

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**PARKWAY FLORIST, INC.,**

**and**

**Case 06-CA-209583**

**JO ANN VAUGHN, an Individual.**

**PARKWAY FLORIST, INC.,**

**and**

**Case 06-CA-217020**

**PAUL CAVALERO, an Individual.**

**Supplemental Decision**

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. On December 12, 2018, I issued a decision and recommended order in the above-captioned matter. In that decision I dismissed the General Counsel's allegations that the Respondent's terminations of Charging Party Jo Ann Vaughn and Charging Party Paul Cavalero, and the reduction in hours of work for Cavalero, violated the Act. I found, as alleged by the General Counsel, that the Respondent violated the Act by interrogating an employee about her and other employees' cooperation with the Board's investigation into the unfair labor practice charge filed over Vaughn's discharge.

In the absence of exceptions, on February 5, 2019, the Board issued an order adopting the findings and conclusions in my decision and ordering the Respondent to comply with the recommended order.

On March 4, 2019, the Respondent filed an application for legal fees and other expenses under the Equal Access to Justice Act (EAJA), and Section 102.43 of the Board's Rules and Regulations. By order of the Board issued March 6, 2019, the matter was referred to me for appropriate action. Counsel for the General Counsel filed an opposition to the Respondent's application on May 6, 2019. No reply was filed.

**Analysis**

As set forth in Section 102.143 of the Board's Rules and Regulations, EAJA provides that a "respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding and who otherwise meets certain eligibility requirements" (relating to net worth, number of employees, etc.) "is eligible to apply for an award of fees and other expenses." An eligible applicant may receive an award "unless the position of the General Counsel over which the applicant prevailed was substantially justified."

Board Rules and Regulations 102.144. “The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel’s position in the proceeding was substantially justified.” *Id.*

5           In considering an application under EAJA it is important to understand the meaning the Board ascribes to the term “substantially justified.” As explained in *In re Meaden Screw Products, Co.*, 336 NLRB 298, 300 (2001), quoting *Galloway School Lines*, 315 NLRB 473 (1994), “The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and that it is not intended to deter the agency from bringing forward close questions.” As the Board has explained in *In re David Allen Co.*, 335 NLRB 783, 784–785 (2001):

15           The United States Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552 fn. 2 (1988), defined the phrase “substantially justified” as meaning “justified to a degree that could satisfy a reasonable person” or “justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” Further, the fact that the Government did not prevail on the merits does not give rise to a presumption that its position was unreasonable, and the “substantially justified” standard does not require the Government to establish that its decision to litigate was based on substantial probability of prevailing. *Carmel Furniture Corp.*, 277 NLRB 1105, 1106 (1985). The Government’s position can still be deemed reasonable in fact and law notwithstanding that the General Counsel failed to establish a prima facie case. *Id.* However, where the General Counsel presents evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct, the General Counsel’s position is deemed to be substantially justified within the meaning of EAJA. *SME Cement, Inc.*, 267 NLRB 763 fn. 1 (1983). Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of a proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative law judge. Accordingly, where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and thereafter presents evidence which, if credited, would constitute a prima facie case, the General Counsel’s case has a reasonable basis in law and fact and is substantially justified. *Barrett’s Contemporary & Scandinavian Interiors*, 272 NLRB 527 (1984).

40           Finally, the fact that the General Counsel’s arguments “ultimately proved to be unpersuasive is insufficient to sustain the application” under EAJA where the arguments “were not insubstantial.” *Euoplast, Ltd.*, 311 NLRB 1089, 1089 (1993). Where “it was possible to draw a set of inferences from the circumstances . . . that would have supported the General Counsel’s position, . . . the General Counsel’s arguments ha[ve] a reasonable basis in law and fact and [are] therefore substantially justified within the meaning of the Equal Access to Justice Act.” *Id.*; *Meaden Screw Products Co.*, 336 NLRB 298 302–303 (2001) (the General Counsel’s litigation position is substantially justified where it is possible to draw a set of inferences that would have supported the General Counsel’s position).

