

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

DATE: March 11, 2019

TO: Peter Sung Ohr, Regional Director
Region 13

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

SUBJECT: Metro Staff, Inc. and Bimbo Bakeries USA, Inc.
Case 13-CA-225710

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This case was submitted for advice as to whether the two charged Employers were joint employers. We conclude that it is not necessary to determine whether the two Employers were joint employers because they are each separately liable for the alleged unfair labor practices, and the Board can properly remedy the unfair labor practices without engaging in difficult litigation regarding joint employer status.

FACTS

In January 2018,¹ the Charging Party was hired by Metro Staff, Inc. (MSI), a staffing agency that provides temporary employees to other companies. [REDACTED] was immediately assigned to work at a facility of Aryzta Bakeries in Cicero, Illinois. MSI supplied employees to Aryzta Bakeries under a service agreement that was set to expire by its terms on July 31.

In February, Bimbo Bakeries acquired the Cicero facility from Aryzta Bakeries and continued its operations. Bimbo Bakeries assumed the service agreement with MSI and continued to use MSI-supplied temporary employees, including the Charging Party. During [REDACTED] employment at the Bimbo Bakeries facility, the Charging Party engaged in various activities on behalf of an organization that protested alleged racial discrimination at the facility and elsewhere by, among other things, appearing at press conferences, circulating petitions, and distributing and posting leaflets in employee areas.

¹ All dates hereinafter are in 2018, unless otherwise noted.

In May, Bimbo Bakeries determined that it would cease using temporary employees supplied by MSI on September 8.² In late July, Bimbo Bakeries prepared a list of the MSI-supplied temporary employees, and classified each of them as to how they would be treated when the Bimbo Bakeries/MSI business relationship ended, *i.e.*, whether Bimbo Bakeries would directly hire the employee on a permanent or temporary basis, or whether the employee would “need to be terminated immediately” at that time. Bimbo Bakeries classified the Charging Party for immediate termination when the Employers’ business relationship ended.³ In an internal Bimbo Bakeries’ email message, the reasons for the Charging Party’s classification included “creating a hostile environment, insubordination, bad attitude.”

On August 8, in an employee break room, the Charging Party had an argument with a Bimbo Bakeries lead employee over a candy wrapper that the Charging Party dropped on the floor and refused to pick up. On August 9, MSI verbally counseled the Charging Party about the incident and decided to issue the Charging Party a three-day suspension. Later that day, however, Bimbo Bakeries told MSI to “[p]lease proceed with the termination of this person.” On August 13, the next work day after the three-day suspension, MSI terminated the Charging Party’s assignment at the Bimbo Bakeries facility. MSI offered the Charging Party two other job assignments at other locations, which the Charging Party rejected. The Region has determined that those positions were not substantially equivalent because they were at locations that are not geographically proximate and the Charging Party is unable to commute the significant distances to the offered locations.

On September 8, the business relationship between Bimbo Bakeries and MSI ended.

ACTION

We conclude that it is not necessary to determine whether MSI and Bimbo Bakeries were joint employers because they are each separately liable for the alleged unfair labor practices, and the Board can properly remedy the unfair labor practices without engaging in difficult litigation regarding joint employer status.

² Bimbo Bakeries’ decision was a result of a limitation on its use of long-term temporary employees contained in a collective-bargaining agreement it executed covering a bargaining unit comprised of its permanent employees.

³ While the Employers’ service agreement formally expired on July 31, they appear to have continued to operate under its terms until they ended their business relationship on September 8.

