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

Advice Memorandum

S.A.M. DATE: December 12, 2016

TO: John J. Walsh, Jr., Regional Director
Region 1

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

SUBJECT: Zane's, Inc.
Cases 01-CA-167721, 01-CA-178261,
01-CA-181191

512-5006-5036-0000
512-5081-7000-0000
524-3325-1400-0000
524-3350-5800-0000

The Region submitted this case for advice as to whether the Employer violated Sections 8(a)(1), (3), and (4) of the Act when, after the Union filed an unfair labor practice charge alleging that three employees had been unlawfully laid off, it hired a firm to scrutinize the immigration documents of the laid off employees and then communicated this to Union representatives in bargaining. We conclude that the Employer's course of conduct violated Section 8(a)(1), (3), and (4) because it was motivated by employees' protected activity and unlawfully interfered with Board processes.

FACTS

Zane's, Inc. ("the Employer") operates two retail stores and a warehouse in Connecticut selling bicycles and bicycle accessories. In the summer of 2015,[1] the Employer employed approximately eight warehouse employees to assemble and package bicycles. Some of these employees began organizing with the United Food and Commercial Workers Local 919 ("the Union") and the Union filed a petition to represent the unit. Soon after, the Employer brought in a former supervisor who urged employees to vote against the Union and told them that if they voted for the Union they would be paid at the minimum wage or drop to the bottom of the pay scale. On September 9, the employees voted six to two in favor of Union representation in a Board election.

The Employer and Union met to bargain twice in November but made little progress. The Union organizer/business agent also visited the shop in late November.

[1] All dates are in 2015 until otherwise noted.

At that time, (b) (6), (b) (7)(C) told him that business was down and that it would need to lay off the employee who had served as (b) (6), (b) (7)(C) during the election because (b) (6), (b) was the "weakest" in terms of production. The Union immediately sent a letter to the Employer informing it that it was obligated to negotiate over the manner of the layoff and asking for a variety of information. The Employer did not respond to the Union's communications, but did not take any immediate action regarding the employee.

The Employer refused to bargain in December claiming it was too busy and said it could only bargain in January 2016. The Union contacted the Employer various times in December to confirm the January 2016[2] date and to request additional January dates. The Employer finally confirmed that it would bargain on January 8 but said it would not bargain on any other date in January.

At the (b) (6), (b) (7)(C) session, the Union began by expressing concern regarding the Employer's failure to respond to its communications. The parties then reviewed the Union's proposed contract but the Employer did not offer feedback on most of the articles and said it would have to get back to the Union. At the end of the meeting, the Employer told the Union that because sales were down (b) (6), would need to lay off three workers as of that day (including (b) (6), (b) (7)(C)) and in two weeks would possibly need to lay off two additional workers. In response to a question from one of the Union representatives, the Employer said it would bring back the workers once business picked up. Of the three employees laid off, two had been employed by the Employer for approximately (b) (6), (b) (7)(C), and the third had been employed by the Employer for approximately (b) (6), (b) (7)(C).

On January 14, the Union filed unfair labor practice charges alleging that the Employer violated the Act by, among other things, laying off employees because of their union activity in violation of Sections 8(a)(1) and (3), and failing to bargain in good faith in violation of Section 8(a)(1) and (5). On February 2, the laid off employees, along with a news reporter and a number of community organizations, delivered a petition to the Employer requesting reinstatement and that the Employer negotiate in good faith. The employees also delivered a letter from a U.S. Congresswoman.

The Employer explains in its position statement that around February, in connection with the unfair labor practice charge filed by the Union, it requested advice from counsel as to its potential financial exposure and possible defenses to any claim for back pay and reinstatement. It therefore "undertook a review of the I-9

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[2] All further dates are in 2016 unless otherwise noted.

documentation previously produced by the three laid off employees." As a result of that review, the Employer concluded that the documentation submitted by each laid off employee (in [redacted] and [redacted] respectively) was fraudulent, rendering the employees ineligible for continued employment.

At a bargaining session on March 4, the Union asked the Employer if it was prepared to rehire the three laid off employees. The Employer requested to discuss that issue at the end of the meeting. The Union agreed and, after the parties discussed contract proposals for a short time, (b) (6), (b) (7)(C) pulled out a folder and told the Union that there was a problem. [redacted] showed the Union representatives the I-9 documents of the three laid off employees, which had circles in various locations. [redacted] explained that there were misspellings and incorrect alignment. [redacted] said that after consulting with [redacted] attorney, they had determined that the documents were fraudulent and that [redacted] could not rehire the laid off employees because they had "bad papers." The Union organizer/business agent asked when (b) (6), (b) (7)(C) had found this out because the Employer had employed the employees for [redacted] years. (b) (6), (b) (7)(C) got angry and asked if the Union was telling [redacted] to break the law. [redacted] then said that it was the Union's fault and that the Union had forced [redacted] into this with the charges it had filed.