50           In its application, the Respondent contends that the allegation that Vaughn was discharged as a result of protected and concerted activity was dismissed because the General Counsel “failed to present any evidence or testimony that Jo Ann Vaughn engaged in any protected concerted activity,” and that “[b]ased on the fact that Jo Ann Vaughn did not engage in any protected concerted activity the Region was unable to carry its burden regarding the charge

and the charge was resolved wholly in favor of Parkway Florist.” Application at ¶¶ 7–8. See also application at ¶15 (“General Counsel’s position in the proceeding involving Jo Ann Vaughn was not substantially justified in that the Region presented no evidence that Jo Ann Vaughn engaged in any protected concerted activity, which was the fundamental basis for the charge”).

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The Respondent is incorrect. To the contrary, as I found, the evidence showed that the employees, including Vaughn, engaged in discussion among themselves regarding their treatment by the Respondent’s owner, Cheryl Bakin, and that this employee discussion constituted concerted and protected activity. Moreover, as I found, Vaughn engaged in protected and concerted activity during the very incident that led to her discharge—her intervention in the angry exchange between Respondent’s owner Cheryl Bakin and Vaughn’s coemployee Paul Cavaleiro on Friday, October 20, 2017, where Vaughn made a comment to Bakin about Bakin’s treatment of employees that I found “constitutes protected concerted activity.” ALJD at 8. This altercation on Friday afternoon was inextricably bound up in Vaughn’s discharge Monday morning as soon as she returned to the store. Based on this, I found that “the first two prongs of the General Counsel’s [burden under the] *Wright Line* test are easily satisfied.” *Id.* Thus, the premise of the Respondent’s EAJA application is flatly incorrect. The General Counsel alleged and proved that Vaughn engaged in protected activity.

Although the Respondent does not assert it as specific grounds for finding that the General Counsel was not substantially justified in bringing the complaint, I went on to dismiss the allegation of Vaughn’s unlawful discharge, based on my finding that evidence did not prove that animus to Section 7 rights contributed to the Respondent’s motive for the discharge. In doing so, I rejected the General Counsel’s contention that the timing of Vaughn’s discharge provided a basis on which an inference of animus should be drawn. Nevertheless, there is no question that the timing of the discharge—Vaughn was discharged first thing Monday a.m., as soon as she returned to work after the confrontation with Bakin involving protected activity on the previous Friday afternoon—was facially suspicious and provided a reasonable factual basis on which to allege discrimination. My rejection of the contention turned on my full evaluation of the facts involved with the incident leading to Vaughn’s discharge, including my evaluation of Bakin’s testimony explaining her reasons for the discharge. Similarly, my rejection of the General Counsel’s contention of pretext in the discharge involved consideration of Bakin’s testimony and explanation for the discharge of Vaughn. Under these circumstances, and although the General Counsel’s allegations were not sustained, I find that the General Counsel was “substantially justified” in prosecuting the case within the meaning of EAJA.

With regard to Cavaleiro’s reduction of hours and subsequent discharge, the General Counsel alleged that the January 2018 reduction in hours, and then his discharge in March 2018, were motivated by his involvement in the Region’s unfair labor practice investigation of Vaughn’s discharge, and alternatively, by his own protected and concerted activity. The Respondent contends in its EAJA application that the

general counsel’s position in the Paul Cavaleiro matter was not substantially justified, as general counsel failed to present any evidence that Parkway Florist, Inc. knew, at any point in time, about Paul Cavaleiro’s involvement with the Jo Ann Vaughn investigation.

Application at ¶16.

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5 However, while I dismissed the case over the Respondent's treatment of Cavalero, I disagree with the Respondent's characterization of the evidence. While the General Counsel failed to prove by a preponderance of evidence that the Respondent knew of Cavalero's activities in support of the Region's investigation, it is not correct that the General Counsel failed to present any evidence to that effect.