It is well established that an employer violates the Act when it refuses to hire an individual, or to transfer a temporary employee to a permanent position, for unlawful discriminatory reasons.⁴ The generally appropriate remedy for such a violation is an instatement order requiring an offer of employment to the discriminatee.⁵

It is also well established that, when one employer directs another separate employer with whom it has business dealings to discharge, discipline, or otherwise affect the working conditions of employees because of their union or other protected activities, both employers may be found jointly and severally liable for the statutory violations.⁶ In such cases, however, while both employers may be found liable for backpay or other monetary relief, only the direct employers of unlawfully-discharged employees generally have an obligation to reinstate the employees.⁷

⁴ See, e.g., *GTE Lenkurt, Incorporated*, 204 NLRB 921, 955-58 (1973) (employer unlawfully refused to transfer a temporary employee to a permanent position, or to consider him for hire after he applied as a new employee, because of his union activity), *overruled on other grounds in Resistance Technology, Inc.*, 280 NLRB 1004, 1007 n.7 (1986), *enforced mem.*, 830 F.2d 1188 (D.C. Cir. 1987).

⁵ *Id.*, 204 NLRB at 924.

⁶ See, e.g., *Dews Construction Corp.*, 231 NLRB 182, 182-83 (1977) (two separate employers -- a general contractor and a subcontractor -- were jointly and severally liable when the general contractor caused the subcontractor to unlawfully transfer an employee), *enforced mem.*, 578 F.2d 1374 (3d Cir. 1978); *Tracer Protection Services*, 328 NLRB 734, 735, 742 (1999) (two separate employers -- a contractor who provided security services and its customer -- were jointly and severally liable when the customer requested and caused the contractor to unlawfully discharge its own employee); *Black Magic Resources*, 312 NLRB 667, 668 (1993) (two separate employers -- a contractor and its customer -- were jointly and severally liable where the customer caused the contractor to discharge employees for engaging in protected activity); *Reliant Energy*, 357 NLRB 2098, 2101-02 (2011) (same).

⁷ See, e.g., *Tracer Protection Services*, 328 NLRB at 734 (“Consistent with Board precedent, the Respondents have joint and several backpay liability to Crump, but only Tracer has the remedial obligation to reinstate him. . . We will order Ormet to notify Tracer that it has no objection to Tracer’s rehiring of Crump and assigning him to the Ormet facility, in the event that Tracer performs security services at that facility”).

In the instant case, the Region has determined that the Employers engaged in two acts of unlawful discrimination in retaliation for the Charging Party's protected concerted activity, and one of those violations is appropriately remedied by a reinstatement order against Bimbo Bakeries. Thus, Bimbo Bakeries unlawfully listed the Charging Party as an employee whom it would not hire after the Employers' business relationship ended. That violation was an independent violation committed by Bimbo Bakeries itself, and was not merely a directive given to MSI. Significantly, that is the only violation alleged in the instant case that would require reinstatement at the Bimbo Bakeries facility, because MSI could no longer assign the Charging Party to work at the Bimbo Bakeries facility given that the Employers' business relationship has ended.

The second act of discrimination was MSI's termination of the Charging Party's assignment at the Bimbo Bakeries facility on August 13, at Bimbo Bakeries' express direction. For that violation, both employers would have joint and several backpay liability, pursuant to the *Dews Construction Corp.* line of cases discussed above, but Bimbo would not have a reinstatement obligation.⁸ Since MSI's reinstatement obligation related to that violation is limited by the locations at which it may have available substantially-equivalent positions, and MSI may not have any geographically-appropriate positions available, the best remedy for the Charging Party would likely be reinstatement by Bimbo Bakeries at its facility, and that remedy can be obtained without alleging joint employer status.

Accordingly, absent settlement, the Region should seek backpay liability and reinstatement by Bimbo Bakeries for its unlawful conduct of listing the Charging Party as an employee it would not directly hire after the Employers' business relationship ended. The Region should also seek joint and several backpay liability for both Employers, and an appropriate reinstatement order against MSI, for the unlawful termination of the Charging Party's assignment at the Bimbo Bakeries facility.

/s/
J.L.S.

ADV.13-CA-225710.Response.Bimbo Bakeries (b) (6), (b) (7)

⁸ See the cases cited in notes 6 and 7, *supra*.