FACTS

Service Employees International Union ("SEIU" or "Employer") funds and organizes Fight for \$15 ("FF15"), a nationwide campaign employing SEIU field organizers who recruit and support low-wage workers in their effort to obtain a living wage. The Union of Union Representatives ("UUR") sought, but was denied, voluntary recognition by the Employer for the Employer's FF15 field organizers ("employees"). UUR issued press releases as part of an unsuccessful public

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<sup>1</sup> 344 NLRB 1055 (2005).

campaign to obtain voluntary recognition on behalf of the employees. At the time of the events in question, the parties were arbitrating a grievance over whether the collective-bargaining agreement between the Employer and UUR covered the employees.

The Employer planned a FF15 convention to take place in Richmond, Virginia on August 12-13, 2016 to bring together low-wage workers from around the country and garner public support for FF15. The employees recruited low-wage workers for the convention. Each employee was responsible for accompanying his or her recruited low wage workers throughout the convention. The Employer made hotel arrangements, distributed meal money, and paid for the travel and lodging expenses of both the employees and the low-wage workers.

In an effort to publicize their labor dispute and pressure the Employer to recognize UUR as their bargaining agent, the employees planned an action for the Richmond convention. The plan was for the employees to approach the stage as a group and deliver a letter seeking recognition to SEIU (b) (6), (b) (7)(C) during (b) (6) convention speech. In anticipation of the event, UUR issued a press release stating that an unspecified action was set for Richmond.

On August 12, 2016, SEIU (b) (6), (b) (7)(C) speech was broadcast live on C-SPAN 2.<sup>2</sup> About 3.5 minutes into (b) (6), (b) (7)(C) speech, a mixed group of employees and low-wage workers, totaling fewer than ten persons, approached the stage, some carrying signs that read “\$15 minimum wage and union rights for all means FF15 organizers, too!” Before they could reach the stage, however, the employees were confronted by a line of convention attendees. At this point, (b) (6), (b) (7)(C) paused (b) (6), (b) (7)(C) speech as a “Fight for 15!” chant erupted from the crowd. Some employees verbally engaged with attendees when one of the attendees forcefully removed a sign from a demonstrator’s hands. The employees immediately abandoned their letter delivery plan. Over the next 8 minutes or so, individuals on stage took turns at the microphone, shouting at and criticizing the employees. Neither (b) (6), (b) (7)(C) nor any other managers standing nearby sought to intervene or to resume the program. About ten minutes after (b) (6), (b) (7)(C) paused (b) (6), (b) (7)(C) speech, (b) (6), (b) (7)(C) resumed where (b) (6), (b) (7)(C) left off, finishing (b) (6), (b) (7)(C) speech unencumbered. No violence occurred.

Later that night, the Employer contacted each of the five employees who had approached the stage, issued them revised itineraries, and sent them home the

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<sup>2</sup> See Fight for Fifteen Minimum Wage Convention, C-SPAN, <https://www.c-span.org/video/?413904-1/minimum-wage-advocates-hold-convention> (last visited 10 Sep, 2017).

following morning. One UUR member noted that some low-wage workers were upset by the Employer's removal of the protesting employees.

### **ACTION**

We conclude that the employees' participation in the action at the FF15 convention was protected, and that the employees did not lose the Act's protection under the work stoppage principles laid out in *Quietflex*.<sup>3</sup> We also conclude that the Employer's conduct of sending the employees home from the convention constituted an adverse employment action. The Region should therefore issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by sending the employees home early from the convention in retaliation for their protected concerted activity.