(b) (6), (b) (7)(C), the two employees that the Employer had threatened to lay off in [redacted] quit their jobs because they were scared they would be fired. One of these employees told the Union organizer/business agent that [redacted] and the other employee were nervous about being deported and did not believe the Employer would negotiate a contract.

The Union filed amended charges alleging that the Employer's conduct with respect to scrutinizing the employees' immigration status violated Sections 8(a)(1), (3), and (4) and that is the sole issue submitted to advice.[3]

In October, the Employer told the Union during a tense moment in negotiations that the first thing it was going to ask during the upcoming trial was whether the employees were citizens. The Employer said that the employees will have to tell the truth and then they will be arrested.

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[3] The Region has already determined that the Employer violated the Act by unlawfully laying off the three employees and failing and refusing to bargain in good faith, among other things.

ACTION

We conclude that the Employer violated Sections 8(a)(1), (3), and (4) of the Act when, after the Union filed an unfair labor practice charge alleging that three employees had been unlawfully laid off, it hired a firm to scrutinize the immigration documents of the laid off employees and communicated this to Union representatives during bargaining. Thus, the Region should issue complaint, absent settlement.

It is well established that conducting an investigation because of an employees' protected activity is unlawful.[4] The Board has also held that terminations based on information gleaned during investigations motivated by protected activity are unlawful.[5] Where such investigations involve employee immigration status, the interference with employee rights under the Act is heightened. The Board has long noted the severely coercive effect on the exercise of Section 7 rights that results from an employer raising the immigration status of its employees in response to their protected concerted activities.[6] The Board has specifically held that employer

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[4] *See, e.g., Murtis Taylor*, 360 NLRB No. 66, slip op. at 14 (Mar. 25, 2014) (an employer violates Section 8(a)(1) when it subjects an employee to an investigation, and possible discipline, based on the employee's conduct in the course of protected activity); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (employer violated Section 8(a)(1) for investigating employees for harassment based on their protected activities), *enforced*, 263 F.3d 345 (4th Cir. 2001).

[5] *See, e.g., Concrete Form Walls, Inc.*, 346 NLRB 831, 835 (2006) (rejecting employer's 11th hour concern with complying with IRCA as the reason it terminated the only four Hispanic group employees who voted in the election), *enforced*, 225 F. App'x 837 (11th Cir. 2007); *Kidde, Inc.*, 294 NLRB 840, 840 n.3 (1989) ("an employee's misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful"); *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121-122 (1979) (post-discharge investigation that uncovered misconduct insufficient to bar reinstatement because investigation was undertaken pretextually).

[6] *See, e.g., Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 (Sept. 8, 2014) ("[e]mployer threats touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees."); *Viracon, Inc.* 256 NLRB 245, 246-47 (1981) (employer threats that a union election could result in employees being reported to immigration officials would remain "indelibly etched in the minds" of any who would be affected by such actions). *See*

scrutiny of employees' immigration status in response to protected concerted activity is extremely coercive and unlawful.[7] It has therefore, in many cases, found that an employer violates the Act by requiring employees to produce immigration documents in response to their protected concerted activity.[8] The Board has analyzed such employer requests for immigration documents as implied threats of unspecified reprisal that could have adverse immigration consequences.[9]

Likewise, the Board has concluded that raising questions about employees' immigration status in an intimidating or threatening manner during litigation is a

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also (b) (7)(A) [redacted]
(b) (7)(A) [redacted]

[7] *See, e.g., Nortech Waste*, 336 NLRB 554, 554-55 (2001) (employer review of employees' immigration status was a "smokescreen to retaliate for and to undermine a [u]nion's election victory").

[8] *See Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 1 n.3, 16 (employer violated the Act when, because of an employee's protected concerted activities, it required him to provide documentation to confirm his immigration and/or citizenship status); *North Hills Office Services*, 344 NLRB 1083, 1084, 1099-1100 (2006) (employer's demand to employee to provide it with documentation establishing that he was legally entitled to work in the United States was motivated by union animus and violated the Act); *Michael's Painting, Inc.*, 337 NLRB 860, 868 (2002) (employer violated the Act where, prior to employee picketing, it freely allowed false documentation, but after employee picketing, it demanded documentation of authorization to work in this country); *Victor's Café 52*, 321 NLRB 504, 514 (1996) (employer violated the Act by demanding to see employees' work documents when it only did so after learning that the union had obtained authorization cards from a number of its employees); *Del Rey Tortilleria, Inc.*, 272 NLRB 1106, 1113 (1984) (employer violated the Act by posting a notice requiring employees to present two forms of identification in order to obtain their paychecks in reprisal for their union activities).