10 Cavalero gave an affidavit to the Region during and in support of Jo Ann Vaughn's discharge case against the Respondent. While there was no direct evidence that the Respondent knew of Cavalero's involvement, such is not uncommon, and absolutely no bar to a successful prosecution of a case. Circumstantial evidence is often the basis for a finding of discrimination, including knowledge of protected activity by a respondent. *BMD Sportswear Corp.*, 283 NLRB 142 (1987), enfd. 847 F.2d 835 (2d Cir. 1988); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

15 Here, the General Counsel relied on circumstantial evidence to support the contention that the Respondent knew of Cavalero's activities. The General Counsel relied, most strongly, on two pieces of evidence. One was the fact that Bakin unlawfully interrogated another employee, Chisolm, in an effort to find out who was assisting the Region in the investigation into Vaughn's discharge. Although I rejected the argument that knowledge of Cavalero's participation should be inferred from this unlawful interrogation, it was a plausible circumstantial argument. As I noted, this is a small store, there were very few employees, and Cavalero was the major participant in the October 20 confrontation that led to Vaughn's discharge. Indeed, Cavalero was much more central to and aggressive in the dispute than Vaughn—so it is not unreasonable that the General Counsel would contend that Bakin suspected that Cavalero was the employee cooperating with the Region in the Vaughn investigation. While I found the General Counsel's argument regarding the unlawful interrogation of employee Chisolm unconvincing to raise an inference that the Respondent suspected Cavalero's involvement, it certainly proved that Bakin was not indifferent to who was cooperating with the Region—that is precisely what she wanted to know from Chisolm. Indeed, I speculated, and believe now, that she may well have figured out that it was Cavalero, although I did not and do not believe that the General Counsel met his burden prove it.

35 The General Counsel also relied on the timing of Cavalero's reduction in hours—which occurred less than a month after the unlawful interrogation—as evidence that the Respondent knew that Cavalero was involved in the protected activity of participating in the Board's investigation. Again, this was not implausible. The General Counsel did prove—it was undisputed—that Cavalero engaged in protected activity by providing the Board with a pretrial affidavit as part of and in support of the Vaughn discharge case, and he did, in fact, tell another employee about it—Chisolm—the same employee who was unlawfully interrogated on the subject by the Respondent's owner Bakin. Moreover, soon thereafter, his hours were reduced, and as far as the record shows, the reduction was unexpected and unprecedented. However, I rejected the General Counsel's argument based on my crediting of the alternative explanations for the reduction in hours provided by Bakin at the hearing. Thus, I rejected the General Counsel's timing argument “given that Bakin provides other reasonable explanations for the timing of the reduction in hours, and given, again, that the evidence is that Bakin did not learn of Cavalero's involvement with the Board through the interrogation.” ALJD at 19.

50 In other words, this contention of the General Counsel's failed, but failed based on my assessment of Bakin's testimony. Had she come to the hearing and testified differently, or not testified at all, the case may have looked different. But the fact that the merits of this argument

turned on Bakin's testimony at the hearing renders this the opposite of a case that, for EAJA purposes, the General Counsel was not "substantially justified" in bringing.<sup>1</sup>

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### ORDER

10 The application of Parkway Florist, Inc., for attorneys' fees and other expenses under the Equal Access to Justice Act is denied.<sup>3</sup>

15 Dated, Washington, D.C. May 30, 2019



David I. Goldman  
U.S. Administrative Law Judge

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<sup>1</sup>As to the allegations of unlawful motive for Cavalero's discharge in March 2018, while dismissed, these allegations were alleged by the General Counsel in follow-up to and conjunction with the allegations that his hours of work had been recently unlawfully reduced in January 2018. Had the allegations of unlawfully motivated reduction of hours in January been sustained, the allegations of unlawful discharge two months later would have looked considerably different.

<sup>2</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup>In his opposition to the Respondent's application, Counsel for the General Counsel raises several objections to the Respondent's application based on the rates sought, the nature, and the timing of some of the fees and expenses for which recovery is sought, and the lack of detail of the proffered billing records. Given my resolution of the merits of the EAJA application, I do not reach these objections to the specifics of the recovery sought by the Respondent.