### **The Employees' Action was Protected Activity**

"It is well established that employees may, with the Act's protection, make appeals to the public exposing their views concerning a labor dispute with their employer."<sup>4</sup> Peacefully attempting to deliver a grievance letter to management, even in the presence of customers on an employer's property, is also protected.<sup>5</sup>

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<sup>3</sup> 344 NLRB at 1056-57. *Atlantic Steel*, which focuses on face-to-face communications between employees and supervisors, should not apply here. The conduct did not involve a workplace confrontation solely between the employees and a supervisor or manager; rather, the employees sought to publicize their labor dispute to the convention attendees and the public. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3-4 (Aug. 22, 2014) (rejecting use of *Atlantic Steel* to analyze communications on social media), *aff'd sub nom. Three D, LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015). See also *Starbuck's*, 360 NLRB 1168, 1169 (2014) ("accept[ing] as the law of the case" the Second Circuit's holding that *Atlantic Steel* does not apply to employees' outburst to supervisors in the presence of customers), *remanded by*, 679 F.3d 70 (2d Cir. 2012). We agree with the Region, though, that there would be no loss of protection under *Atlantic Steel* should that test be applicable.

<sup>4</sup> *Greyhound Lines, Inc.*, 251 NLRB 1638, 1640 (1980), *enfd.* 660 F.2d 354 (8th Cir. 1981).

<sup>5</sup> *Thalassa Restaurant*, 356 NLRB 1000, 1000 f.3 & 1019 (2011) (off-duty employee's peaceful entry with a group of nonemployees into customer area of the employer's restaurant for five minutes during business hours to deliver a grievance letter to management was protected); *Goya Foods of Florida and Unite Here, CLC*, 347 NLRB

Section 7 also protects employees' right to engage in on-the-job protests over terms and conditions of employment.<sup>6</sup> However, that right is not unlimited.<sup>7</sup> In striking "an appropriate balance" between the employees' Section 7 rights and the employer's property rights, the Board must accommodate both rights "with as little destruction of one as is consistent with the maintenance of the other."<sup>8</sup> To effectively balance these rights, the Board in *Quietflex* has formulated a ten-factor test for work stoppages that take place on employer property.<sup>9</sup> The *Quietflex* analysis takes into account the unique circumstances of each work stoppage, including the type of business and location.<sup>10</sup> The factors are:

- (1) the reason the employees have stopped working;
- (2) whether the work stoppage was peaceful;
- (3) whether the work stoppage interfered with production, or deprived the employer access to its property;<sup>11</sup>
- (4) whether employees had adequate opportunity to present grievances to management;
- (5) whether employees were given any warning that they must leave the premises or face discharge;
- (6) the duration of the work stoppage;

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1118, 1133-34 (2006) (off-duty employees' entry into customer areas of secondary employer's retail store for four minutes to deliver grievance letter to management was protected), *enfd.* 525 F.3d 1117 (11th Cir. 2008).

<sup>6</sup> *Quietflex Mfg. Co.*, 344 NLRB at 1056 (citing *Washington Aluminum*, 370 U.S. 9 (1962)).

<sup>7</sup> *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at 3 (Aug. 27, 2016).

<sup>8</sup> *Id.*, slip op. at 3 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

<sup>9</sup> 344 NLRB at 1056-57.

<sup>10</sup> *Wal-Mart Stores*, 364 NLRB No. 118, slip op. at 3.

<sup>11</sup> The disruption/ interference inquiry focuses on whether employees "interfere[d] with production or the provision of services by preventing *other* employees who are working from performing their duties." See *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB 1080, 1084 (2014), *enfd.* 789 F.3d 154 (D.C. Cir. 2015) (emphasis added).

- (7) whether employees were represented or had an established grievance procedure;
- (8) whether employees remained on the premises beyond their shift;
- (9) whether employees attempted to seize the employer's property; and
- (10) the reason for which employees were ultimately [disciplined].<sup>12</sup>

Applying these factors in *Quietflex*, the Board held that a 12-hour work stoppage on the employer's property, involving both on- and off-duty employees, lost the Act's protection where, inter alia, the employees refused to leave the property until the employer summoned the police.<sup>13</sup> Although created in the context of work stoppages involving employees' refusal to leave the property, the Board has since applied the *Quietflex* factors to other situations involving on-the-job protests and found them protected, even where they involved some cessation of work.<sup>14</sup> For instance, in *Santa-Barbara News-Press*, the ALJ, affirmed by the Board, concluded that employees' 10-minute cessation of work to deliver a grievance letter to management was protected under *Quietflex*.<sup>15</sup> The ALJ emphasized the brief and peaceful nature of the activity, as well as the absence of an established grievance procedure by which employees could resolve the subject of their dispute.<sup>16</sup>