[9] *See, e.g., Belle Knitting Mills,* 331 NLRB 80, 80 n.2, 100-01 (2000) (employer's request to employees for immigration papers for union election was an implicit threat that without them, employees could face possible arrest and deportation); *Impressive Textiles*, 317 NLRB 8, 13 (1995) (in the absence of exceptions on the substantive violations, Board affirmed ALJ's rulings, findings, and conclusions, including that an employer's requirement that an employee produce immigration documents upon recall constituted an implied threat to report her to the INS in retaliation for her support of the union).

violation of the Act. In *John Dory Boat Works*, the Board held that an employer violated Section 8(a)(1) when it served subpoenas on five of its six Spanish-speaking employees, commanding them to produce travel and immigration documents that they could only possess if they were legal immigrants into the United States.[10] The ALJ described the effect upon the General Counsel's witnesses of the "wholly irrelevant probe" as "rang[ing] from unsettling to devastating and certainly affected their ability to testify."[11] In *Commercial Body & Tank Corp,* the Board concluded that an employer's comment to an employee witness outside of the hearing room that "[Y]ou are in the wrong place . . . What happens if the immigration man should come inside here now," was in fact calculated to induce or influence the employee either not to testify in the case or to give false testimony and thus violated Section 8(a)(1).[12] And in *AM Property Holding Corp.,* the Board held that the employer attorney's objection to a line of questioning regarding the witness's good acts, in which the attorney stated he would "have to get an investigator and [find] out whether [the witness was] here in this country illegally," was an unlawful threat in violation of Section 8(a)(1) and (4).[13] Federal courts have also recognized the extreme chilling effect that employer inquiries into immigration status can have during litigation, as well as the deterrent

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[10] *John Dory Boat Works*, 229 NLRB 844, 852 (1977).

[11] *Id.* at 852.

[12] *Commercial Body & Tank Corp.*, 229 NLRB 876, 879 (1977).

[13] *AM Property Holding Corp.*, 350 NLRB 998, 998 n.4, 1042-43 (2007), *enforced in part on other grounds*, 647 F.3d 435 (2d Cir. 2011). *See also Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1474 (1976) (employer counsel's statement at Board hearing that witnesses had no immunity and that the employer would take "appropriate action" against any newly discovered wrongdoing was a maneuver to intimidate witnesses to prevent them from testifying for fear that their fellow employees might lose their jobs and/or be prosecuted and thus was unlawful), *enforced in rel. part*, 567 F.2d 791, 796 (8th Cir. 1977) (concluding that employer's statements at hearing intimidated prospective employee-witnesses even though they were technically correct); *OM Memorandum 11-62*, "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," dated June 7, 2011, at 7 (instructing Regions to contact the Board's Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law, including "alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings").

effect such inquiries might have on employees' willingness to cooperate with federal agencies or otherwise attempt to enforce their statutory rights.[14]

For these reasons, the Board has also carefully limited how and when immigration status can be raised during an unfair labor practice proceeding.[15] In *Flaum Appetizing*, the Board characterized questions about immigration status during litigation as an "intrusive inquiry" and discussed the intimidating and chilling effect it could have on statutory rights.[16] The Board therefore concluded that, even in a compliance proceeding, employers could not plead an affirmative defense regarding employees' immigration status without a factual basis.[17] In doing so, the Board reasoned that if employers could raise immigration status as an affirmative defense in any and every case, that it could subject every employee whose rights have been violated to "what is often an embarrassing and frightening inquiry into their immigration status."[18] The Board noted that it would be the filing of the unfair labor practice charge and the discriminatees' participation in the case that would have

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[14] *See Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540, 563 (5th Cir. 2016) (vacating discovery order relating to immigration issues and noting that "[c]onsiderable evidence suggests that immigrants are disproportionately vulnerable to workplace abuse, and not coincidentally, highly reluctant to report it for fear of discovery and retaliation"); *Rivera v. NIBCO, Inc.,* 364 F.3d 1057, 1065 (9th Cir. 2004), *cert. denied,* 544 U.S. 905 (2005) (explaining that individuals may choose to forego civil rights litigation if discovery around immigration status is permitted and that even documented workers may be chilled by such inquiries as they may fear that their immigration status would be changed, would reveal immigration problems of family or friends, or feel intimidated by the prospect of having their immigration history examined in a public proceeding).