In *Wal-Mart Stores*, the Board held that on-duty employees' 88-minute protest in customer areas of a retail establishment, during retail hours, was a protected work stoppage under *Quietflex*.<sup>17</sup> There, seeking to voice concerns over their continued employment, a group of 10-20 on-duty employees and non-employee participants gathered in the customer service area of the employer's store, holding a banner reading "Stand Up, Live Better, ForRespect.org, OUR

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<sup>12</sup> *Quietflex*, 344 NLRB at 1056-57.

<sup>13</sup> *See id.* at 1058-59.

<sup>14</sup> *See Wal-Mart Stores*, 364 NLRB No. 118; *Santa Barbara News-Press*, 357 NLRB 452, 483 (2011), *vacated on other grounds*, 702 F.3d 51 (D.C. Cir. 2012).

<sup>15</sup> 357 NLRB 452, 483 (2011), *vacated on other grounds*, 702 F.3d 51 (D.C. Cir. 2012).

<sup>16</sup> *Id.*

<sup>17</sup> 364 NLRB No. 118, slip op. at 7.

Walmart, Organization United for Respect at Walmart.”<sup>18</sup> After 88 minutes, protestors were dispersed by police.<sup>19</sup> Characterizing the activity as a “work stoppage,” the Board concluded that 9 of 10 *Quietflex* factors weighed in favor of protection.<sup>20</sup> In finding the activity protected, the Board emphasized the protest’s protected aims, peaceful nature, brief duration, non-seizure of property, and the “little to no disruption of the [employer’s] ability to serve its customers.”<sup>21</sup>

Applying the *Quietflex* factors, we conclude that the employees here did not lose the Act’s protection when they briefly protested while working at the Richmond convention.<sup>22</sup> The employees’ on-the-job protest was an effort to obtain UUR recognition from the Employer for the purpose of improving their terms and conditions of employment, clearly a protected aim.<sup>23</sup> Indeed, an absence of representation and adequate grievance mechanisms weigh in favor of protection,<sup>24</sup>

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<sup>18</sup> *Id.*, slip op. at 2.

<sup>19</sup> *Id.*, slip op. at 3.

<sup>20</sup> *Id.*, slip op. at 6.

<sup>21</sup> *Id.*

<sup>22</sup> We conclude that *Restaurant Horikawa*, 260 NLRB 197 (1982), is not applicable. That case involved an “invasion” of a restaurant by 30 off-duty and non-employee demonstrators whose marching and chanting in the quiet customer reception area at the dinner hour was found to have “seriously disrupted” the employer’s business. 260 NLRB at 197-98. Here, there was no invasion of a quiet service area by unwelcome off-duty employees. Rather, the employees were working at a social justice convention at the time of their short action, which merely entailed an effort to deliver a letter to the SEIU (b) (6), (b) (7)(C). Moreover, to the extent that an analogy between retail customers and social justice convention attendees is appropriate, *Quietflex* still governs. See *Wal-Mart Stores*, 364 NLRB No. 118, slip op. at 7 (expressly rejecting the contention that *Restaurant Horikawa* governs on-duty employee actions in customer areas of retail establishments, instead applying *Quietflex*).

<sup>23</sup> See, e.g., *Washington Aluminum Co.*, 370 US at 15.

<sup>24</sup> See, e.g., *Wal-Mart Stores, Inc.*, 364 NLRB No. 118, slip op. at 6-7 (although employees could present grievances to the employer individually, they had no representation or way to present collective concerns); *City Dodge Center, Inc.*, 289

and the employees here were without a means of presenting grievances to the Employer, since the Employer had declined to voluntarily recognize UUR as the employees' chosen representative.<sup>25</sup>

The action was also brief and peaceful, and became disruptive only when certain attendees initiated a confrontation as the employees approached the stage. No acts of violence or property damage were committed. Indeed, once confronted by the convention attendees, the employees abandoned their attempt to deliver the letter to (b) (6), (b) (7)(C). Thus, the length and confrontational tone of the action was caused by the attendees' reaction to the demonstrators, rather than by the employees themselves.

In addition, the employees neither received nor defied orders to leave the premises at the threat of discipline, did not remain on the premises beyond their shift, and did not attempt to seize the Employer's property. The employees' brief interruption of (b) (6), (b) (7)(C) speech did not prevent the speech from being completed in full. Indeed, (b) (6), (b) (7)(C) resumed (b) (6), (b) (7)(C) speech with no further interruption and there is no evidence the brief interruption impaired the convention's scheduling, attendance, or success.

Finally, the Employer concedes that the reason it sent employees home was that they approached the stage during (b) (6), (b) (7)(C) speech. Because approaching the stage, however, was "part and parcel" of the employees' protected on-the-job action, it is not a separate lawful basis upon which to discipline the employees.<sup>26</sup> Accordingly, applying the *Quietflex* factors, the employees' action maintained its protected status.

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NLRB 194, 197 (1988) (lack of grievance procedure was a factor in finding employee work stoppage protected), *enfd. sub nom. Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989); *Pepsi-Cola Bottling Co.*, 186 NLRB 477 (1970), *enfd.* 449 F.2d 824, 829-30 (5th Cir. 1971) (in agreeing with the Board that the work stoppage was protected, the court noted that the employees had no established grievance procedure and had been denied the chance to communicate their grievances to management).

<sup>25</sup> Although, at the time of the convention, the parties were preparing to arbitrate a grievance over the scope of the collective-bargaining agreement's coverage, the employees were, in the meantime, without the benefit of that contract and its grievance mechanisms.

<sup>26</sup> *Wal-Mart Stores*, 364 NLRB No. 118, slip op. at 6 (finding that "engaging in a sit-in and disrupting business and customer service operations" were "part and parcel of the

### **Adverse Action**

We further conclude that the Employer's removal of the five employees from the convention constituted an adverse employment action.

To establish an adverse employment action, the General Counsel must show by a preponderance of the evidence that "the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse."<sup>27</sup> The existence of an adverse employment action is not dependent on an employee's loss of wages.<sup>28</sup> In *Bellagio, LLC*, the Board found that an employee's suspension with pay pending investigation constituted an adverse employment action, suggesting that removal from work, without more, qualifies as an adverse employment action.<sup>29</sup>

Here, the removal of the five employees from the convention for engaging in protected concerted activity had an adverse effect on their terms and conditions of employment. First, the removal deprived the employees of their ability to carry out their roles at the convention, a key component of the Employer's ongoing FF15 organizing campaign. Second, the nature of the removal—in which the employees were plucked from the convention without explanation after being publicly disparaged while the Employer looked on—confirmed to the attendees the Employer's disapproval of the five employees, and marginalized them from the FF15 organizing campaign. In short, the removal compromised the employees' standing as legitimate FF15 representatives and jeopardized their ability to fulfill their ongoing professional responsibilities. Finally, it is immaterial that the five

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work stoppage itself," and therefore not a separate justification for disciplining the employees).

<sup>27</sup> *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006).

<sup>28</sup> *Bellagio, LLC*, 362 NLRB No. 175, slip op. at 3 (Aug. 20, 2015), *rev'd* 854 F.3d 703 (D.C. Cir. 2017).

<sup>29</sup> *Id.*, slip op. at 3 ("That [employee] ultimately suffered no loss of wages as a result of the [suspension] and that no other discipline was imposed, does not negate the fact of the suspension (removal from the workplace) or its chilling effect on the exercise of the [protected] right, given the potential for discipline or discharge.")

employees suffered no loss of wages or other disciplinary consequences, given the chilling effect on protected rights caused by the workplace removal.<sup>30</sup>

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by removing the five employee demonstrators from work in retaliation for engaging in a protected work-time protest.

/s/  
J.L.S.

ADV.05-CA-187532.Response.SEIU (b) (6), (b) (7)

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<sup>30</sup> See *id.*, slip op. at 3.