[15] *See, e.g., Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 1, 5 (Oct. 30, 2014) (affirming ALJ's decision to preclude respondent from questioning witnesses about their immigration status during ULP trial); *Rogan Bros. Sanitation*, 357 NLRB 1655, 1658 n.4 (2011) (leaving to compliance "questions concerning the effect, if any, of the discriminatees' immigration status on the reinstatement and make whole remedies").

[16] *Flaum Appetizing Corp.,* 357 NLRB 2006, 2012 (2011).

[17] *Id.* at 2012-13.

[18] *Id.* at 2011-12.

motivated the pleading at issue and the inquiry that would follow.[19] The Board thus stated that "mere service of a subpoena…combined with knowledge that such an inquiry may be made in every case and will have to be contested, would have a chilling effect on the exercise of the fundamental right to file a charge with the Board."[20]

In the instant case, because the Employer's conduct was motivated by the employees' protected activities, including their activity in support of the Union and as alleged discriminatees in a charge, and because the Employer's conduct substantially interferes with Board processes, it violated Sections 8(a)(1), (3), and (4) of the Act. Specifically, the Employer conducted its investigation soon after the employees, the Union, and their allies engaged in a high-profile protest in support of their Section 7 rights, as well as explicitly in response to the Union filing a charge on behalf of the employees.[21] And, the Employer communicated the investigation and its results to the Union in a threatening manner by stating that the employees' papers were fraudulent, and that the Union had forced the Employer to investigate their immigration status by filing charges. It referred back to these threats months later, telling the Union that it would ask the employees about their immigration status on the stand and that they would have to tell the truth and would be arrested. The Employer's course of conduct with respect to the investigation of employees' status is intimidating and chilling and, in fact, caused two of its then current employees to resign out of fear that the Employer would retaliate against them.

While the Employer admits to having investigated the employees in response to their protected activities, it asserts that it had a legitimate interest in preparing a defense to litigation, which includes a defense that the employees were not lawfully authorized to work. While we acknowledge the Employer's interest in preparing its defense, its conduct here threatens core employee Section 7 rights and the integrity of Board processes. If permitted, it would mean that any employee that engages in protected activity and files an unfair labor practice could be subject to an investigation of its status and potential threats based on such an investigation. Under these circumstances, employees who are unauthorized, have uncertain status, or who have family members or friends with uncertain status could be chilled from

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[19] *Id.* at 2011.

[20] *Id.* at 2012 n.11.

[21] The Board has held that being the subject of a charge is protected activity under the Act. *See Fairprene Industrial Products*, 292 NLRB 797, 804 (1989), *enforced*, 880 F.2d 1318 (2nd Cir. 1989), *cert. denied,* 493 U.S. 1019 (1990).

engaging in the "fundamental right to file a charge with the Board."[22] Such a result is inimical to the Act's purposes and threatens the Board's ability to conduct investigations and enforce the Act. It is thus unlawful. We also note that in other contexts, the Board has likewise placed reasonable limits on an employer's conduct in preparing defenses to litigation, where allowing such conduct threatens Section 7 rights and the Board's processes.[23] Here, where the Employer conducted its investigation in a threatening and intimidating manner, chilling its current employees in addition to the discriminatees involved in Board litigation, such a limitation is not only reasonable, but is also necessary to maintain the integrity of Board processes.[24]

For these reasons, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1), (3), and (4) through its course of conduct.

/s/
B.J.K.

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[22] *See, supra,* note 18. *See also*, *Manno Electric*, 321 NLRB 278, 297 (1996) (*citing Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967)), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997) ("Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board.")

[23] *Guess?, Inc.,* 339 NLRB 432, 434 (2003) (employer's deposition questions regarding employee Section 7 activity is unlawful unless employer's interest in obtaining information outweighs employees' confidentiality interests under Section 7); *Johnnie's Poultry Co.*, 146 NLRB 770, 774-775 (1964), *enf. denied on other grounds* 344 F.2d 617 (8th Cir. 1965) (recognizing that an employer has a right to ask employees questions in anticipation of litigation but finding such questions unlawful unless accompanied by multiple safeguards).

[24] *See, e.g., Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 1, 5 (affirming judge's decision to preclude respondent from questioning witnesses about their immigration status in part to protect the integrity of Board proceedings).